EMPLOYMENT TRIBUNALS

Claimant: **Mr M Jones**

Respondent: **Brake Bros Limited T/a Freshfayre**

Heard at: **Leeds** **On: 19 and 20 January 2017**

Before: **Employment Judge Maidment**

Representation

Claimant: Mr M Morse, Solicitor

Respondent: Miss S Tharoo, Counsel

RESERVED JUDGMENT

The Claimant's complaint of unfair dismissal fails and is dismissed.

REASONS

1. **The issues**

1.1. The Claimant's sole claim in these proceedings is of unfair dismissal which is based on the Claimant having been constructively dismissed. The Claimant maintains that there were a series of acts and/or treatment of him which singularly and/or, more particularly, cumulatively amounted to a fundamental breach of contract – a breach of the duty of trust and confidence.

1.2. As a complaint of ordinary unfair dismissal, this case had not had the benefit of active case management and in particular there had not been any identification apart from the pleadings of those acts/aspects of alleged treatment relied upon by the Claimant. At the commencement of the hearing the Tribunal listed out the alleged acts it had extracted from the Claimant's grounds of complaint. Whilst in some respects they were lacking in particularisation or the identification of more specific acts/events, the Respondent confirmed that it was aware of what was relied on and had been able in its witness evidence to answer the allegations. These included: bullying and undermining by Mr Kevin Siddle, the Claimant's line manager; extreme disrespect by Mr Siddle in front of junior and senior employees; Mr Siddle stating in February 2016 that the Claimant's face did not fit and he should look for another job; in April 2016 inappropriate disciplinary action being taken against the Claimant in respect of allegations which were five months old; inconsistent disciplinary treatment; the Claimant being made to work excessively long shifts with a particular instance raised of a 19 hour shift worked on 8 February 2016; there being no risk assessment for stuck

pallets at high level; there being no lift or cherry picker available thus causing risk to the Claimant and his colleagues; the Respondent's technical compliance officer being overruled as regards the rejection of inbound stock recorded as being over the permissible temperature; the Respondent failing to take action regarding vermin infestation; the Respondent failing to apply its grievance policy and the Respondent seeking to dismiss longer serving employees before the closure of the Leeds warehouse to avoid redundancy costs.

1.3. The Respondent disputed the above allegations and certainly that they singularly and/or cumulatively amounted to a fundamental breach of contract.

1.4. The issue was then whether the Claimant resigned in response to any breach or whether he affirmed the contract of employment by delaying too long before resigning.

1.5. In the alternative, if the Claimant is found to have been dismissed the Respondent would argue that the dismissal was for reason of his misconduct or in the alternative redundancy or in the further alternative some other substantial reason such as to justify dismissal and that it acted reasonably in all of the circumstances. By the point of submissions it was clear that those alternatively pleaded potentially fair reasons for dismissal were in effect instead raised in argument in support of a reduction of any compensation on the basis of the principles to be derived from the case of **Polkey**.

2. The evidence

2.1. The Tribunal had before it a bundle of documents numbering in excess of 138 pages. At the commencement of the hearing, but without any dispute, a further document, the Respondent's anti bullying and harassment policy, was added to the agreed bundle.

2.2. Having identified the issues with the parties the Tribunal took some time to privately read into the witness statements and relevant documents so that when each witness came to give his/her evidence he/she could do so by, subject to brief supplementary questions, confirming the content of his/her statement and then being open to be cross-examined on it.

2.3. Due to availability issues the Tribunal heard firstly, on behalf of the Respondent, from Mr Daniel Pearson, formerly employed by the Respondent as its head of sales but no longer in its employment. He was followed on behalf of the Claimant by Mr Owen O'Donnell, a former warehouse inbound supervisor, who had been dismissed from the Respondent's employment arising out of a health and safety incident and who had successfully brought a complaint of unfair dismissal. The Claimant then gave evidence on his own behalf. Finally, the Tribunal heard from Ms Ali Richardson, HR business partner and from Mr Kevin Siddle, formerly operations manager with the Respondent but again no longer employed by it.

2.4. Having heard all of the relevant evidence the Tribunal makes the findings of facts as follows.

3. **The facts**

3.1. The Respondent is in business in the supply of fresh and chilled food products. The circumstances of this case involve one of its warehouse operations. The Claimant was employed by the Respondent from 27 June 2011 as warehouse manager at the Respondent's Hunslet site. As such he reported to Mr Kevin Siddle, operations manager. Due to flooding in early 2016, the Respondent's operations had to be relocated from the Hunslet site to a separate warehouse facility in Maybrook. The Claimant and indeed Mr Siddle transferred to the warehouse at Maybrook on a temporary basis.

3.2. The Claimant had a clean disciplinary record apart from a written warning he had received around September 2015 from Mr Siddle arising out of the Claimant making an inappropriate remark when introducing a new employee of the business at a conference. The new employee originated from Wales and the Claimant had referred to sexual relations with sheep when introducing him.

3.3. The Claimant agreed that the new employee had made a complaint. He recollected that Mr Siddle had told him he would go to a hearing before Mr Pearson and would get a written warning and be sent on a racial awareness course. The Claimant said that that was exactly what had happened (albeit he was never sent on any training course), with the implication indeed that Mr Siddle got his own way in matters of discipline.

3.4. The Claimant resigned from his employment after Mr Siddle had initiated disciplinary proceedings against him which were ultimately being dealt with by Mr Pearson and indeed before such process was completed.

3.5. Early in the cross-examination of the Claimant, he was taken to a list of alleged treatment of him at paragraph 77 of his witness stated headed "*further breaches of trust and confidence*". He was asked if they formed part of the reason for him resigning to which he responded that he resigned because he had no faith in the process (i.e. the disciplinary process) and the resignation was purely because of that loss of faith. He said that the further breaches referred to formed a pattern of previous behaviour by Mr Siddle so that they did play a part in him arriving at his decision to resign from his employment.

3.6. As will be explained, the disciplinary process which was continuing at the time of the Claimant's resignation related to a charge of potential gross misconduct arising out of the Claimant having allowed himself, it was suggested in serious breach of health and safety requirements, to be lifted by a fork lift truck up to a height of around 20 feet in order for the Claimant then to clear products from the warehouse racking which had spilled beyond its holding pallet due to that pallet having been broken/collapsed.

3.7. This incident occurred on 18 November 2015 but only came to light in March 2016 when Mr Siddle was carrying out a disciplinary hearing with Mr O'Donnell, who was employed as inbound supervisor at the time reporting to the Claimant. Mr O'Donnell had used a fork lift truck to lift an external delivery driver up in the air to repair a van door. This was regarded by Mr Siddle as an unsafe act and as a result Mr O'Donnell was dismissed for it. No action was taken against the delivery driver as he was not an employee of the Respondent.

3.8. During Mr O'Donnell's disciplinary process, he informed Mr Siddle that there had been prior instances where people had been lifted indeed to greater height on the prongs of a fork lift truck and on the instructions of a manager.

3.9. Mr O'Donnell declined to give details of those involved in any previous instances of lifting people using a fork lift truck, but the Respondent sought to investigate this further and video footage emerged of the incident on 18 November 2015 when the Claimant had been lifted in the air.

3.10. The Claimant alleged that there had been an inconsistency in terms of disciplinary action as others seen on video doing the same as the Claimant were not treated as potentially guilty of gross misconduct and kept their jobs. The fork lift truck used to lift the Claimant to height at the racking on 18 November was Mr Marcin Karpinski. He was not dismissed from the Respondent's employment although the Claimant accepted that he had been subjected to a disciplinary sanction. Whilst the Claimant accepted that Mr Karpinski had received a sanction short of dismissal, he felt that his sanction ought to have been the same as that given to Mr O'Donnell regardless of the Respondent's conclusion, which he accepted, that Mr Karpinski had been following the instructions of his line manager, the Claimant himself.

3.11. In any event, the Claimant accepted that he did not know anything about the disciplinary sanction imposed on Mr Karpinski until after he had resigned from his employment such that he accepted, as he had to, that this was of no relevance in terms of his own decision to resign from the Respondent's employment.

3.12. In terms of inconsistent treatment, the Claimant also referred to Mr Leeroy Carty. The Claimant accepted that he was not shown in the video and that evidence had only emerged of his potential involvement in a similar incident at the Employment Tribunal hearing which heard Mr O'Donnell's claim, again some time after the Claimant's resignation. The Claimant further accepted that by that point Mr Carty had already left the Respondent's employment by reason of redundancy on the closure of the depot such that he could not therefore have been disciplined.

3.13. At this stage the Tribunal would note that the Employment Tribunal hearing in respect of Mr O'Donnell's dismissal took place on 25 November 2016 arising out of which he was found to have been unfairly dismissed. In the Employment Tribunal's reasons it records Mr O'Donnell bringing to Mr Siddle's attention that there had been occasions in the past where difficulties had arisen in the warehouse and where damaged pallets at height needed to be accessed. Mr O'Donnell said that the Claimant had authorised a fork lift truck driver to lift the Claimant himself to a height of some 20 feet in the air so that necessary remedial work could be carried out. The Tribunal recorded Mr Siddle's reaction to such suggestion and his initiation of further investigation. Mr Siddle as a result found that what Mr O'Donnell had said was true. The Tribunal also heard at that hearing from the Claimant in these proceedings to the effect that it was not unusual for pallets stored at height to become damaged and in the absence of particular equipment provided to reach such pallets, fork lift truck drivers had been authorised to raise employees to height to effect the necessary repairs. In reaching

its conclusion in favour of the unfair dismissal of Mr O'Donnell the Tribunal expressed itself as being troubled at Mr Siddle taking the view that the Claimant, as warehouse manager, having condoned such conduct in the past had no relevance whatsoever to whether or not Mr O'Donnell should be dismissed. Mr Siddle in the Tribunal's view should have given substantial weight to this evidence and had he done so would have arrived at a conclusion that a sanction short of dismissal would have been appropriate.

3.14. The Claimant next in terms of further breaches of trust and confidence relied upon him being expected to work excessively long shifts with particular reference to having worked 19 hours on 8 February 2016. He said that that due to a shift manager being unable to attend work due to a bereavement, Mr Siddle had told him that he had no option but to work the shift regardless of the hours already worked by him.

3.15. The Claimant confirmed in cross-examination that he had not referred to this allegation up to and including the date he resigned from his employment. He maintained however that it was illustrative of the Respondent's ethos and Mr Siddle's attitude that the Claimant had the title *"manager, earned the big bucks and had to work the extra shift*". As a manager the Claimant did not complete time sheets such that there was no evidence showing the length of time the Claimant worked on 8 February 2016. Mr Siddle could neither deny nor confirm which hours the Claimant had worked but did certainly not recall ever instructing him to work the extra shift.

3.16. Indeed, at the end of December 2015 Mr Siddle had given notice of his intention to resign from his employment and his replacement, Mr Mackenzie, who took over line management responsibility for the Claimant commenced work in January 2016 overlapping with Mr Sidle. Albeit his stay with the business was relatively brief and Mr Siddle took back line management responsibilities and extended his employment with the Respondent by around a further six months before finally leaving and whilst not impossible for Mr Siddle to give any instruction to the Claimant, it was more likely in this period that any instruction came from Mr Mackenzie.

3.17. Mr Siddle's evidence was that long hours were worked from time to time, particularly after the flooding of the Hunslet site and, as regards the other shift manager's bereavement absence, Mr Siddle himself had also worked extra hours to cover his absence on a couple of occasions.

3.18. The Claimant's usual shift start time was 7am (albeit he, out of choice, typically arrived earlier) and finished at 4pm. Mr Dan Halligan, who was absent due to bereavement started his shift at 4pm and carried through until 12pm. The Claimant's view was that he had worked longer than the end of Mr Halligan's normal shift as it had been necessary for him to do so and therefore he had worked from 6am to around 1.30am the following morning rather than the hours from 7am to 12pm which would have covered both of their normal contractual shifts. Mr Siddle expressed himself at being surprised that the Claimant would have stayed so late into Mr Halligan's shift referring to an expectation that he would ordinarily have been able to leave the site at around 8 or 9pm if everything was running smoothly and leaving the more junior team leader to manage the remaining period of the shift.

3.19. The Claimant in evidence was convinced that he had been requested by Mr Siddle to work Mr Halligan's shift on the night in question and given his strength of expression, as against Mr Siddle's perhaps unsurprising lack of such specific recollection, the Claimant's evidence is accepted. Whilst he might have been under the line management of Mr Mackenzie by this point, Mr Siddle was likely to be continuing to manage the operation in parallel with him during a period of effective hand over.

3.20. However, the Tribunal is unable to conclude on the balance of probabilities that Mr Siddle was at all specific about the hours which he expected the Claimant to work and if the Claimant did work the hours he maintained he did so by his own choice albeit in circumstances where it was his own view of his responsibilities that he ought to work those hours. Indeed, the evidence suggest that the Claimant did work very hard for the Respondent but in circumstances where he understood what was expected and was of the view that the Respondent's demands were commensurate with the Claimant holding a management position. Again, the Claimant raised no issue of complaint at the time or thereafter about excessive working hours.

3.21. Next the Claimant complained of a failure on the part of management to supply a risk assessment or statement regarding safe working for the removal of collapsed pallets on higher level racking. Mr Siddle accepted that there were no risk assessments in place regarding the removal of damaged pallets. The risk assessments in place were regarding the lifting and moving of pallets more generally and safe lifting was part of the training undertaken by any fork lift truck driver.

3.22. He accepted that from time to time pallets did break and indeed some of those were sold on for recycling. He also accepted that the Claimant had at times reported broken pallets but not in the context of any safety issue and indeed there is no evidence of that. Mr Siddle said that the Claimant was aware that he was instructed to refuse to accept pallets which were delivered not of sufficient quality and that it was not the case that the Respondent had ever refused to pay for more substantial pallets.

3.23. Mr Siddle's evidence was that on a particular occasion of a pallet collapsing, the issue had been raised in a safety meeting where he had asked for an explanation from a Mr David Harrison who had said that there had been previous instances of collapsed pallets. Mr Siddle was clear, which the Tribunal accepted, that there was no mention of people going up on fork lift trucks to remedy the situation. Instead, Mr Harrison confirmed that there were goods within the warehouse on lower grade pallets at which point the meeting was stopped and the warehouse management team including the Claimant were taken round the warehouse by Mr Siddle to seek to identify poor quality pallets which were then to be removed.

3.24. A particular supplier, British Bacon, was responsible for the poor quality pallets and was told to send better quality pallets in the future. The fork lift truck drivers were told to check the quality of pallets before lifting them and to make sure that they rejected deliveries on substandard pallets and did not simply load goods on to the warehouse racking knowing that the pallet on which they were placed was of poor quality and therefore more liable to break. Mr Siddle recognised that despite his instruction there was still the chance from time to time of poor pallets being accepted and

used. He said that he went to see the Respondent's managing director, Mr Walker. He got permission from him to instruct British Bacon that, if they sent poor pallets again, their orders would be refused.

3.25. Mr Siddle was of the view that if a pallet did collapse then a dynamic risk assessment would be necessary to determine how best to deal with each particular situation. He said the circumstances of each collapsed pallet would be different. For instance if there was a pallet with one or several slats broken but the frame structure still intact, this could still safely be brought down using a fork lift truck. A pallet might alternatively have completely cracked in the middle with all the product falling through. In that case the damage was effectively done and the product would be cleared out of the way. If a pallet was broken and the product was still there but at risk of falling he said that he would expect those present to assess the situation to see if they could get the forks into the pallet and therefore use a fork lift truck to remove it. If they couldn't then the aisles at each side would be cleared and made safe before deciding whether to simply pull the pallet until all the product fell through or whether to bring in an external contractor to assist with the removal. When it was put to him in cross-examination that it would have been useful for such a form of risk assessment to have been published along the lines of the description of different circumstances Mr Siddle had just given, he agreed that that was a good point.

3.26. In his cross-examination, the Claimant accepted that he himself, as warehouse manager, bore a responsibility for health and safety risk assessments albeit he said in conjunction with Mr Siddle who for a period prior to the Claimant's resignation had acted as the Respondent's health and safety manager as well as operations manager. He agreed that he had never raised with Mr Siddle the need for a specific risk assessment or sought to draw one up himself.

3.27. When asked whether he was suggesting that a lack of risk assessment was one of the reasons for his resignation, the Claimant said that was being taken out of context. It was part of the background and not the only reason. He agreed that the issue of a lack of risk assessment had been one which he had endured throughout his employment with the Respondent and that he had never raised any concern regarding such omission. He also accepted that a lack of risk assessment was not comparable with the actions involved in lifting someone by a fork lift truck unsecured at height. He also agreed that the absence of a risk assessment did not prevent the Respondent taking such an instance seriously and agreed that it should indeed have been taken seriously. A lack of risk assessment did not mean that being lifted by a fork lift truck was not a serious safety issue.

3.28. Connected with the lack of risk assessment, the Claimant further complained that there had never been any scissor lift or cherry picker supplied by the Respondent to assist in removing pallets stored at height. It was accepted on behalf of the Respondent that there had never been such equipment in the warehouse. Mr Siddle's view was that he had never been aware of any argument that such equipment was necessary but maintained that even if only on rare occasions such equipment might have been needed to effectively prevent an employee being lifted at

height using a fork lift truck, then such equipment would have been provided.

3.29. The Claimant accepted that, including when he was raising the quality of pallets with Mr Siddle, he never at any point said that the only way of dealing with the issue was for someone to be lifted on a fork lift truck. The Claimant accepted that he did not tell anyone in management at any point during his employment that damaged pallets were from time to time being dealt with by raising someone to a height using the fork lift truck. The Claimant maintained that if he had suggested that the Respondent had to spend money, adding to its costs, he believed he would have been out of a job. He raised such contention in a number of contexts but the Tribunal has seen no evidence from which he could draw such a conclusion as to the Respondent's alleged attitude in particular towards safety at work.

3.30. The Claimant again in cross-examination accepted that the reason management did not know about people being lifted by the fork lift trucks was because he had chosen not to tell them. The Claimant referred to Mr Siddle as being the expert and having seen the near miss books referring to problems with pallets. He believed that Mr Siddle was at fault in not asking the Claimant the question. When put to him that that did not mean that he himself had acted appropriately in being lifted at height by a fork lift truck he agreed that such behaviour of his own was not appropriate, but that Mr Siddle was not doing his own job. The Claimant's view was that he accepted that Mr Siddle was not aware of the practice which had been going on lifting people up by fork lift truck but that as health and safety manager he should have been aware and he was often in the warehouse area.

3.31. The Claimant next complained of senior management overruling the technical complaints officer when she wished to reject inbound stock outside the compliant temperature range. The Claimant's allegation in this case was particularly unspecific. Further, whilst he said that the acceptance of goods outside of temperature was a life and death matter, he accepted that he had never raised an internal complaint. He said that he had sought to raise the matter through the individual compliance officers but that the atmosphere within the Respondent was one where people did not dare to put their heads above the parapet.

3.32. The Claimant accepted that, in terms of any breach of his contract of employment, the issue did not directly affect him but was part of a background and his own thought process that the Respondent was prepared to ignore health and safety issues and that he would not get a fair hearing himself in the disciplinary proceedings against him. He accepted, however, that even if he was correct regarding such double standards, this did not mean that the Respondent should not take seriously an incident where he was lifted up in the air on a fork lift truck.

3.33. In a similar vein, the Claimant raised that no meaningful action was taken when there was vermin infestation – a particular problem with rats, at the temporary Maybrook site. In apparent contradiction of the Claimant's assertion, he was shown a summary of visits and action taken by a third party company engaged by the Respondent to deal with the problem of vermin on site, Ecolab. This showed there to be regular visits and reporting of issues as well as remedial action taken. The Claimant also

accepted that the Respondent had been in a rush to cease the use of six chilled containers placed outside the main warehouse area and to install "refrigerated balloons" inside it for the safer storage of food. The Claimant's view was that, still, certain product where the Respondent knew there was a likely contamination by rats had been supplied to customers including schools and hospitals. He said he had raised the issue with Mr Siddle and indeed Mr Walker and in so doing had done his duty but that if he had said that the Respondent had to stop using the containers then he would have felt his job at risk. He said he did not want to risk that by going over Mr Siddle's head.

3.34. As already identified in the issues section above, the Claimant also relied on specific complaints regarding alleged aggression and bullying of him by Mr Siddle. Those indeed again were set out in his witness statement or at least cross referred in his witness statement to evidence he had given when he was a witness himself in Mr O'Donnell's separate Tribunal proceedings.

3.35. In those allegations he referred to an occasion of Mr O'Donnell saying to him that Mr Siddle had been aggressive and of Mr O'Donnell reporting this which resulted in a heated discussion and from then on Mr Siddle finding fault in everything Mr O'Donnell did. The Claimant accepted that this incident/issue had nothing to do with himself. He provided the same confirmation in respect of a further instance where he raised Mr Siddle complaining about Mr O'Donnell's fork lift driving ability. Similarly, in the alleged reporting of damage to a safety barrier caused by Mr O'Donnell being greeted with pleasure by Mr Siddle, had nothing to do with the Claimant. Nor did a complaint from other staff about Mr Siddle when he accused an employee of misuse of his clock card. The Claimant commented generally that Mr Siddle was felt to be a bully across other departments. He also referred to Mr Siddle having a disregard for employment rights in ignoring instructions from human resources regarding support from someone on long term sickness.

3.36. In essence, in terms of treatment of the Claimant himself, there were three issues complained of. The first related to the alleged insistence by Mr Siddle that the Claimant work a 19 hour shift. The Tribunal has dealt with such issue already above.

3.37. The next involved the Claimant maintaining that Mr Mackenzie had on one occasion asked the Claimant if Mr Siddle always talked to him in *"that way"* and to Mr Mackenzie stating on the Claimant's confirmation of that: "*I wouldn't talk to a dog like that*". He said that after Mr Mackenzie left he had sent the Claimant a text wishing him luck with Mr Siddle. No text messages had been retained. The Claimant's company mobile had been returned to the Respondent and he had not made any copy of the text he suggested he had received. The Claimant accepted that if this comment was made it must have been made in a brief window of around 3 weeks when Mr Mackenzie was employed by the Respondent. The Claimant gave in his evidence no context or background for the alleged comment by Mr Mackenzie such that the Tribunal has no idea whatsoever as to how Mr Siddle is alleged to have spoken to the Claimant which produced the alleged reaction from Mr Mackenzie.

3.38. The Claimant did however specifically allege that Mr Siddle had said to him in January 2016 that: *"your face doesn't fit anymore and I would look for another job*".

3.39. Mr Siddle in his witness statement denied using the term that the Claimant's face did not fit and of informing him that he should look for another job. His position changed however when he came to give evidence before the Employment Tribunal.

3.40. Mr Siddle said that he recalled the relevant conversation with the Claimant as occurring around mid February 2016 at a time when he was expecting shortly to be leaving the business and handing over to Mr Mackenzie. His recollection was that an employee Dennis Grigson had complained about the Claimant and the way he had spoken to him, which he had passed on to Mr Mackenzie to deal with. Separately Mr Walker had also asked Mr Siddle to speak to the Claimant about an issue another employee had with the Claimant. Mr Siddle said that he had called the Claimant over and asked him if he was aware of Mr Grigson bringing a complaint. He said the Claimant was not and said that he had apologised to Mr Grigson and therefore had not expected the matter to be taken further. He said that he then referred to the Claimant having had two complaints against him within a couple of weeks and this being in the context of him already having a disciplinary warning (the reference to the Welsh employee described above). He said that he had told the Claimant he needed to be careful, he might get a reputation and was on a slippery slope. He said the Claimant then said something about if his face did not fit to which Mr Siddle responded with the word "*yeah*" saying further that it may be time to look for something else. He said that he thought the Claimant's comment regarding his face not fitting was a reaction to his own suggestion to the Claimant that he was on a slippery slope. Further on being cross-examined Mr Siddle said that to the best of his memory he did not make any reference himself to the Claimant's face not fitting and agreed in contrast to his witness statement he did say something like "time to look for a new job". He said however that the conversation was a friendly one, two weeks before Mr Siddle himself was due to leave and in circumstances where he could not see why the Claimant could be concerned given his imminent departure. He denied that what he said could be viewed as at all threatening and said he could not see any harm in tipping the Claimant off i.e. in tipping him the wink about complaints against him not looking very good.

3.41. The Claimant was adamant in evidence that the comment about his face not fitting and separately that he should look for another job were both comments which came from Mr Siddle. On balance, given the discrepancy described in Mr Siddle's own evidence, the Tribunal accepts the Claimant's account as more likely than not to be the most accurate. The Tribunal must also however, on the Claimant's evidence, conclude that the Claimant did not at the time feel threatened by the comment or treat it as a form of threat. When it was raised with him in cross-examination, why he did not complain until he had been invited to the disciplinary hearing, he said he had no occasion to do so. He went on to describe the comment of Mr Siddle as a friendly warning that the company wanted to get rid of him. He said that Mr Siddle was leaving and that he was giving the Claimant a *"head's up".*

3.42. As already referred to, the Claimant prior to his resignation was subject to disciplinary proceedings. The Tribunal has already described the actions of the Claimant on 18 November which gave rise to a disciplinary process. The Claimant was first invited to a disciplinary hearing by a letter of 4 April 2016 from Mr Siddle who sought to arrange a hearing for 7 April. The letter described the incident on 18 November 2015 where it was said that the Claimant had given instructions to an employee under his management to use a fork lift truck to lift him by means of a pallet on to the top part of warehouse racking where, using a pallet to kneel on, the Claimant carried out some form of task whilst balancing on an empty pallet. It was said that this was an act the Claimant was aware was strictly prohibited under any circumstances due to the high risk of serious injury or death. The hearing was therefore to put to the Claimant an allegation of gross misconduct and the Claimant was warned that this could lead to his dismissal. The Claimant was provided with a still photograph from the video footage referred to together with witness statements from colleagues who worked with the Claimant – those statements had been anonymised. The Claimant was provided at the same time with the Respondent's disciplinary policy and given the right to be accompanied by a colleague or union representative.

3.43. It is noted that the Claimant at this point in time and indeed from around February 2016 had been absent from work due to a trapped nerve. He was told that the Respondent would be prepared to arrange for a taxi to transport the Claimant to and from the disciplinary hearing.

3.44. Whilst the Claimant had suggested that the Respondent had acted unreasonably in pursuing an allegation that was five months old he agreed in evidence that at the time of the incident no one from management was aware of it and it only came to light during the investigation into Mr O'Donnell's case. He agreed that its staleness did not mean there should be no investigation and when, in a letter in reply to the disciplinary invite of 6 April, he complained of the staleness of the incident, this was out of shock and a feeling that it was unfair that the matter be dragged up. He agreed now that it was something that had to be investigated. This letter also referred to previous threats of disciplinary action which the Claimant accepted related to the warning regarding the Welsh employee. The Claimant accepted that the sanction in respect of that earlier matter had been delivered by Mr Pearson but repeated that Mr Siddle had told him in advance what the sanction would be. The Claimant's letter also referred to the comment attributed to Mr Siddle regarding the Claimant's face no longer fitting and that he should look for another job as well as asserted that the company was looking to get rid of him. The Claimant referred to there being a will on Mr Siddle's part to remove him from the business which could give rise to a constructive dismissal claim against the company which he said he wished to discuss with his advisors in more detail later that week.

3.45. As regards the 18 November incident itself the Claimant disputed that this amounted to gross misconduct but did say that *"this may have been an error of judgment"*. Miss Tharoo referred the Claimant to his witness statement suggesting that there was no acknowledgment of any real issue in the Claimant's behaviour of 18 November 2015. The Claimant's evidence before the Tribunal was that his view now was that what he had done was unsafe and he accepted it was dangerous. He accepted that

there was a possible risk of serious injury but, in the context of someone potentially falling 20 feet, did not accept that there was a potential for a fatality.

3.46. The Claimant in his letter of 6 April sought a postponement of the disciplinary hearing to 14 April 2016. It is then common ground that the Claimant sent an email to Mr Siddle which has not been retained by either party requesting some form of informal meeting. When put to the Claimant that he was concerned because he knew what he had done was serious, he agreed. He also agreed that there was a good chance of him receiving some form of disciplinary sanction albeit he believed there was a justification for his behaviour in terms of him having to deal with an issue without proper equipment and following the custom and practice which previous warehouse managers had adopted before him. He accepted some form of disciplinary sanction would be justified but he was not sure what and that the previous history of Mr Siddle's comments and behaviour towards him indicated that the Respondent was using the incident as an opportunity to get rid of him.

3.47. Mr Siddle emailed the Claimant on 6 April stating that the meeting requested was for a formal disciplinary hearing and it would not be appropriate to have an informal meeting. The Claimant's postponement request was accepted however.

3.48. The Claimant's 6 April letter having been referred to Ali Richardson of human resources and advice having been taken, it was seen as inappropriate, given the complaints raised regarding Mr Siddle, for Mr Siddle to continue to manage the disciplinary process. Mr Siddle wrote to the Claimant on 7 April informing him that Mr Joe Smith would be conducting the disciplinary meeting. The Claimant's view was that this showed Mr Siddle's guilt in terms of the bullying allegations, there being no reason why there ought to be a change of manager if there was no evidence of bullying.

3.49. On 13 April 2016 a company announcement was published which involved a proposal to close the Respondent's warehousing function in Maybrook and to move it to Grantham with a resultant redundancy situation affecting all of the warehouse staff including the Claimant. Mr Siddle's position is that he was unaware of the redundancy situation himself until that announcement and there is no evidence to contradict that.

3.50. The Claimant quickly made telephone contact with Mr Smith during which the Claimant agreed that he had asked about the possibility of a compromise agreement bringing his employment to an end. The Claimant accepted that he wanted to avoid a disciplinary hearing which he considered to be stacked against him and to avoid having the stigma of a dismissal against him as well. He was going to be made redundant in any event, he considered, and if he went to an Employment Tribunal that would cost the Respondent. Indeed the Claimant's evidence was that Mr Smith said that the Claimant's suggestion made sense and he thought he could 'sell it' to Mr Walker.

3.51. Mr Smith emailed the Claimant on 8 April confirming that the disciplinary hearing had been re-scheduled for 29 April and that he had referred the Claimant's offer of a compromise agreement to Mr Walker.

3.52. A further letter of invitation was sent to the Claimant dated 15 April from Darren Illiffe, regional operations manager who said that he would now be the person who would conduct the disciplinary hearing.

3.53. The Claimant responded by a letter of 20 April saying that he found the process confusing and distressing particularly at a time when he was recovering from a recent operation. He referred to the conversation with Mr Smith and awaiting a response to the offer of a compromise agreement. He asked for confirmation of whether or not the Respondent intended to push ahead with a form of disciplinary hearing. He said: "*if it is indeed the company's intention to push ahead with this process then I wish to raise a formal grievance against Kevin Siddle. The grounds of that grievance are clear from my letter to him of 6 April (attached). I assume such grievance should be submitted to HR and would precede any disciplinary hearing if you intend to proceed*". The Claimant confirmed in cross-examination that he intended only to raise a formal grievance if the disciplinary process continued. He rejected however the proposition that he did not consider his own grievance to be a serious matter and was using it as a form of threat to obtain a compromise agreement.

3.54. The Claimant then sent an email directly to Mr Walker on 22 April. Within this he acknowledged that the alleged incident had occurred and that he might have made an error or judgment albeit in the sole interest of the efficient operation of the Respondent. He referred to Mr Siddle turning a blind eye to breaches of health and safety and non compliance of hygiene standards, reference to the vermin infestation. He continued that he had been advised that he could resign over his treatment and had a strong case to claim constructive dismissal based on Mr Siddle's intention to remove him from the business. He said that he was also advised that he should lodge an internal grievance against Mr Siddle if his disciplinary was to proceed. He then said that none of this was action which he actually wanted to take and set out two clear options, the first being his preference to effectively allow the redundancy process to take its course or alternatively that he would agree to an early termination on a compromise agreement no less favourable to the redundancy terms which would subsequently have been applied. The Claimant accepted that this offer to Mr Walker did not bear fruit.

3.55. Instead the Claimant received a further invitation to a disciplinary meeting dated 26 April arranging a hearing for 29 April. Following receipt of that the Claimant sent an email to human resources but copied to Mr Walker and Mr Pearson, who according to the latest invitation was now to chair the disciplinary hearing, saying that he wished to raise a grievance against Mr Siddle. He continued: "*the grievance is for bullying and intimidation and against the company for threatening dismissal during redundancy consultation*".

3.56. On 1 May the Claimant emailed Mr Pearson stating that he had not had confirmation as to whom he should lodge his grievance with. Mr Pearson replied the following day asking him to send details directly to Miss Richardson who would assign the grievance to an appropriate senior manager. The Claimant's earlier email stating a wish to raise a grievance was forwarded to Miss Richardson on 3 May.

3.57. Miss Richardson saw what had been forwarded to her as only a brief summary of the grievance with no detail given as to the specific allegations. She was unaware of the detail of the disciplinary issues being pursued against the Claimant and the stage they had reached. She emailed the Claimant acknowledging his grievance and attaching a copy of the Respondent's grievance policy. She referred to the Respondent encouraging employees to raise matters informally in the first instance and stating that if he would be prepared to speak with Mike Walker as Mr Siddle's manager or indeed Miss Richardson herself regarding the situation they would welcome that approach. If he wished to use the formal grievance process then she asked that he provide her the details so that an appropriate person could investigate the situation.

3.58. On Miss Richardson becoming shortly thereafter aware of the more detailed background to the Claimant's situation and on taking advice it was determined that informal resolution was inappropriate and that the Claimant ought to be invited to a grievance meeting to take place at 9am on Friday 6 May. The most recent arrangement of the disciplinary hearing was for that hearing to commence at 10am, i.e. after the grievance hearing and the letters made it clear that Mr Pearson would be considering both. The Claimant responded saying that he had been invited by Miss Richardson to attend an informal meeting with herself and Mr Walker in an attempt to avoid formal proceedings which he had accepted. He therefore asked for confirmation that the formal hearings on 6 May had been cancelled. He also emailed Miss Richardson on 5 May, assuming that there had been a miscommunication and she was not aware that Mr Pearson had planned the formal meeting. Again he asked for confirmation from her that the formal meetings were cancelled pending the informal discussion to which he had been invited. She responded shortly afterwards saying that she understood that a formal grievance hearing had now been arranged and in the circumstances agreed that this was the appropriate forum particularly in light of the disciplinary matter which was also outstanding. She confirmed that Mr Pearson would hear both.

3.59. The Claimant responded a little later on 5 May expressing his extreme disappointment albeit not surprise that the offer of an informal meeting had been withdrawn. He said that he saw this as an indication that the Respondent had no desire to discuss a conciliatory outcome. He said he had no confidence in the impartiality of the grievance and disciplinary process. Finally he said that if the Respondent was not prepared to offer an informal discussion it was his intention to terminate his employment by letter at 9am the following morning. It would then be his intention to bring Tribunal proceedings alleging constructive dismissal.

3.60. Miss Richardson responded saying that in his original email there had been little detail provided of the grievance and her view was that an informal resolution might be appropriate. She said that having seen the seriousness of the matters that he had raised now as well as the later allegations to be considered in separate disciplinary proceedings, she was of the view that the matter was not appropriate for an attempt at informal resolution. She said that the meeting would be chaired by an independent manager who had had no previous involvement in the matter. The Claimant agreed that at no stage did he indicate to the Respondent that he had difficulties in attending either meeting on 6 May

arising out of any lack of time he had had to consider the representations he wished to make.

3.61. The Claimant next sent an email to Miss Richardson, Mr Pearson and others at 11.09pm on 5 May. In this he expressed confusion. He stated that the grievance and disciplinary were interlinked. He felt it inappropriate to schedule a disciplinary hearing immediately after a grievance hearing in circumstances where matters needed to be fully considered. He continued that if the Respondent was prepared to hear his grievance and postpone the disciplinary interview he was prepared to attend the grievance hearing. However if the Respondent did not postpone the disciplinary hearing he re-affirmed that he would terminate his employment at 9am the following morning. The Claimant accepted that his proposal in that letter differed from the previous suggestion that he would resign if the Respondent did not allow an informal discussion.

3.62. Mr Pearson had no recollection of reading this latest email prior to seeing the Claimant at the Leeds site on the morning of 6 May. Mr Pearson travelled from Liverpool that morning and said that he would have set off not long after 6am and went straight into the meeting with the Claimant on his arrival at site such that he had not had an opportunity to read any emails. The Tribunal considered such account to have a ring of truth.

3.63. The Claimant had arrived on site with a pre-typed letter of resignation referring back to the email of the day to Miss Richardson. He said that he had no intention of attending any meeting with Mr Pearson but intended to immediately hand to him his letter of resignation.

3.64. However, he said that Mr Pearson arrived, said that the person appointed as note taker was late but asked the Claimant to come into his office for a quick chat. The Claimant said that Mr Pearson said he wanted to talk to the Claimant about his grievance and the Claimant said that he was not prepared to do so. The note taker never arrived, they had a long conversation and the Claimant's view was that Mr Pearson had tried to trick him and that is in fact what he had done. When asked in cross-examination if Mr Pearson had asked the Claimant whether he had raised a formal grievance and the Claimant said he had not, the Claimant said that that was correct. When asked if the Claimant had said that he did not want to engage at all and was not going to discuss his grievance at all, the Claimant said that that was correct *"at that point in time".* It was suggested that it was clear that Mr Pearson wanted to understand the Claimant's grievance. The Claimant responded in cross-examination that Mr Pearson had encouraged him to divulge information about Mr Siddle and he felt he was being encouraged to dig up dirt on Mr Siddle. When suggested that that was the whole point of his complaint about Mr Siddle, the Claimant said he did not expect that conversation. The Claimant said he was not prepared and had been caught on the hop. The Claimant's complaint appeared to be that Mr Pearson had encouraged him to have a chat about the grievance issues after the Claimant had said he wouldn't discuss his grievance. The Claimant did not say to Mr Pearson that if the disciplinary hearing was postponed he would participate in a grievance meeting.

3.65. The conversation reached a point where , after the Claimant had confirmed that he would not proceed with a grievance hearing, Mr Pearson informed him that they would proceed with the disciplinary

hearing. At this point the Claimant handed him the letter of resignation. Mr Pearson asked the Claimant to reconsider this and again to participate in the grievance process so that his concerns could be discussed. The Claimant confirmed again that he did not wish to participate. He said that he would work his notice period but, in those circumstances, Mr Pearson's response was that the disciplinary process would therefore continue. The Claimant asked to consult with his advisors and returned to his car. He then shortly after returned to Mr Pearson to say that his resignation was in fact from immediate effect and he would not be serving his notice. Mr Pearson again offered the opportunity for the Claimant to have his grievance heard which he declined. He also stated that he would not attend a disciplinary hearing.

3.66. At this point the Claimant said that he had not been given time to prepare for the grievance hearing and alleged that the only reason Mr Pearson wanted to continue with it was to get enough ammunition to dismiss Mr Siddle. He informed Mr Pearson that he had a *"wealthy financial position"* due to an inheritance and that he was prepared to pursue a claim against the Respondent.

3.67. Shortly after the meeting at 10.27am on 6 May the Claimant emailed Mr Pearson to confirm that he had raised his grievance with human resources which had been acknowledged by them and that he had now terminated his employment that morning without notice. He expressed disappointment at not having received a response to the letter he sent the previous evening and that the Respondent "*is not prepared to hear my grievance and postpone the scheduled disciplinary interview until such time as the issues have been fully and properly considered …*" (this does not coincide with the position the Claimant had actually taken with Mr Pearson). He said that, together with the nature of Mr Pearson's questions, had re-affirmed his contention that the Respondent's sole intention was to conduct a formal disciplinary hearing and to dismiss him regardless of the issues he had raised. He said that he would be lodging a Tribunal complaint.

3.68. On 8 May 2016 the Claimant contacted Miss Richardson stating, amongst other things, that the decision to terminate his employment was based on the bullying he had received from Mr Siddle, the threat of summary dismissal during the redundancy consultation, double standards as regards health and safety and food standards and the failure of the Respondent to act in accordance with the spirit of its own procedures enforcing his belief that the sole intent was to orchestrate his summary dismissal. He sought various information from the Respondent including around his complaints of breach of health and safety standards.

3.69. By a letter of 13 May 2016, Mr Pearson wrote to the Claimant at length setting out his position regarding the events on 6 May which had immediately preceded the Claimant's resignation.

3.70. The Claimant then wrote to Mr Walker in respect of outstanding responses he was awaiting. He said that he intended to refer some of the issues he had raised to Leeds City Council Environment Department with a request for them to investigate. He offered a further opportunity to meet with him and his advisor with a view to reaching a form of agreement.

3.71. In a further email to the Respondent of 16 May the Claimant sought to take matters to a higher level of management. He referred to the Respondent no longer having a valid licence to supply the healthcare sector. He said that if he did not receive an offer to meet senior management with a view to agreeing a mutually acceptable outcome he would contact the Respondent's customer base *"with a view to giving them this information plus details of the recent outbreak of rodent infestation. I will begin with the Company Radu at Seacroft Hospital with a personal interview on Thursday morning at 10am and continue on a daily basis until I receive a response from the company".*

4. **Applicable law**

4.1. In order to bring a claim of unfair dismissal an employee must have been dismissed. In this regard the claimant relies on Section 95(1)(c) of the Employment Rights Act 1996 which provides that an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. The burden is on the claimant to show that she was dismissed.

4.2. The classic test for such a constructive dismissal is that proposed in **Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27CA** where it was stated:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employer is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".*

4.3 The claimant asserts there to have been a breach of the implied duty of trust and confidence.

4.4 In terms of the duty of implied trust and confidence the case of **Malik v Bank of Credit and Commerce International 1997 IRLR 462** provides guidance clarifying that there is imposed on an employer a duty that he *"will not without reasonable and proper cause conduct himself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee".* The effect of the employer's conduct must be looked at objectively.

4.5 The Court of Appeal in the case of **London Borough of Waltham Forest v Omilaju 2004 EWCA Civ 1493** considered the situation where an employee resigns after a series of acts by her employer.

4.6 Essentially, it was held by the Court of Appeal that in an unfair constructive dismissal case, an employee is entitled to rely on a series of acts by the employer as evidence of a repudiatory breach of contract. For an employee to rely on a final act as repudiation of the contract by the employer, it should be an act in a series of acts whose cumulative effect is to amount to a breach of the implied term of trust and confidence. The last straw does not have to be of the same character as the earlier acts, but it has to be capable of contributing something to the series of earlier acts. There is, however, no requirement for the last straw to be unreasonable or blameworthy conduct of the employer, but it will be an unusual case where perfectly reasonable and justifiable conduct gives rise to a constructive dismissal.

4.7 If it is shown that the employee resigned in response to a fundamental breach of contract in circumstances amounting to dismissal (and did not delay too long so as to be regarded as having affirmed the contract of employment), it is then for the employer to show that such dismissal was for a potentially fair reason. If it does so then it is for the tribunal to be satisfied whether the dismissal for that reason was fair or unfair pursuant to Section 98(4) of the Employment Rights Act 1996.

4.8 Applying the above legal principles to the findings of fact the Tribunal reaches the conclusions set out below.

5. **Conclusions**

5.1. On the Claimant's own evidence, the Tribunal is clear that he resigned in response to and before the completion of the disciplinary process commenced against him regarding his alleged health and safety failures on 18 November 2015. At times, the case has been argued as if the Respondent dismissed the Claimant and acted unreasonably in so doing. There was of course no actual dismissal and no evidence of a decision having been made to dismiss the Claimant.

5.2. The Claimant has raised a number of other allegations but these are said to be more accurately viewed as relevant background to the Claimant's resignation and of corroborative evidence of a desire to remove the Claimant from the Respondent's business, in particular as regards Mr Siddle's view of the Claimant. Saying that, the Claimant was not necessarily prepared to accept that they had no impact on his decision to resign from his employment.

5.3. Looking at those issues raised in turn the Tribunal in its findings of fact is clear that the Claimant was never effectively forced to work a 19 hour shift and has found that, in any event, the Claimant agreed and had no particular concern at the time for his own safety regarding working longer hours to cover or partially cover the shift of a colleague who was absent due to bereavement.

5.4. As regards a failure to have in place a risk assessment regarding the manoeuvring of damaged pallets, whilst this would be as warehouse manager a primary concern of the Claimant, it is notable that he had never raised any concern nor indeed sought to take any steps to put in place a risk assessment or bring it to anyone's attention that there was a safety issue regarding dealing with broken pallets.

5.5. Similarly as regards any lack of proper available equipment to deal with situations of broken pallets, the Claimant conceded that he had not told

any members of management that there was an issue requiring such equipment and if there had been a concern on the Claimant's part the Tribunal is unconvinced by his protestations that his raising any need would have been met with hostility on the Respondent's part.

5.6. As regards accepting goods out of permissible temperature range, the Claimant was lacking in terms of specifics in this allegation but in any event it is clear that the Claimant never raised any complaint at the time and indeed the introduction of this issue and indeed to an extent the issue regarding vermin infestation was after the Claimant's resignation as a potential lever to get the Respondent to the negotiating table rather than face the negative publicity and damage to customer relations likely to result from the Claimant reporting such matters.

5.7. Whilst the Claimant has alleged bullying and aggressive behaviour directed towards him by Mr Siddle, he has been unable to provide the many examples at all of such alleged behaviour which the Tribunal would find surprising if, as seemed to be the suggestion, there has been a continuous campaign of bullying and ill treatment directed at the Claimant. Again, the allegation regarding being forced to work an excessively long shift cannot be on the facts interpreted as one of bullying. Nor does the Claimant's assertion that Mr Mackenzie noted that Mr Siddle had spoken to the Claimant inappropriately get the Claimant anywhere in circumstances where the Tribunal has been given no evidence of what comment Mr Mackenzie might have been referring to. Certainly none was ever put to Mr Siddle. In terms of actual allegations pursued, this strand of the Claimant's case therefore came down to Mr Siddle telling the Claimant that his face did not fit and that he perhaps might wish to look for work elsewhere - a comment which in that or a similar form the Tribunal has ultimately accepted was made by Mr Siddle. However, the context is very important in such circumstances and the Claimant on his own evidence felt that he was being given some friendly advice rather than being bullied and harassed in circumstances of course where at the point such comment was made Mr Siddle was about, as the Claimant knew, to depart the business.

5.8. The Tribunal agrees with Miss Tharoo that the grievance pursued at the time (and now before the Tribunal and since the Claimant's resignation expanded upon) has to be seen more as an attempt to gain some advantage when faced with disciplinary charges and/or indeed an attempt to gain some leverage in terms of a potential compromise solution whereby the Claimant would leave the Respondent's employment rather than an expression of serious and genuine concerns the Claimant had during his employment. Indeed, such concerns were not evident until the Claimant was faced with disciplinary charges against him.

5.9. Turning to those disciplinary charges, whilst they did relate to a matter some five months earlier there is no evidence that the Respondent knew anything about the practice which the Claimant, on his own admission, adopted of allowing employees to be raised at height on fork lift trucks. Having discovered this practice, the Claimant accepted himself that it was not improper for the Respondent to seek to investigate what was occurring. On the Claimant's own admission these were serious issues to be considered.

5.10. The Claimant cannot argue that any inconsistency in treatment led him to resign from his employment. Mr O'Donnell was obviously dismissed for raising someone else by a fork lift truck. The Claimant was unaware at the time he resigned of what action was to be taken in respect of other employees involved in the 18 November 2015 incident. Of course, the Claimant at the time he resigned was unaware as to what would happen to himself. Whilst the Claimant suggests he had adopted a practice carried on by his predecessors as warehouse manager, there is no suggestion of any awareness of this amongst the Respondent's more senior management.

5.11. There was no basis for concluding that a disciplinary case was pursued against the Claimant to avoid redundancy costs. Clearly there was a closure of a whole warehouse with a number of employees' jobs at risk. Furthermore, the disciplinary process initiated by Mr Siddle occurred at a point where there is no evidence that Mr Siddle was aware of the forthcoming closure.

5.12. Again, the Claimant accepted that it was inappropriate to have allowed himself to be lifted using a fork lift truck and in correspondence prior to his resignation referred to a potential error of judgment by him. He accepted that there was an issue the Respondent was within its rights to investigate. He accepted indeed that there was a safety issue and that there was a risk of danger in what he had done. Whilst he did not accept that his actions might have resulted in death he did accept they could have resulted in serious injury.

5.13. The Claimant's resignation decision and it amounting to a constructive dismissal is predicated on the Respondent having already and on a prejudiced basis determined that his employment would be terminated regardless of any explanation he might be able to advance for his behaviour. That conclusion was objectively not one which the Claimant on the evidence could have reached. He might have reached the conclusion that dismissal was likely and indeed dismissal may well have been likely but, if that was so, it was because the Claimant had acted in breach of health and safety in allowing a practice and himself to be lifted to a significant height by a fork lift truck to resolve issues with broken pallets. It almost goes without such saying that such practice was reasonably to be viewed by the Respondent as dangerous and inappropriate and certainly it was recognised as such by the Claimant as warehouse manager with, albeit not the sole responsibility for health and safety by any means, a significant responsibility for the safe operation of the warehouse.

5.14. The Respondent did not act unreasonably in the changes of the composition of the disciplinary panel effectively changing the potential decision maker on a number of occasions. Indeed a decision to remove Mr Siddle as a decision maker was a sensible one in circumstances where if he had remained a decision maker the Claimant could legitimately have said that he could not have had a fair hearing from him given the allegations made against Mr Siddle. Further, there was nothing unreasonable in the Respondent seeking to link the grievance and disciplinary hearings by having them conducted by one person. Part of the grievance linked in to the reason for the Claimant's behaviour and it was clearly of advantage, including to the Claimant potentially, for the

person making the decision on the disciplinary question to be aware of the full background and of the Claimant's own grievances. There is no reason why Mr Pearson could not have heard and determined both.

5.15. It might have been that, having heard the Claimant's grievances, he would have required further investigation and indeed that would have resulted in Mr Person postponing the disciplinary stage. Mr Pearson said that is what is likely to happen had the Claimant's grievances been fully aired, albeit he accepted that he had not told the Claimant of that. Fundamentally, the Claimant did not let matters progress to that stage. He took what can only be viewed as pre emptive decision to resign from his employment in circumstances where it must follow from the Tribunal's findings of fact that the Respondent at the point of his resignation had certainly not acted in fundamental breach of his contract of employment and had not acted in particular in breach of the obligation of trust and confidence. The Claimant, as Miss Tharoo submits, resigned because he had acted inappropriately and in a dangerous manner and where a likely disciplinary sanction he faced would be one which was justified. He wished to seek to avoid such sanction and reduce the further impact this might have on him in terms of his reputation and ability to gain employment elsewhere. Given the impending warehouse closure, the Claimant saw no long-term future with the Respondent in any event.

5.16. The Claimant's emphasis in such circumstances was to seek an alternative way out through informal discussions ultimately he hoped leading to a compromise agreement. The grievances raised were part of that effective tactic and were not the Tribunal considers grievances which would have been raised at all had the Claimant not been faced with potential disciplinary action. The grievances and the Claimant's general considerations regarding how he had been treated by the Respondent and the Respondent's way of doing business and/or its general ethics were not the reason for the Claimant's resignation.

5.17. The Claimant resigned because he faced disciplinary action and in an effort to avoid it but in circumstances where the reason behind the initiation of such proceedings was entirely justified as the Claimant well knew and where the Respondent sought to address such issues by a fair and proper process which indeed again the Claimant had objectively no grounds for objection to at the time.

5.18. On the basis of these findings the Claimant was not dismissed and therefore his complaint of unfair dismissal must in itself fail and is hereby dismissed.

Employment Judge Maidment

10 February 2017