Case Number: 3400839/2016
3401424/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Ojuederie	**v**	**John Lewis Plc**

Heard at: Cambridge **On:** 17, 18, 19 & 20 October 2017

Before: Employment Judge G P Sigsworth

Members: Mr T Wilshin and Mr R Eyre

Representation

For the Claimant: Mr R Omamor, Trade Union Representative.

For the Respondent: Mr J Crozier, Counsel.

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:-

1. The Claimant was constructively unfairly dismissed by the Respondent.

2. The Claimant contributed to his dismissal to the extent of 50%.

3. The Respondent did not unlawfully discriminate against the Claimant because of his race.

4. A remedy hearing will be listed, on the application of the parties.

RESERVED REASONS

1. By claim forms dated 11 August and 13 December 2016, the Claimant brings claims of direct race discrimination and constructive unfair dismissal to the Tribunal. The Respondent denies the allegations.

2. The Claimant clarified the race discrimination allegations at this hearing. The first allegation remains as it was at the preliminary hearing – direct race discrimination because he was suspended and his white comparator, Mr Stephen McKee, was not. The second allegation is now put as follows – that the Claimant had to go through the Respondent's grievance process for there to be an investigation of his complaint against Mr McKee, whereas Mr McKee's complaint against the Claimant was dealt with through the Respondent's disciplinary procedure. The constructive unfair dismissal claim is based on a breach of the implied term of mutual trust and confidence.

3. The Tribunal heard oral evidence from the Claimant. Called on behalf of the Respondent were Mr Darren Marsh, operations manager; Mr Terrance Mould, shift manager; and Mr Mark Smith, night lead for Blakelands. The Tribunal was also asked to consider documentary evidence in a bundle of documents of some 400 pages. At the end of the evidence, the parties' representatives made written and oral submissions. There was insufficient time at the listed hearing for the Tribunal to reach a decision and deliver it to the parties. The decision was therefore reserved. The tribunal heard and read evidence only on the issue of liability.

Findings of Fact

4. The Employment Tribunal made the following relevant findings of fact:-

    4.1 The Claimant is of black Nigerian ethnic and national origin. He was employed by the Respondent as a warehouse operative at John Lewis's warehouse at Magna Park Distribution Campus in Milton Keynes. Magna Park is a huge operation. There are 74 section managers (level 8) managing about 1,000 warehouse assistants – either as direct reports or as shift managers. The Claimant began his employment with the Respondent on 31 July 2007. He resigned on 1 October 2016 with immediate effect. In 2013/14 he received a first written warning from Mr Marsh for aggressive behaviour towards another partner (employee). Mr Marsh was not the Claimant's line manager, but the Claimant reported to him when they were on shift together. For his part, the Claimant referred to background matters in his witness statement, when he says he was subjected to racial abuse by a white colleague in 2011 and aggressive behaviour from a white colleague in 2013. The latter instant lead to a formal grievance by the Claimant, which was upheld.

4.2 On 9 March 2016, an incident took place in the locker room at the distribution centre, which is material to the claim before us. Leading up to that incident there was a meeting in the communications room, attended by various warehouse assistants and the level 7 manager, Mr Kevin Farmer Backhouse. Mr Farmer Backhouse apparently encouraged colleagues to challenge each other, and partners would nominate colleagues who went above and beyond their role. The Claimant felt he had done this by offering to work in another department. Mr McKee said to him that employees do not get rewarded for doing their job, and another employee also challenged the Claimant. According to Mr Farmer Backhouse (in the grievance interview with Mr Smith later), he rewarded all three employees (including the Claimant) with a breakfast voucher. The Claimant denied this, saying he received no such voucher, and also he said that colleagues laughed at him and he felt isolated and humiliated. Then there was then the incident in the locker room when the Claimant challenged Mr McKee, saying to him, "do not speak to me like that again". This challenge was overheard by two witnesses. The Claimant also alleged that Mr McKee called him a "black bastard", but this is not corroborated by the witnesses. The Claimant raised a grievance through the grievance procedure about the matter, sending the grievance via reception to personnel or HR who are off-site, and who received the grievance on 15 March 2016. The Claimant did not raise the issue with Mr Marsh or Mr Farmer Backhouse at the time as an allegation to be investigated in a disciplinary manner. In effect, he followed a different process. On the other hand, Mr McKee did take his complaint to Mr Marsh the next day, which lead Mr Marsh to obtain witness statements from the two witnesses. The Claimant's grievance complaint about Mr McKee was investigated by Ms Victoria Winslade of HR as a grievance, and it was found that the Claimant's allegation was not supported by witnesses. Mr Marsh told us, and we accept, that if the Claimant had raised with him the allegation against Mr McKee he would have investigated in the same way as he investigated Mr McKee's allegation about the Claimant. In other words, he would have obtained witness statements, spoken to personnel, and then held an informal meeting with Mr McKee to obtain his version of events. Ms Winslade found there was insufficient evidence to uphold the grievance, reaching that decision on 22 April 2016.

4.3 In the meantime, on 10 March 2016, Mr Marsh attempted to speak to the Claimant about Mr McKee's complaint, having taken the witness statements. He did not know about the Claimant's grievance/complaint against Mr McKee. Mr Marsh asked the Claimant to come to a meeting room with him for an informal chat, not saying what it was about. The Claimant went with Mr Marsh, but then, on seeing that there was a note taker present, declined to stay without a representative, feeling he was outnumbered two to one. Mr Marsh's view was that it was not necessary for him to have

a representative as this was an informal meeting. However, Mr Marsh conceded in cross examination that, if a further meeting had been possible, he would allowed the Claimant a companion (on PPA advice) although not a trade union representative. However, by now it was 1.30pm and coming to the end of the Claimant's shift. Mr Marsh then further discussed with personnel, and because of the seriousness of the allegation and the Claimant's reaction to the note taker, Mr Mash decided to suspend the Claimant. He did so because the Claimant was, as he described it, in a "heightened emotive state", as demonstrated to Mr Marsh by the Claimant's refusal to remain in an informal meeting without a companion. The note-taker made a statement about the attempted meeting. She said that the Claimant's behaviour became aggressive and made her feel uncomfortable.

4.4 The Claimant's representative did not suggest to Mr Marsh in cross examination that there was any other reason for the suspension, in other words that it was discriminatory. We find that Mr Marsh had in his mind the incident in 2013, when he had disciplined the Claimant for aggressive behaviour, and he believed that the Claimant may have been the aggressor on this occasion also. That was another potential reason for the suspension, we find.

4.5 There was insufficient time for a suspension letter to be given to the Claimant before the end of his shift, so Mr Marsh telephoned the Claimant at home and left a voice mail message that he was suspended and should not attend work. The Claimant raised a separate grievance about this, as his family could hear the message, and that grievance was upheld by Ms Winslade. It led to a note being put on Mr Marsh's file. The suspension letter sent to the Claimant in the post does not set out the reason for suspension or any details of the allegation against him by Mr McKee. In fact, the Claimant was not told in writing of the full reasons for his suspension for many months, if at all. The suspension continued without review, contrary to the procedure. The Respondent's disciplinary policy says that "a period of suspension should be as brief as possible and kept under review". The Claimant was suspended on full contractual pay. Mr Marsh's disciplinary investigation was put on hold, at Ms Winslade's request, while the Claimant's grievance was investigated and concluded. The Claimant did not appeal the outcome of the grievance. To some extent, we find that he slipped through the cracks, as there was no one else keeping his suspension under review. Mr Marsh was removed from the investigation, because of the upholding of the grievance against him concerning the telephone call.

4.6 Mr Robert Gasson telephoned the Claimant on 8 April 2016 with an oral reason for the suspension, and he confirmed that in writing on the same day. Mr Gasson told the Claimant there was an investigation ongoing and due to the grievances raised by him the

investigation had been put on hold until the grievances had been heard. The reason given for his suspension was that he was deemed to be a potential risk to the investigation or another partner. We find that this was not an accurate or full explanation. There was no explicit reference to the incident with Mr McKee or to the meeting that Mr Marsh had attempted to have with the Claimant on 10 March. Throughout the period we are concerned with, when managers contacted the Claimant by telephone, the Claimant told them that he could not receive that information by telephone and it ought to be put into writing, because of his hearing issues and also that he had depression, anxiety and panic attacks. However, the Respondent's managers did not put matters into writing, or even seek a welfare meeting in person with the Claimant to get to the bottom of his problems. Mr Marsh told us that he was not getting into the "game" of exchanging letters. On 20 or 21 June 2016, Mr Matthew Grant, another level 8 manager, rang the Claimant and asked him to return to work. The Claimant said that he was getting his ears syringed, and asked for the request to return to work to be put in writing. Mr Grant said that was not necessary and the Claimant should return to work or face an absence management procedure.

4.7 On 1 July 2016, Mr Jeff Maxey telephoned the Claimant and asked him how he was. He asked for the Claimant's email address so that he could send him an email asking him to return to work from suspension. That email address was given, but the Claimant said that he was not able to return to work yet. A lot had happened in his life during the last four months. Mr Maxey explained that if he did not return to work from suspension he needed to telephone the absence line as usual. Mr Maxey confirmed his request for the Claimant to return to work in writing on the same day, 1 July 2016. He said that it was a formal notification to the Claimant that his suspension from employment had now finished and according to the work rota he was expected to attend for work at 6am on 2 July 2016. Mr Maxey asked the Claimant to get back to him if the Claimant had any difficulties in complying with the request. The Claimant then wrote to Mr Maxey on the same day, pointing out that he had not been notified of the reason for his suspension even though he had been suspended for nearly four months, and that he had not received a welfare call or letter from anyone at John Lewis to check on him. The Claimant raised a number of questions. They were as follows:-

Why was the Claimant suspended?

Had any investigation been carried out and if so where is the outcome of this investigation?

The Claimant was being asked to return to work; was the four months suspension a sanction for something he had done wrong?

Was the Claimant's request for the outcome of the investigation an unreasonable request?

Why did John Lewis now want to breach its own disciplinary procedure?

The Claimant ended the letter by saying that there was already a fundamental breach of trust and confidence between John Lewis and himself, and that answers to these questions would help in preventing an irreversible breakdown in their relationship.

4.8 The Claimant was asked in cross examination whether a letter answering his questions, explaining the reason for suspension and the lifting of it, but indicating that the investigation was continuing, could repair the breakdown in trust and confidence. The Claimant said that it could. However, there was no answer in writing to any of the points made by the Claimant on the part of the Respondent.

4.9 On 12 July 2016, Mr Marsh rang the Claimant to ask him to return to work on Saturday 16 July 2016. He acknowledged receipt of the Claimant's letter and said that the Respondent would discuss it with the Claimant on the Claimant's return to work. The Claimant did not return to work, and instead raised a grievance – against Mr Marsh, Mr Grant, Mr Farmer Backhouse and Mr Maxey. The grievance concerned the incident in the communications room, the Claimant's suspension and his being asked orally to come back to work. He complained of efforts by managers to isolate and exclude him from work unreasonably, and intending to make him resign from his position with John Lewis. He again repeated the fact that he believed there had been a fundamental break in confidence and trust with John Lewis. Mr Smith told us that it was his view that to leave a partner on suspension for so long was unacceptable, and that the suspension should have been lifted within two or three days of the end of the grievance process. Mr Smith is a level 6 manager, and therefore senior to Mr Farmer Backhouse, Mr Mould and Ms Winslade (level 7 managers), and all the other managers referred to are at level 8. The Claimant's pay was stopped with effect from 21 June 2016. We accept Mr Smith's explanation of how and when pay is stopped in such circumstances, and the fact that it is back dated to the first day an employee is deemed to be absent without leave.

4.10 On 21 July 2016, another level 8 manager (Mr Mould) became involved, and wrote to the Claimant and invited him to a meeting on 25 July, to sit down and discuss his return to work and answer any of his questions face to face. Mr Mould ended the letter by saying that if the Claimant did not attend the meeting or turn up for work on his normal shift on Tuesday 26 July he would have no alternative but to invite the Claimant to a formal meeting to discuss his

behaviour, failure to follow a reasonable management request and his unauthorised absence. The Claimant did not attend the meeting with Mr Mould on 25 July, and on 26 July, when the Claimant did not turn up for his shift, Mr Mould wrote to him inviting him to attend a disciplinary meeting on 5 August. The allegation to be discussed was his serious misconduct, namely his unacceptable behaviour following an incident in March 2016, failing to follow a reasonable management request and his unauthorised absence. Mr Mould sent the meeting notes from the attempted investigation on 10 March, the statements from the two witnesses, and a statement from Mr McKee. The Claimant was told that he could be accompanied at the meeting by a colleague or a trade union representative. He was warned that the outcome of the meeting could be disciplinary action up to and including dismissal. In evidence to us, Mr Mould was inconsistent and vague over whether he had seen the Claimant's letter of 1 July 2016. We find that we do not know whether he had in fact read this letter.

4.11 In the meantime, the Claimant entered ACAS early conciliation on 25 July 2016. He had a grievance meeting on 29 July 2016 with Mr Smith. He was asked by Mr Smith what he wanted by way of a good outcome. The Claimant said that he would like to return back to work slowly, and would probably like to work in another environment or department. He referred to his medical condition and domestic difficulties. He said that he believed he should be compensated for what he had been through. Between 2 and 8 August 2016, Mr Smith held further investigatory meetings with those named in the grievance and with Ms Winslade.

4.12 On 5 August 2016, there was the disciplinary meeting, and the Claimant attended with his trade union representative. However, in his evidence to us, Mr Mould told us that it became obvious to him that the Claimant was not fit for work. The meeting therefore turned into a welfare meeting and the disciplinary aspects of it were not moved forward. The Claimant said that the meeting had been misrepresented and refused to take further part in it, and Mr Omamor left. We find that Mr Mould was confused as to the nature of the meeting from the outset. It seemed to be part welfare, part disciplinary and part investigation. Although the Claimant was subsequently invited to a welfare meeting on 18 August, he did not attend further meetings. He had by this time lodged his first claim form and he was advised by is trade union not to go to further meetings with the Respondent. The Claimant appears to have believed that he was no longer employed by the Respondent, because he was no longer being paid, and the claim form indicated a claim for direct unfair dismissal. However, although the box is ticked for unfair dismissal in the claim form, the narrative of the grounds of complaint says that he believed he was suspended and had been suspended without pay since the 21 June 2016. He also

said that his employment was continuing. The Claimant did not believe that he had been dismissed, we find.

4.13 Mr Smith concluded the grievance and did not uphold it. We find that Mr Smith did a thorough investigation. He met with the Claimant and he interviewed witnesses. On the evidence that Mr Smith had, the Claimant did receive a breakfast voucher from Mr Farmer Backhouse. The transcript of the call with Mr Marsh showed that Mr Marsh was not aggressive. Mr Smith acknowledged that the Claimant was not notified of the reason for his suspension, although Mr Smith (reasonably, we find) believed that the Claimant in fact knew the reason for his suspension. The allegation against Mr Grant was of a factual nature rather than a complaint. Mr Smith noted that there was no response to the letter of 1 July from Mr Maxey. However, the managers were trying to get the Claimant back to work and they were not seeking to exclude him, on the facts, as found by Mr Smith. In the outcome letter, Mr Smith said that the Claimant had been told the reason for his suspension by Mr Gasson, but not the exact reason. The Claimant chose not to appeal the grievance outcome.

4.14 On 25 September 2016, yet another manager became involved, Mr Stephen Lyons. What we find is an inaccurate and rather aggressive letter from Mr Lyons to the Claimant. He accused the Claimant of refusing co-operation with Mr Mould's investigation meeting. This was a misrepresentation of the position, as the meeting was identified by the Respondent in advance as a disciplinary hearing but changed into a welfare meeting during the course of it. Mr Lyons offered the Claimant what he said was a final opportunity to attend an investigation meeting. The fact is that the Claimant had not been given any opportunity to attend an investigation meeting to that date. Mr Lyons purportedly set the meeting up for 30 September, indicating that the Claimant had a right to be accompanied by a work colleague or trade union representative, etc. The Claimant did not attend the investigation meeting, and resigned on 1 October 2016. In his resignation letter he said that he had been suspended from work without any clear reason, and subjected to bullying, harassment and victimisation by the Respondent's managers. He said there had been a lack of duty of care to ensure a fair disciplinary process was used to get this matter to a fair conclusion. The Claimant referred to disparity in how partners are treated depending on their ethnic origin, over the years, and that he had been subjected to some of this poor treatment. He had written letters seeking clarity on why he had been suspended and had not been paid since June, but no letters had been responded to. The latest letter from Mr Lyons had confirmed to him that, regardless of responses and letters to the Respondent, there was an agenda that the company would follow regardless of whether the outcome for him was fair or not. He said he was supposed to wait quietly for the investigation of an alleged

incident that happened in March while not being paid since June. He felt that he had no choice but to resign his position.

4.15 On 9 December 2016, at the preliminary hearing, the unfair dismissal claim was withdrawn, and shortly afterwards a second claim of constructive unfair dismissal was presented to the Tribunal.

The Law

5. By section 4 of Equality Act 2010, race is a protected characteristic.

By section 13(1), a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

By section 23(1), on a comparison of cases for the purposes of s.13 …., there must be no material difference between the circumstances relating to each case.

By section 39(2), an employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

Section 123(1) provides that there is a three month time limit for the bringing of a complaint from the date of the act complained of, although the time limit can be extended if the tribunal thinks that it is just and equitable to do so.

Section 123(3); for the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

Section 123(4); in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section136 deals with the burden of proof.
If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.

6. We note the authorities of Igen Ltd v Wong [2005] IRLR 258, CA; and Madarassy v Nomura International Plc [2007] IRLR 246, CA, on how to apply the burden of proof. If the Claimant establishes a first base or prima facie case of direct discrimination by reference to the facts made out, the burden of proof shifts to the Respondent to prove that they did not commit those unlawful acts. However, the burden of proof does not shift to the employer simply by the Claimant establishing a difference in status (such as race) and a difference in treatment. They are not, without more, sufficient material from which the tribunal 'could conclude' on a balance of probabilities that the Respondent has committed an unlawful act of discrimination.

The basic question in a direct discrimination case is what are the grounds/reasons for the treatment claimed of – see Amnesty International v Ahmed [2009] IRLR 884, EAT. We have to have regard to the motivation of the alleged discriminator, whether conscious or unconscious, that may have led the alleged discriminator to act in the way that he or she did. We should draw appropriate inferences from the conduct of the alleged discriminator and surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – see Anya v University of Oxford [2001] IRLR 377, CA.

It is often sensible for a tribunal to approach the 'because of' factor first; Shamoon v Chief Constable of Royal Ulster Constabulary [2003] ICR 337, CA. We were asked to consider the approach that was explained in O'Neill v Governors of Sir Thomas Moore RCEVA Upper School [1997] ICR 33. The tribunal's approach should be 'simple, pragmatic and commonsensical'. What needs to be identified is the 'effective and predominant' or 'real and efficient' cause of the acts complained of – this is not simply a matter of historical, factual or scientific speculation. An effective cause of a matter complained of need not be the only or main cause.

In Hewage v Grampian Health Board [2012] IRLR 870, SC, endorsement was given to the guidance by the Court of Appeal in Igen v Wong with regard to the drawing of inferences. However, the Supreme Court also held that the burden of proof provisions will 'require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in the position to make positive findings on the evidence one way or the other'.

7. By section 94(1) of Employment Rights Act 1996, an employee has the right not be unfairly dismissed by his employer. By section 95(1)(c), for the purposes of the Act, an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) and in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct – so called constructive dismissal. An employee has the right to treat himself as discharged from his contractual obligations only where his employer is guilty of conduct which goes to the root of the contract or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract – see Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA. Thus, the employer's conduct must constitute a repudiatory breach of the contract. There is implied in the contract of employment a term that the employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation which necessarily goes to the root of the contract – see Woods v WM Car Services (Peterborough) Limited [1982] IRLR 413, CA; and Malik v BCCI SA [1997] IRLR 462, HL. Conduct which breaches the term of trust and respect is automatically serious enough to be repudiatory, permitting the employee to leave and claim constructive dismissal – see Morrow v Safeway Stores [2002] IRLR 9, EAT. Failure to deal properly with a formally raised grievance may constitute a contractual repudiation, based on a specific implied term to take such grievances seriously (not just on the more general term of trust and respect) – see WA Goold (Permak) Limited v McConnell [1985] IRLR 515, EAT. In Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445, CA, it was held that the range of reasonable responses test is not appropriate to establishing whether an employer has committed a repudiatory breach of contract entitling an employee to claim constructive dismissal. The Malik test is the correct test. The implied term of trust and confidence is qualified by the requirement that the conduct of the employer about which complaint is made must be engaged in without reasonable and proper cause. Thus, even it there are acts such as the suspension and a disciplinary investigation of the employee, which are likely on their face to seriously damage or destroy the relationship of trust and confidence, there will be no breach of contract if the employer had reasonable and proper cause for such action – see Hilton v Shiner [2001] IRLR 727, EAT.

8. The employee must leave in response to the breach of contract. In Nottinghamshire County Council v Meikle [2004] IRLR 703, CA, it was held that once a repudiation of a contract has been established, the proper approach is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It is enough

that the employee resigned in response, at least in part, to fundamental breaches by the employer. The innocent party must at some stage elect between whether to affirm the contract or to accept the repudiation which latter course brings the contract to an end. Delay in deciding what to do in itself does not constitute an affirmation of the contract, but if it is prolonged it may be evidence of an implied affirmation – see WE Cox Toner (International) Ltd v Crook [1981] IRLR 443, EAT. Whether there has been a breach of trust and confidence in any case is an objective test for the tribunal to determine. The fact that the employer's conduct must either be calculated or likely to destroy or seriously damage the employment relationship is arguably a high threshold. The particular incident which causes the employee to leave may in itself be insufficient to justify his/her resignation, but may amount to a constructive dismissal if it is the 'last straw' in a deteriorating relationship. This means that the final episode does not in itself need to be a repudiatory breach of contract, although there remains the requirement that the alleged last straw must itself contribute to the previous continuing breaches by the employer – see Waltham Forest London Borough Council v Omilaju [2005] IRLR 35, CA. In Lewis v Motorworld Garages Ltd [1986] ICR 157, CA it was said that the breach of the implied obligation of trust and confidence may consist in a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each particular incident may not do so. In particular, in such a case the last act of the employer which leads to the employee leaving need not itself be a breach of contract. The question is, does the cumulative series of acts taken together amount to a breach of the implied term? This is the 'last straw' situation.

9. We asked the parties to make submissions on the issue of contributory fault and the Polkey principle, in the context of any award of compensation, should there be a finding of constructive unfair dismissal.

Section 122(2) of ERA provides that where the tribunal considers that any conduct of the complainant before the dismissal …. was such that it would be just and equitable to reduce …. the amount of the basic award to any extent, the tribunal shall reduce …. that amount accordingly.

Section 123(1) provides that the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

Section 123(6) provides that where the tribunal finds that a dismissal was to any extent caused or contributed to by any act of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

In Nelson v BBC (No 2) [1979] IRLR 346, CA, it was held that in determining whether to reduce an employee's unfair dismissal compensation on grounds of his contributory fault, an employment tribunal

must make three findings. First, there must be finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy. Second, there must be a finding that the matters to which the complaint relate were caused or contributed to, to some extent, by action that was culpable or blameworthy. Third, there must be a finding that it is just and equitable to reduce the assessment of the complainant's loss to a specified extent.

In Polkey v AE Dayton Services Ltd [1987] IRLR 503, HL, it was held that, in considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the employment tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.

Conclusions

10. Having regard to our findings of fact, and applying the appropriate law, and taking into account the submissions of the parties, we have reached the following conclusions:-

10.1 We will deal first with the allegation of race discrimination concerning the Claimant's suspension. The evidence that we have heard and read suggests that the reason the Claimant was suspended was because he was regarded by Mr Marsh (rightly or wrongly) as a potential risk to the investigation or another partner because of his perceived aggression and lack of response to the informal meeting Mr Marsh attempted to hold with him. We have regard to Mr Marsh's evidence and the note-taker's witness statement. Because of the first written warning for aggression towards a colleague administered by Mr Marsh to the Claimant, Mr Marsh had in his mind that the Claimant could be the aggressor on this occasion also. We conclude that this was a genuine reason for the suspension, even if it may not have been a particularly good one. Therefore, we conclude that the reason for suspension was not motivated by unlawful discrimination.

10.2 The allegation of race discrimination is that the Claimant had to go through the grievance route with his complaint whereas Mr McKee had it dealt with through the disciplinary procedure. We conclude that the reason for this was that Mr McKee and the Claimant had different approaches to complaint and counter complaint. Mr McKee went direct to his line manager with his complaint. However, the Claimant did not and chose the grievance route, possibly because he had taken a similar complaint through the formal grievance procedure on an earlier occasion. Further, Mr Marsh did not know about the Claimant's complaint in any event. It would seem that such complaints can go down two different

routes – grievance and discipline. Neither route is necessarily wrong. Thus, the reason for the difference in treatment of Mr McKee's complaint and the Claimant's complaint had nothing to do with race. We would further note that even if we are wrong about this and indeed wrong in respect of the suspension complaint, both complaints as stand-alone complaints are brought out of time. We have not heard any evidence from the Claimant as to why it would be just and equitable to extend time. Therefore, we would have no jurisdiction to determine these complaints in any event.

10.3 We turn now to the constructive unfair dismissal case. Although the suspension may have been justified, it was anticipated that it would only be for a short period of time. However, for one reason or another, it extended over a very long period and was not reviewed, as it should have been. In effect, the Claimant was suspended from 10 March until he was asked to return to work on 20 June with no adequate reason given for why he had been suspended. Although we accept that the initial oral request to return to work was legitimate, when the Claimant said that he could not deal with issues on the telephone because of his ears and his mental health it would have been reasonable then for the Respondent to write to him. There was certainly no good reason why they could not have done so. Further, the Claimant had no welfare meeting with the Respondent when he raised health and other issues, there was no referral to occupational health and, until later on, he was not even requested to provide a fit note. It may be that these issues arose because there was no HR support on-site, and perhaps more importantly no one line manager dealing with the matter. It seems that Mr Farmer Backhouse asked any line manager who was on duty to contact the Claimant as and when on an ad hoc basis. There was therefore a total lack of thought or consistency about how to approach the matter, and no ownership of it. All these are factors which we take into account when considering whether the Respondent was in breach of the implied term.

10.4 There were further matters that caused additional harm to the relationship of trust and confidence between the parties. The meeting with Mr Mould on 5 August 2016. It was not clear what sort of meeting it was. It should have been. The letter of invitation to the meeting had asked the Claimant to attend a disciplinary hearing at which one outcome could be dismissal, and so Mr Omamor attended as the Claimant's trade union representative. However, the meeting turned into a welfare meeting and possibly an attempted investigatory meeting. Mr Omamor left and the meeting went nowhere. By and large, the outcome of the grievance taken to Mr Smith cannot be criticised. However, Mr Smith was wrong when he said that the Claimant had been given the exact reason for his suspension. He had not. We have found that the letter from Mr Lyons was both aggressive and inaccurate. Unfortunately, Mr

Lyons did not speak to Mr Mould before he wrote it. It was certainly capable of being and, we conclude, was a last straw in this deteriorating relationship between the Claimant and the Respondent. We conclude that, taking all these factors into account, there was a breach of the implied terms of mutual trust and confidence on the part of the Respondent here. The Claimant was entitled to take all these matters cumulatively as amounting to such a breach, and resign in response to that breach.

10.5 The Respondent contends that the Claimant affirmed the contract. We disagree. Although in the meeting with Mr Smith he indicated that he wanted to come back to work, perhaps in a different department and with a phased return, and in the first claim form he sought reinstatement, all that was before the letter from Mr Lyons which we have concluded was a genuine last straw matter. Clearly, the first claim form was not really a claim for unfair dismissal but one for race discrimination. The Claimant resigned unequivocally within days of getting Mr Lyons' letter, and because of it and what had gone before. We note that, at the preliminary hearing, the Judge explained to the Claimant that he could not rely on the first claim form to make a claim of constructive unfair dismissal. Thus, a second claim form was presented. We do not consider that there was any undue delay by the Claimant before his resignation. He did not want to lose his job and he was seeking ways round it by suggesting working elsewhere and a gradual return. It has been argued that he should have resigned when he was no longer being paid. However, at that point his grievance was still continuing and Mr Smith might have put matters right. Although a few weeks elapsed between 29 August (the Claimant's letter to Mr Smith following the grievance outcome) and 25 September, Mr Lyons' last straw letter had the effect of reviving the earlier complaints and, anyway, we do not conclude that this passage of time should be taken as the Claimant's affirmation of the contract when the Respondent had left the Claimant hanging on for months. We also take into account the Claimant's medical issues, and these may have impeded his ability to act more quickly.

10.6 However, we also conclude that the Claimant was not blameless in all of this. He refused to go back to work when issues could have been discussed and informally resolved at the first time of asking on 21 June 2016, and at the subsequent welfare meeting. For some reason not clear to us, the Claimant did not provide the Respondent with a fit note or a GP letter, which could have confirmed that he was not fit to return to work. If he was relying on his medical condition as a reason for not returning to work, he needed to back this reason up with evidence. We do not hold the alleged conduct on 9 March against the Claimant because, as the investigation had not been completed, it had not been established. Matters dragged on as long as they did and issues were not resolved in part because the Claimant did not give the Respondent the opportunity to resolve

them, say by about May 2016. We conclude that the Claimant contributed to his resignation and his constructive unfair dismissal by this culpable and blameworthy behaviour to the extent of 50%. It would be just and equitable to reduce his compensation by that amount.

10.7 We make no reduction for Polkey, or the chance of a fair dismissal. We find that we cannot assess what view would have been taken by the Respondent of the McKee incident so many months after it had happened, or of the alleged unauthorised absence from 21 June 2016, which absence in part was caused by the Respondent's failures in process, as identified above.

10.8 It is hoped that, on the basis of our findings and conclusions in respect of the liability hearing, the parties can now reach a settlement with regard to the amount of compensation that should be paid to the Claimant. If this cannot be achieved, a remedy hearing will be listed on the application of the parties. That application should be made within 28 days of the date that the liability decision is sent to the parties.

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Employment Judge G P Sigsworth

Date: …..29/11/2017…… ……..

Sent to the parties on: .....

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For the Tribunal Office