EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE SPENCER**

BETWEEN: **MR S HEATH** **CLAIMANT**

AND

CAE (UK) PLC **RESPONDENT**

ON: **14-16 January 2019**

Appearances

For the Claimant: **In person**
For the Respondent: **Mr T Dracass**

JUDGMENT

The Judgment of the Tribunal is that the Claimant was unfairly dismissed, but that had a fair procedure been adopted the Claimant's employment would have come to an end within three months and the amount of the compensatory award is limited to three months loss.

The case has been listed for a remedy hearing on 4th June 2019.

REASONS

1. This is a case of unfair dismissal. The Respondent accepts that it dismissed the Claimant but says that the Claimant was dismissed for some other substantial reason, namely a breakdown in the personal relationships between the Claimant and the Respondent. (In its ET 3 the Respondent contended that the Claimant was dismissed for conduct and, in the alternative, some other substantial reason (SOSR), namely his

persistent disruption in the workplace and his refusal to accept the grievance outcome, work effectively with his line manager. However, during the course of the hearing, the Respondent pinned its colours firmly to the SOSR mast.)

2. Evidence. Although listed as a 3-day hearing the Tribunal had over 820 pages of documents and (initially) 6 witnesses. In the end, however, I heard only from the Claimant and the Respondents witnesses, and accepted into evidence witness statements from four individuals who supported the Claimant.

3. For the Respondent I heard from:
   a. Ms McCurry, Training Centre Leader at the Respondent who took the decision to dismiss the Claimant;
   b. Mr Warton, General Manager at the Respondent who heard and dismissed the Claimant appeal;
   c. Ms Becky King, HR Business Partner
   d. Mr Nigel Orme, who heard the Claimant's grievance; and
   e. Mr Chris Glass, Area Operations Leader who heard the grievance appeal.

4. I also heard from the Claimant and accepted into evidence statements from:
   a. Ms Jukes, a former colleague of the Claimant and who left the Respondent in November 2015
   b. Ms Alderson, a former colleague
   c. Ms Reeves, a former colleague who left in 2009
   d. Mr Pelling, a former colleague.

Relevant Facts

5. The Respondent provides specialist training for the defence and security, aviation, and healthcare sectors. The Claimant was employed by the Respondent as a Training Administrator from 29 August 2006 until his eventual dismissal with notice in November 2017.

6. The Claimant worked in a small team of training administrators, some 4 or 5 people together with some part-time staff. In 2009 the Claimant was made the co-ordinator of the team. In late 2016 a new position of Group Leader, responsible for managing the Administration and Scheduling departments was announced. The Claimant applied for this position as did Ms Garrard and other members of the team. Ms Garrard, who had joined in 2009 (and who was on maternity leave at the time), was successful. Her new role meant that once she returned from maternity leave she would take line management responsibility for the Claimant and the other training administrators. The Claimant worked in an open plan office of about 15 people and there was close interaction with Ms Garrard.

7. There had, for some time, been some difficulties in the relationship between the Claimant and Ms Garrard. When she obtained the Team Leader position the Claimant was upset. He believed, based on what he had been told by a colleague, that the job had been "set up" for Ms Garrard from the outset.

8. On 12 January 2017 the Claimant wrote to Ms King and his (then) line manager, Ms Powell, expressing his upset (73). In his email he expressed his disappointment. He said (amongst other things) that he had been an amazing employee. He said he would not mind losing to someone better qualified than him. *"The fact that the job (rumoured to be set up for Cathy) has gone to a slandering bully who has lied, bullied, harassed and bad-mouthed people is frankly beyond belief.… Several people have complained about being bullied by Catherine. She lied and attacked a staff member with mental health issues. She has called other staff unstable, stalkers, love cheats, psychos and even sent a letter to my partner Julie claiming I was sleeping with other women. The police were informed. A current member of the scheduling team recently claimed she was being bullied. Catherine still doesn't turn up at weekends. Even when you questioned her, she lied. She then blanked me totally which is bullying."* The Claimant said he would be submitting a formal complaint against Ms Garrard and against Mr McGrath (the Training Centre Leader) for harassment and bullying.

9. The Claimant sent a lengthy email to Ms McCurry, (copied to Ms King, Ms Powell and Mr Berge) on 23 January (77) complaining about Mr McGrath, that he had bullied the Claimant, had shown bias in his treatment of Ms Garrard. Becky King was also part of a management team that had discriminated against him. He felt he had been wrongly scored in the interview process.

10. On 7th February 2017 the Claimant submitted a Data Subject Access Request (DSAR). He asked for his personnel file together with all emails and Instant Messages between various members of staff. On 21st March 2017 the Claimant received relevant redacted email messages and IM conversations from the live and archived email mailboxes of 13 members of staff.

11. The Claimant's formal grievance was submitted on 12 February 2017 (83) It was a complaint against Mr McGrath and Ms Garrard for harassing, bullying, aggressive and unfair or biased treatment since 2012 but the Claimant's grievance was more wide ranging than that in that he also alleged that he had been unfairly treated by the Respondent's management team in relation to bonus, rosters, salaries and the failure to pay him for a medical invention. A summary of his complaint is set out in

paragraph 26 of Ms King's witness statement. A more detailed summary can be found in Ms Ray's grievance instigation report (145 to 148).

12. The Respondent initially proposed that the grievance be heard by an individual who was a solicitor working for the Respondent's retained legal adviser as an HR consultant. The Claimant objected and the Respondent appointed Ms Ray, a self-employed HR Consultant. Ms Ray had never worked for the Respondent's legal advisers or acted for or advise the Respondent before. The Claimant agreed to her appointment. It was agreed that during the grievance process that Claimant would temporarily report to his old line manager, Ms Powell.

13. Ms Ray began an investigation into the Claimant's grievance. On 4 April 2017 the Claimant submitted further material to back up his grievance. This included a number of documents that had been included in the DSAR response, including redacted IM conversations sent between various members of the team which were in unprofessional, gossipy and inappropriate terms.

14. Ms Ray interviewed Ms Garrard, Mr McGrath, Ms King and the Claimant and reviewed the unredacted DSAR material. . Surprisingly she did not interview Ms Powell or the other members of the admin team. Ms Ray sent her investigation report to Mr Orme on 22 June 2017 (141). In my view it would have been better to interview other members of the team but the report does contain a detailed analysis of the IM conversations and there is nothing to suggest that the report was not a fair, unbiased evaluation of the whole.

15. Ms Ray concluded that there had been no bullying or harassment of the Claimant by the individuals concerned. She said that it was difficult to investigate all of the Claimant's instances of poor treatment as some wen back as far as 8 years. She concluded that there was justification for the various management decisions about which the Claimant complained, including the appointment of Ms Garrard to the Group leader position. She did consider that there was evidence of a serious breakdown in the working relationship between the Claimant and the 3 individuals against whom he had presented his grievance and she was critical of various inappropriate electronic discussions (emails and IMs) of a personal nature which had taken place between colleagues (including the Claimant). She found that while several of Ms Garrard's comments about the Claimant were not appropriate, some of the Claimant's communications were also unprofessional and inappropriate.

16. Ms Ray recommended that the Respondent consider whether formal mediation would be an appropriate method to assist in repairing the relationships.

17. The Claimant was given Ms Ray's report and appendices (including the notes of her interviews with all the individuals concerned) on 27th June. Unfortunately, the Grievance investigation report only served to fan the flames of the Claimant's grievance. In her interview with Ms Ray, Ms Garrard had made some unsubstantiated and personal allegations about the Claimant's behaviour and that of Mr Pelling. The Claimant was very upset by these remarks. (610-623)

18. A grievance hearing before Mr Orme took place on 6 July 2017 and the Claimant attended with his union representative. The Claimant said that he could not imagine having a career with CAE after what had happened. He felt that Ms Garrard and Mr McGrath were guilty of gross misconduct, specifically bullying. He considered that various management decisions (around bonus, pay, and promotion) had been unfair, and that Ms King had acted inappropriately. The Claimant said he would not report to Ms Garrard, who was spreading malicious rumours about him. He felt his career had been ruined and that CAE should make a serious offer for him to leave.

19. On 13th July the Claimant was placed on paid leave for the duration of his grievance.

20. Mr Orme sent the grievance outcome to the Claimant on 17 July 2017. His conclusion was that he had not been bullied by the individuals named. It was not appropriate for the Respondent give him monetary compensation in respect of his claim to a "medical invention". He acknowledged that there was a breakdown in his professional relationship with Cathy Garrard and proposed that an external mediator be appointed to work with the Claimant and Ms Garrard "*to agree a way forward for you to accept Cathy Garrard's authority*" as his manager." In the meantime, the Claimant was to remain on paid leave pending mediation planned to take place in the week commencing 31st July.

21. On 20 July Ms Garrard agreed to mediation with the Claimant. The Claimant's response was he would appeal the grievance outcome, could not mediate or work with Ms Garrard again and that Ms Garrard should be dismissed for gross misconduct and criminal offence.

22. The Claimant appealed the grievance outcome on 23 July 2017 (218). In his appeal letter the Claimant said it was "not an option" to re-establish a working relationship with Ms Garrard and he would go to the Police and take legal action over her actions.

23. The Respondent arranged for Mr Glass to hear the appeal. Prior to hearing the appeal Mr Glass contacted 5 members of the admin team to

ask whether they had witnessed any bullying behaviour by Cathy Garrard or Tom McGrath towards the Claimant. He contacted Miss Goacher, Mr White, Ms Granville Smith, Ms Newbon and Ms Foster by email and obtained their email responses. Ms Foster and Ms Granville Smith replied in the negative. Mr White said that he had witnessed one incident of aggressive behaviour from Mr McGrath "some years ago", and Ms Goacher said that, while she had not witnessed any inappropriate behaviour, she could confirm that on one occasion, when Cathy had accused the Claimant of taking some receipts from her desk drawer, she had witnessed the Claimant finding them on the printer.

24. The notes of the hearing support Mr Glass' evidence that at the hearing the Claimant did not present any new points or raise any new evidence but simply asserted that, had Mr Orme properly considered all of the evidence presented, he would have upheld the Claimant's grievance. In terms of future working relationships, the Claimant was clear that there had been a complete breakdown of his relationship with Ms Garrard, he could not work with her, and that she had committed gross misconduct and should be dismissed.

25. By letter dated 9th August Mr Glass dismissed the grievance appeal (259). The outcome letter is considered and thoughtful. Mr Glass had done what he original investigation had not and taken evidence form other members of the team. Overall, I am satisfied that the Claimant had the benefit of a fair grievance process, even if the outcome was one that he rejected.

26. Ms King wrote to the Claimant on the same day asking the Claimant to return to work the following Monday (14th August) and to attend a return to work meeting with Ms Garrard at which Miss King would be present. The Claimant's email responses made it clear that he did not accept the grievance outcome, which he referred to as "biased and unacceptable". He said he was being discriminated against and victimised, that he would attend the meeting on Monday with a witness and would start legal proceedings. (268).

27. Miss King responded that the meeting was a return to work meeting, and he had no entitlement to bring a witness. The Claimant then emailed Ms Powell, his former manager, to ask her to take "appropriate action against Cathy to put a stop to all the bullying and harassing she does" (270). Ms Powell telephoned the Claimant who said that unless the Respondent wanted to offer a settlement, or allow him a witness, he would not attend the return to work meeting.

28. Following that call, on 11th August, the Claimant was suspended pending a disciplinary hearing to take place on 15th August to answer allegations that he failed to follow a reasonable management request in that he

a. refused to attend a return to work meeting and
b. indicated that he would refuse to work with Ms Garrard.

The Claimant responded that he had not refused to attend – he had simply asked for a witness.

29. On Monday, 14 August the Claimant reported sick and remained on sick leave till mid October. During his absence he sent further emails to senior management, all of which were in terms which made it clear that the Claimant did not accept the grievance outcome and remained outraged by what he understood to be the behaviour of the individuals against whom he had presented his grievance.

30. On 11th October 2017 (314) the Claimant reported that he would return to work on 12th October, while at the same time accusing the Respondent of failing in its duty of care, and saying that it was entirely foreseeable that requiring him to return would cause injury to his health. Although he continued to complain about his treatment, the Claimant attended a return to work meeting with Ms Garrard and Ms Powell on 12th October and he returned to work. No further action was taken in relation to the earlier disciplinary hearing.

31. On 13th October Katie Crofts (HR admin assistant) went to see Ms McCurry to say that the Claimant had been going around telling people he was being victimised and how badly the Respondent was treating him. Ms McCurry met the Claimant (321) who complained that he felt physically sick when sitting at his desk; and that reporting to Cathy Garrard was not acceptable; although he was "not refusing because you will probably suspend me again". He said that Ms Garrard had broken the law. It was clear that the Claimant was not able to let go of his grievance. He told Ms McCurry that he was not refusing mediation, but he did not think there would be any benefit "*If someone steals off you, they can repay the money. If someone defames your character they can't*."

32. On 13th and 14th October the Claimant emailed Ms King and other members of management rehearsing his grievances (327). He said that he was too stressed to participate in mediation on his own, but if the Respondent would pay for an approved mediation representative to attend with him, then he would consider it as a possibility. Ms McCurry responded that the Claimant could be accompanied at a mediation by his union representative or a legal representative, although if it was the latter then the Claimant would have to pay the costs himself.

33. The Claimant was absent from work ill on 20th October. On 22nd October the Claimant said he would attempt mediation but asked again for the Respondent to pay for his legal representation. He continued to send a

significant number of emails in terms which made it clear that he remained wholly wrapped up in his grievances.

34. On 26 October Ms Garrard reported that she was seriously considering taking out a grievance against the Claimant, as he was making accusations about her and discussing his concerns with a number of employees. The same day the Claimant told Miss King that he did not think mediation was worth the effort, as it would not resolve anything, and said it would make better sense to have a discussion around settlement. He said he would be raising a further grievance about Ms Garrard, that he didn't want to be there, that he felt physically sick and that mediation would not be successful. He said that he would be at his desk doing very little work, which wasn't productive for the company. (343) (In evidence the Claimant denied that he had said this to Ms King, but Ms King took a contemporary note and those remarks are consistent with the Claimant's own email correspondence. I find that he did.)

35. On 27th October Mr McGrath told Ms King he was considering raising a grievance about the Claimant. Ms McCurry also received 2 notes from one of the Claimant's colleagues Ms Kennard. The first note reported that the Claimant had said to her *"I don't plan staying long-term I'm just waiting to get my pay-out".* The second said that the Claimant had told a colleague that he hadn't been into work on the 20th, or at the weekend, because "*he wasn't willing to work full-time for the company until the issues were resolved"*. Ms Kennard had also reported that the Claimant had told her he had better not use the waste bin behind Ms Garrard otherwise he "*might have a violent twitch*"

36. On 30th October the Claimant was suspended again and invited to a disciplinary meeting on Friday 3rd November. The suspension and invitation letter was read out to the Claimant. He was told that:

> "The *purpose of this meeting is to discuss the culmination of recent events. It is very clear that you still fail to accept the outcome of your recent grievance and its appeal, despite the fact that your grievance was considered in accordance with our grievance policy and procedure and the ACAS code of practice.…*
>
> *Despite your failure to accept the grievance outcome, you continue to refuse to work in a positive manner with Cathy Garrard and are being disruptive in the workplace by making it known that you not accept the outcomes the company has given you. In recent conversation with Becky King you have made it known you will do limited work tasks due to your dissatisfaction in the workplace and that you see the offer of mediation as a tick box exercise only and do not wish to participate. It is therefore evident that you have little intention to focus on rebuilding*

relationships in the workplace…..We consider that this may have resulted in there being a fundamental breakdown in trust and confidence between you and the company.

All of this considered, this places CAE in a very difficult position in respect of moving your employment relationship forward in a positive and effective manner, so that you are able to be a productive member of the team, and we consider that this may have resulted in their being a fundamental breakdown in trust and confidence between you and the company."

The Claimant was told that a possible outcome of the meeting would be that his employment would be terminated with notice "due to a fundamental breakdown in trust and confidence between you and CAE."

37. In response to the letter the Claimant said that he had not chosen to do limited work and said that what he had said to Ms King was that he felt physically sick while he was at his desk and that meant he could not give 100%.

38. Ms McCurry did not inform the Claimant about the notes that she had received from Ms Kennard or of the fact that Ms Garrard and Mr McGrath were considering taking out grievances against him or why. She herself did not know exactly what these grievances might be about and did not speak directly to Ms Garrard and Mr McGrath. She does however acknowledge that these factors, and what the Claimant had said to Ms King on 26th October, were the trigger for her decision to suspend the Claimant and invite him to a disciplinary hearing.

39. The disciplinary hearing took place on 16th November. The Claimant attended with his trade union representative. The Claimant was told that the purpose of the hearing was to determine whether there had been a fundamental breakdown of trust and confidence between the Claimant and CAE and whether there was any way in which the employment relationship could be moved forward in a positive and effective manner. Ms McCurry said that the grievance was now closed and the Respondent was not prepared to revisit those decisions. He was also told that the disciplinary hearing was about his refusal to work with Ms Garrard and "*the disruptive behaviour that you have exhibited in the workplace which is making it very difficult if not impossible for the team to move forward with the employment relationship with you".*

40. The notes of the disciplinary hearing reveal that the meeting was not a happy one. The Claimant's trade union representative told Ms McCurry that there should have been an investigation and a statement of case. He said that the Claimant was unaware why the Respondent felt there was a

case to answer. I accept that the Claimant was largely confused as to the reasons why the hearing had been called.

41. The Claimant denied saying that mediation was a tick box exercise – he had only asked if mediation was a tick box exercise for CAE. He denied saying he would do limited work. He denied refusing to attend mediation. During the hearing, although his trade union representative valiantly tried to answer on his behalf that the Claimant was willing to attend mediation without qualification, the Claimant's attitude was equivocal. He repeated his assertions that Ms Garrard was continuing to harass him and defame his character. He said he would attempt mediation but "*my character has been defamed so I will raise further complaints if that's what it takes for the matter to be dealt with".* He said he would come in and work to the best of his ability but then said that his sickness was being caused by negligence from CAE. When asked how he would behave differently towards everyone going forward he said that that would happen "*by you dealing with my grievance*."

42. It is apparent from the notes of the disciplinary hearing that the Claimant remained fixated with the matters which had been the subject of the grievance. He made it clear that having to work with Ms Garrard made him feel physically sick and that in doing so the Respondent was breaching its duty of care. Although he did eventually say that he would attend mediation, and that he would bring and pay for a legal representative for the mediation, he also said that he did not think that there would be any benefit. He was asked if he believed that there had been a fundamental breakdown in trust and confidence he said "Yes, from CAE"; but also said that he would attend mediation with the positive intent of forming a professional working relationship going forward, and that he had no problem with his relationship with his other colleagues. He said he worked to the best of his ability when he was in the office.

43. Having read the notes of the hearing and the Claimant's emails I accept that it was reasonable for Ms McCurry to conclude, as she did, that the Claimant was blaming, and had issues not only with Ms Garrard but also with the Respondent as a whole. The outcome of the grievance process had exacerbated his grievances almost to the point of obsession. A picture emerges of an employee who did not accept the grievance outcome, who wanted the whole process to start again, and who remained aggrieved and unhappy but who nonetheless did not want to be dismissed and it was only for that reason that he had agreed to attempt mediation and to work to the best of his ability.

44. On 21st November 2017 Ms McCurry wrote to the Claimant dismissing him with notice. Ms McCurry rejected the suggestion that an investigation was mandatory. She said the hearing was in respect of the fact that the

Claimant did not accept the grievance outcome and was being disruptive in the workplace

> "*we do not need to investigate this. The disruption is evident in the workplace and through your email correspondence to all levels of management within the organisation. In the hearing you even confirm that you disagreed with the grievance decisions and that Tom, Becky and Cathy's behaviours are appalling. This only goes to support the fact that you have not accepted the grievance outcome and that you have been making this known to others which has made it impossible for the company to work with you to reintegrate back into the workplace. Peter Raven asked during the hearing what evidence the company has that you are not doing our job. However, the hearing was not to discuss whether or not you are doing a job, but rather whether you are being disruptive by telling others that you did not accept the outcome of the grievance, by refusing to work with Cathy Garrard. I also gave you an example of your disruptive behaviour towards colleagues by pointing you to 2 emails (on 11th October and 27 October 2017) that you sent me which were rude and disrespectful. I note that did not apologise for your behaviour towards me which I consider to be characteristic of your attitude generally….*
>
> *In respect of mediation you say you are willing to attend and will bring legal representation. I have considered the fact you are willing to attend. However I'm not convinced you will be attending the right frame of mind…..*
>
> *I believe there is no positive way forward that will allow you to work closely with Cathy Garrard and your colleagues. ….I believe that your inability to accept the outcome of the grievance process and your disruptive behaviour at work since the decision was notified you has meant that there is a fundamental breakdown trust and confidence which is insurmountable."*

45. The Claimant appealed. The grounds of appeal were that

    a. the reason given the disciplinary hearing was false and inaccurate, namely that he had not said he would only do limited work tasks

    b. the Respondent was breaching its anti-harassment and bullying policy by failing to protect him from harassment due to Ms Garrard's actions;

c. that while he accepted there had been a fundamental breakdown of trust and confidence between him and the Respondent, the Claimant attributed this to the acts or omissions of the Respondent;

d. that he had not been disruptive in the workplace;

e. That Ms McCurry had not considered had not considered all of the evidence that was relevant

46. His appeal was heard by Mr Warton on 12th December, who was newly appointed to the position of General Manager. The Claimant continued to be equivocal about mediation. Amongst other things, the Claimant said that the only way the mediation will work was "*if she apologised and made a complete retraction of everything she said*." He said that Cathy Garrard should have been dealt with for gross misconduct and so should Mr McGrath. He could no longer work for Ms Garrard. He had not been disruptive in the workplace. The grievance process had been compromised. The Claimant said the best outcome for him was a financial settlement.

47. The Respondent wrote to the Claimant on 19 December dismissing the appeal. Mr Warton said he agreed with the conclusion of the Disciplinary Hearing that the Claimant would not attend mediation in the right frame of mind and there was no evidence which showed that the Claimant believed she could have a positive relationship with the Respondent and be a productive team member.

48. Ms McCurry gave evidence, which was not challenged by the Claimant, that there was no possibility of moving the Claimant to a different role internally. There were only about 20 admin staff and then the instructors.

The law

49. Section 94 of the ERA sets out the well-known right not to be unfairly dismissed. It is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1).

50. Section 98(1) (b) provides that it is potentially fair to dismiss for "some other substantial reason". In this case the Respondent says that the reason for the dismissal was a breakdown the working relationship between the employee and the employer.

51. Once an employer has shown a potentially fair reason for dismissal then the Tribunal will need to consider whether, having regard to that reason, and all the circumstances, the dismissal was fair or unfair within the terms

of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

52. In *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, [2009] IRLR 563, [2009] ALL ER (D) 179 the Court of Appeal reaffirmed that in unfair dismissal claims, the function of a tribunal is to review the fairness of the employer's decision, not to substitute its own view for that of the employer. However, it is not the case that nothing short of a perverse decision to dismiss can be unfair within the section, simply that the process of considering the reasonableness of the decision to dismiss must be considered by reference to the objective standards of the hypothetical reasonable employer and not by reference to the tribunal's own subjective views of what we would have done in the circumstances. (see *Post Office v Foley* 2000 IRLR 827).

Conclusions.

53. The reason for dismissal is a set of facts known to the employer. I considered why Ms McCurry had dismissed the Claimant. The invitation to the hearing and the dismissal letter both convey somewhat mixed messages. Was the purpose of the disciplinary hearing to consider his "refusal to work with Cathy Garrard", his "disruptive behaviour" over the 2 weeks or so he had been back at work (i.e. conduct) or was it about whether there was a breakdown in relations and whether Claimant was able to move forward with the Respondent in a positive manner?

54. I accept Ms McCurry's evidence that she considered the two to be inextricably linked. The disruptive behaviour that she believed he had had exhibited was an indication that he was not prepared to move forward in a positive manner.

55. I am satisfied that by the end of the disciplinary hearing Ms McCurry genuinely believed that there was an irretrievable breakdown in the working relationship between the Claimant and the Respondent. This was a "some other substantial reason of a kind such as to justify dismissal within section 98 (1) (b).

56. Was that dismissal fair or unfair within the terms of section 98 (4)? Did the Respondent act reasonably in treating the circumstances as a sufficient reason for dismissal? Did the Claimant have a fair chance to answer the case against him.

57. Ms McCurry's evidence was that she had made the decision to call the disciplinary hearing because of the reports she had had from Ms King, Ms Kennard and Katie Crofts and the indications she had received from Ms Garrard and Mr McGrath that they were considering taking out a grievance. In cross examination she also said that she the trigger was that there was "*lots of office tittle tattle*" and "*the café staff had said that its really bad how CAE treat Mr Heath. It was very clear that he had told everyone that he was unhappy with the working environment. He must have told them".* She said that Ms Kennard had reported what the Claimant had said to Ms Powell. She also referred to the Claimant's attitude in the 13th October meeting.

58. However, the Claimant remained unaware of all many of these matters. Although Ms McCurry referred to his disruptive behaviour, he was not told about what the cafe staff had said, what Katie Crofts had reported, what Ms Kennard had said or even that Mr McGrath and Ms Garrard had been considering taking out a grievance. (Even Ms McCurry did not know what particular behaviours had prompted Ms Garrard and Mr McGrath to consider taking grievance action.) He was not given Ms King's note of the 26th October meeting. The notice of hearing did not refer to his attitude in the 13th October meeting nor did she send him the notes of that meeting which had been audio recorded. There was no reference to his emails of 13th and 14th. These were the matters which had led her to conclude that the relationship might be broken. The Claimant's trade union representative asked Ms McCurry what evidence the Respondent had that the Claimant was not doing his job and Ms McCurry did not take that opportunity to explain to the Claimant the matters that she now says were the trigger for her calling the disciplinary hearing, or even to send him the note that Ms King had taken of his meeting with her.

59. Fairness requires that if these were behaviours that would influence the decision maker about whether or not to dismiss the Claimant he should have been informed of those matters and be given a chance to respond.

60. It is also clear from the notes of the meeting that the Claimant was also confused. He thought he was responding to an accusation that he was being disruptive and had said he would do limited work. He denied the latter and was not aware of the disruptive behaviours to which Ms McCurry was alluding. He had been back at work for only 2 weeks. In the outcome letter Ms McCurry says that "*The hearing was in respect of the fact that you had not accepted the grievance outcome and were being disruptive in the workplace. We do not need to investigate this. The disruption is evident in the workplace and through your email correspondence to all levels of management."* While the disruption may have been evident to Ms McCurry, the Claimant was not given a chance to answer.

61. Mr Dracass submits that this does not render the dismissal unfair and that the Respondent did not even need to hold a hearing with the Claimant. I was referred to *Jefferson (Commercial) LLP v Wagstaff UKEAT/0128/12*. In that case the Claimant had been away sick and told the employer at a meeting that his return to work was not an option and the relationship was broken. The Claimant in that case considered (erroneously) he had been constructively dismissed. The situation was different in this case. The Claimant was at work. I heard no evidence that he was not doing his work. Although I accept he wanted a financial pay off, that was not incompatible with wishing to continue to work for the Respondent if that was not on offer.

62. Mr Dracass also submits that the matters which triggered the disciplinary were not necessarily the reason for the dismissal. I accept that, as a matter of principle, but in this case, I am satisfied that they were a significant part of the reason for the dismissal. The dismissal letter refers to his disruptive behaviour in the workplace. As late as the submission of the Response, the Respondent refered to the Claimant's conduct.

63. For that reason, I am satisfied that the dismissal was unfair. Was the unfairness remedied at appeal? It could not have been, because the dismissal letter did not refer to the various factors that had caused Ms McCurry to conclude that the Claimant was being disruptive in the workplace and the Claimant remained unaware of the office "tittle tattle" and the various reported remarks. These were important factors that had influenced Ms McCurry in her conclusion that there was an irretrievable breakdown in the relationship.

<u>Polkey -what was the loss flowing from the unfairness?</u>

64. As was said by the EAT in *Software 2000 Ltd v Andrews 2007 IRLR 568*, "In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal."

65. Mr Dracass, for the Respondent, submits that even if the Claimant had been given all the information set out above, the outcome would have been the same. It was apparent from the Claimant's attitude at both the disciplinary hearing and the appeal hearing that the working relationship had broken down. He submits that the Tribunal should award no compensation to reflect that fact.

66. What would the outcome have been had the Claimant been informed of the numerous factors which were influencing Ms McCurry's assessment that the Claimant was (a) being disruptive and (b) that the working

relationship with the Respondent had broken down? The Claimant may have denied making the statements to Ms Kennard or the cafe staff. More importantly he might have agreed not to talk about his grievances with his colleagues-which was the "disruptive behaviour" to which Ms McCurry was alluding. He may have agreed to desist sending emails or complaining. Such an assessment involves a considerable degree of speculation.

67. On the other hand, even if he had he done all those things and Ms McCurry had not dismissed him at that time, (and the parties had entered into mediation) the evidence before me suggests that the employment would not have continued for long. In his submissions to this Tribunal the Claimant remained aggrieved about the perceived bullying by Cathy Garrard and said that "I didn't want to leave but the situation was almost impossible." The Claimant's view was that mediation should be used to rehearse his grievance rather than to rebuild trust and confidence, and that the Respondent was failing in its duty of care by expecting him to report to Cathy Garrard. He said that he "felt physically sick almost to the point passing out where I have to get out and go for a walk just to get to try and feel better."

68. An assessment of what would have happened is necessarily a speculative exercise. Nonetheless, given the Claimant's position at the disciplinary hearing and that the appeal and at this hearing I find that had the Claimant not been dismissed at that time, the employment relationship would have ended within three months, either by resignation or because of further manifestations of a breakdown in the relationship. There had been a fair and concluded grievance process and the Respondent was not (contrary to what the Claimant may have thought), in breach of contract and had the Claimant resigned, any claim for constructive dismissal would not have succeeded. It follows that compensatory award will be limited to three months loss.

69. Mr Dracass also submits that I should reduce any basic award, and further reduce any compensatory award, to reflect contributory conduct. Section 122(2) of the Employment Rights Act provides that a reduction in the basic award may be made where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just equitable to reduce or further reduce the amount of the basic award to any extent. Section 123(6) provides that "*where the tribunal finds that the dismissal was to any extent caused or contributed to by any action 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."*

70. The two reductions (Polkey and contribution) are not mutually exclusive, and both can be made in appropriate cases. However, in this case, having

regard to the deduction already made for Polkey I do not consider that it would be just and equitable to also reduce the basic award or to further reduce the compensatory award, as the matters of conduct which would have led to such a reduction have already operated to reduce the compensatory award by a significant amount.

71. The case has been listed for a remedy hearing on 4th June 2019, but it is to be hoped that, in view of the limit to the amount of the award set out in these reasons, the parties will be able to arrive at terms of their own. If they do so they should inform the Tribunal at the earliest opportunity so that the date can be vacated.

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Employment Judge Spencer
21 February 2019