



THE EMPLOYMENT TRIBUNALS

Claimant

Mr M Abberley

v

Respondent

Royal Opera House Covent Garden
Foundation

Heard at: London Central

On: 5 -11 October 2017
(12 October 2017 in Chambers)

Before: Employment Judge Baty

Members: Mr L Tyler
Mr S Ferns

Representation:

Claimant: Mr E Blankson (Friend)

Respondent: Ms R Thomas (Counsel)

RESERVED JUDGMENT

The Claimant's complaints of unfair dismissal, breach of contract in respect of notice pay, direct age and sex discrimination and for holiday pay all fail.

REASONS

The Complaints

1. By two claim forms (2200067/2017 & 2200068/2017) presented to the Employment Tribunal on 11 January 2017, the Claimant brought complaints of unfair dismissal, breach of contract in respect of notice pay, direct age and sex discrimination and for holiday pay. The Respondent defended the complaints.

The Issues

2. The issues were agreed between the parties at a preliminary hearing held on 3 April 2017 before Employment Judge Grewal. Those issues were:-

Direct Age and Sex Discrimination

1. Whether the Respondent on the grounds of age and gender treated the Claimant less favourably than it treated Lucy Callaghan by :-
 - a. Accepting her account rather than his and subjecting him to the disciplinary process and dismissing him; and
 - b. Being biased in the investigation and favouring her.

Unfair Dismissal

2. What was the reason for the dismissal? The Respondent contends that it was a reason related to conduct.
3. If it was related to conduct, whether the dismissal was fair.

Wrongful Dismissal (Breach of Contract in Respect of Notice Pay)

4. Whether the Claimant's conduct amounted to a repudiatory breach as a result of which the Respondent was entitled to dismiss him without notice.

Holiday Pay

5. There is a dispute as to whether the Claimant has been paid for all his accrued but untaken holiday.
3. At the start of this hearing, the representatives confirmed that these agreed issues remained the same.
4. It was also agreed in relation to the unfair dismissal complaint that, although the hearing was to deal with issues of liability only, issues of whether the Claimant contributed to his own dismissal or whether any reductions in compensation should be made under the principles in Polkey v A E Dayton, which naturally came from the facts required to be found in the evidence on liability, should be heard at the liability stage and the representatives should be prepared to make submissions at the liability stage about them.
5. In addition, the Judge sought more clarity in relation to the holiday pay complaints. It was an agreed fact between the parties that the Respondent's holiday year, which applied to the Claimant, was 1 September to 31 August. It was therefore agreed that the issue was whether or not the Claimant had any accrued but untaken holiday in relation to the holiday year in which his employment terminated for which he had not been paid. The Claimant maintained that there were 5 weeks' accrued but untaken holiday for which he had not been paid. The Respondent's position was that it had paid the Claimant 2 weeks' holiday in relation to the holiday year in which his employment terminated and that any accrued holiday was therefore fully paid for.

6. At the preliminary hearing, Mr Blankson had confirmed that he was not legally qualified and that he was not being paid for representing the Claimant. He reiterated this at this hearing.

The Evidence

7. Witness evidence was heard from the following:-

For the Respondent:-

Mr Steven Foulston, an HR Manager at the Respondent;

Mr Mark Dakin, the Technical Director of the Respondent and the dismissing officer;

Ms Jane Crowther, the Director of Human Resources at the Respondent;
and

Ms Sally O'Neill, the Respondent's Chief Operating Officer, who heard the Claimant's appeal against dismissal.

For the Claimant:-

The Claimant himself.

8. It was agreed between the representatives and the Tribunal that, although there were elements of discrimination alleged in the complaints before the Tribunal, these related principally to the dismissal process and that therefore the Respondent's witnesses should give evidence first and the Claimant after that, and this was done.
9. An agreed bundle of documents in three volumes numbered pages 1-969 was produced to the Tribunal. In addition, Mr Blankson for the Claimant produced a separate "supplemental bundle" numbered pages 1-533. Although this had been produced at a relatively late stage, previous correspondence from the Tribunal indicated that it was something which the Tribunal did not object to Mr Blankson producing and Ms Thomas did not object to its inclusion. It was therefore agreed that the supplemental bundle should form part of the evidence and it was periodically referred to during the hearing.
10. In addition, the Respondent produced a separate chronology and a suggested reading list. The Respondent's chronology was an agreed chronology, with the exception of one entry in it which Mr Blankson said was not agreed and which was identified at the start of the hearing.

11. The Tribunal read in advance the witness statements and any documents in the bundles to which those statements referred (which included the documents on the Respondent's suggested reading list). It also read a separate chronology set out in the supplemental bundle produced by Mr Blankson, which Mr Blankson had asked the Tribunal to read.
12. A timetable for cross examination and submissions was agreed between the representatives and the parties at the start of the hearing. Initially, Mr Blankson had sought 12 hours' total cross examination time for him to cross examine the Respondent's witnesses. However, the Tribunal pointed out that, if this was permitted, there was a risk that it would not be possible to hear all of the evidence and submissions and for the Tribunal to deliberate on its decision within the 6 day listing. It was therefore agreed that Mr Blankson would be limited to 9 hours' total cross examination time for the Respondent's witnesses and Ms Thomas to 3 hours' total cross examination time for the Claimant. In the end, Mr Blankson required an extra hour's cross examination time, which the Tribunal was prepared to allow, and Ms Thomas completed her cross examination fractionally over her 3 hour allocation, which the Tribunal was again prepared to allow.
13. At the end of the Claimant's evidence, Mr Blankson said he had a lot of re-examination questions and needed about half an hour for these. The Tribunal expressed surprise at this and explained what re-examination was (in terms of what sort of questions were permitted) giving by way of example the two or three re-examination questions which Ms Thomas had asked in relation to the Respondent's witnesses. Mr Blankson commenced his re-examination. The first two questions were leading questions which the Tribunal disallowed. The Tribunal then again explained exactly what re-examination was and that it was, specifically, not an opportunity to introduce more evidence in chief, which would be unfair as the Respondent would not have had the opportunity to cross examine on that evidence. The next question related to a matter that did not come out of cross examination and was therefore disallowed. The next question, whilst not leading, resulted in the Claimant simply confirming something which he been asked about during cross examination anyway and the Tribunal pointed out that it was pointless simply to repeat evidence that had already been given during cross examination. At this point, Mr Blankson confirmed that he did not have any more re-examination questions.
14. The Tribunal had spent the rest of the first day of the hearing reading the witness statements and documents. At the beginning of the second day of the hearing, Mr Blankson asked whether, during his 9 hours cross examination time, he could call three more witnesses, specifically Sam Ryder, Billy Parmenter and Dr Hall to give oral evidence. Ms Thomas objected. The Tribunal heard brief submissions from both parties. It adjourned briefly to consider its decision and decided not to allow these additional witnesses, for the following reasons.

15. Firstly, Ms Thomas had taken the Tribunal through a succession of correspondence in relation to witnesses between the Tribunal and the parties in the run up to the case. It was made clear in that correspondence that the Claimant could call whatever witnesses he wanted to but it was up to the Claimant to do so and to provide written statements for them in accordance with the Tribunal orders. No written statements had been produced for these three proposed witnesses. The Claimant could have got written statements for these witnesses (and this was clear to him from the correspondence) but did not do so. It was only on the morning of the second day of the hearing that Mr Blankson had told Ms Thomas that he wanted to call two of them (he did not mention Dr Hall until he addressed the Tribunal on the matter). There was already a tight timetable for the hearing (the 6 day listing had been agreed a long time previously) and, notwithstanding Mr Blankson's suggestion that he use some of his cross examination time for these witnesses to give evidence, there was a real risk, particularly in the light of the fact that there was no evidence in chief for them at the moment, that this would impact negatively on the timetable. Furthermore, the Respondent had seen no evidence from any of these witnesses but the Claimant had had the benefit of reading all of the Respondent's witnesses' evidence. Therefore, to produce new evidence at this stage would be effectively an ambush. Finally, it was hard to see what relevance any evidence which these individuals might give could have: Dr Hall was not an employee of the Respondent and had not taken part in any of the hearings or other internal matters; Mr Parmenter and Mr Ryder were two individuals who had been interviewed as part of the disciplinary investigation and indeed could add very little even in the statements that they gave as part of the investigation; it was therefore hard to see what relevant evidence they were likely to give here. Furthermore, Mr Ryder had said in the investigation that he was not even in the building when the incident which was the subject of these proceedings occurred. For all of the above reasons, we refused the application.
16. Both representatives produced written submissions and supplemented them with oral submissions.
17. The evidence and submissions was completed within the hearing and the Tribunal reserved its decision.
18. The Tribunal had seen references, when reading the documents, to Mr Dakin having dyslexia and to various medical conditions of the Claimant. The Judge asked both of these individuals as they came to give evidence if there were any adjustments which the Tribunal needed to make to enable them properly to participate. Mr Dakin said that the only adjustment was to give a little more time when going through documents and this was allowed. The Claimant said that he too had dyslexia and that he would need a little bit more time to get through the documents and this was allowed. He did not ask for any further adjustments, with the exception of the usual Tribunal breaks, which were given.

The Law

Unfair Dismissal – Conduct

19. The tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within s 98(1) and (2) of the Employment Rights Act 1996 (“ERA”) and whether it had a genuine belief in that reason. The burden of proof here rests on the employer who must persuade the tribunal that it had a genuine belief that the employee committed the relevant misconduct and that belief was the reason for dismissal.
20. It then has to decide whether it is satisfied, in all the circumstances (including the size and administrative resources of the employer), that the employer acted reasonably in treating it as a sufficient reason to dismiss the employee. The tribunal refers itself here to s 98(4) of the ERA and directs itself that the burden of proof in respect of this matter is neutral and that it must determine it in accordance with equity and the substantial merits of the case. It is useful to regard this matter as consisting of two separate issues, namely:
 1. Whether the employer adopted a fair procedure. This will include a reasonable investigation with, almost invariably, a hearing at which the employee, knowing in advance (so as to be able to come suitably prepared) the charges or problems which are to be dealt with, has the opportunity to put their case and to answer the evidence obtained by the employer; and
 2. Whether dismissal was a reasonable sanction in the circumstances of the case. That is, whether the employer acted within the band of reasonable responses in imposing it. The tribunal is aware of the need to avoid substituting its own opinion as to how a business should be run for that of the employer. However, it sits as an industrial jury to provide, partly from its own knowledge, an objective consideration of what is or is not reasonable in the circumstances, that is, what a reasonable employer could reasonably have done. This is likely to include having regard to matters from the employee’s point of view: on the facts of the case, has the employee objectively suffered an injustice? It is trite law that a reasonable employer will bear in mind, when making a decision, factors such as the employee’s length of service, previous disciplinary record, declared intentions in respect of reform and so on.
21. In respect of these issues, the tribunal must also bear in mind the provisions of the relevant ACAS Code of Practice 2015 on Disciplinary and Grievance Procedures to take into account any relevant provision thereof. Failure to follow any provision of the Code does not, in itself, render a dismissal unfair, but it is something the tribunal will take into account in respect of both liability and any compensation. If the employee succeeds, the compensatory award

may be increased by 0-25% for any unreasonable failures by the employer or decreased by 0-25% for any unreasonable failures on the employee's part.

22. Where there is a suggestion that the employee has by his conduct caused or contributed to his dismissal, further and different matters arise for consideration. In particular, the tribunal must be satisfied on the balance of probabilities that the employee did commit the act of misconduct relied upon by the employer. Thereafter issues as to the percentage of such contribution must be determined.
23. Under the case of Polkey v AE Dayton [1987] IRLR 503 HL, where the dismissal is unfair due to a procedural reason but the tribunal considers that an employee would still have been dismissed, even if a fair procedure had been followed, it may reduce the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.

Wrongful dismissal (breach of contract in respect of notice pay)

24. As to the breach of contract complaint, where an employer claims that it was entitled to terminate the contract without notice, it is for the employer to prove on the balance of probabilities that the circumstances existed, for example gross misconduct on the part of the employee, which entitled it to do so.

Direct Sex and Age Discrimination

25. Under section 13(1) of the Equality Act 2010 (the Act), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. This is commonly referred to as direct discrimination. Both sex and age are protected characteristics in relation to direct discrimination.
26. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

Holiday pay

27. Under the Working Time Regulations 1998 ("WTR") a full-time employee is entitled to 5.6 weeks (or 28 days) holiday, which can include statutory and public holidays, per holiday year.
28. Under the WTR, leave to which a worker is entitled may only be taken in the holiday year in respect of which it is due and it may not be replaced by a payment in lieu except where the worker's employment is terminated.

29. Under Regulation 14 WTR, where a worker's employment terminates during the course of a holiday year and the proportion of leave taken by the worker for that holiday year is less than the proportion of the holiday year which has expired, his employer shall accordingly make him a payment in lieu of leave.

Findings of Fact

30. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.
31. The Respondent Foundation operates the Royal Opera House Covent Garden.
32. The Claimant started work with the Respondent as a casual worker in 1986. On 4 September 1989, he became employed by the Respondent as a permanent member of staff. By the time of the incident which forms the basis of this claim, the Claimant had had over 26 years' service as a permanent employee of the Respondent. The Claimant was a senior employee at Grade 6. By that time, he was a Daily Team Technician in the Respondent's Technical Department. Grade 6 is a high grade. The Claimant had gradually been promoted to this grade over the years.
33. At the time of the incident of 23 March 2016, which forms the subject of these proceedings, the Claimant reported to Mr Gareth Mundy (Daily Team Assistant Manager), who in turn reported to Mr Gary Mardon (Assistant Technical Director). Mr Mardon reported directly to Mr Mark Dakin, the Respondent's Technical Director. Whilst many of the members of the Technical Department were long serving, Mr Dakin had only joined the Respondent recently, in October 2015. One of the reasons why Mr Dakin had been brought into the organisation was to try to change the culture to address long standing issues of workplace culture. Specifically, there was a perception at the Respondent that the culture in the Respondent's Technical Department was old fashioned and was still rooted in a white male macho culture which, in the opinion of Mr Dakin, the modern workplace could no longer be.
34. In the Technical Department, there are a lot of people who have been there a long time and a lot of long-term friendships and family relationships, in other words members of the same family working in that department.
35. In the stage area of the Technical Department, where the Claimant worked, there were 128 permanent staff of which 9 were women.
36. In addition, the Respondent has a list of casual staff on which it also relies. There are around 450 people on this list. They are not permanent employees of the Respondent and there is no obligation upon them to accept work nor for the Respondent to provide work to them. They are given work when the

Respondent needs them. The policies and procedures which apply to the Respondent's permanent employees do not apply to casual staff. Ordinarily, if the Respondent is not happy with the performance or conduct of a casual worker, the Respondent simply does not give any further work to that casual worker.

37. Ms Lucy Callaghan is an individual on that casual list who has done work for the Respondent as a casual worker when required since around 2009. No evidence was adduced by either party as to Ms Callaghan's precise age although it is clear from the evidence we have seen that she is considerably younger than the Claimant.
38. The Claimant is 55 years old.
39. There was no history of any altercations between the Claimant and Ms Callaghan.
40. In or around 2009, Ms Callaghan had brought an (unsuccessful) complaint of sex discrimination against the Respondent in relation to shifts for casual workers.
41. On the evening of 23 March 2016, an incident occurred involving the Claimant and Ms Callaghan (the "Incident").
42. The Incident took place in the Crew Room. This is a common room for technical staff where staff can go to chat, read the paper, make food etc. It is common ground that the Incident involved swearing on both sides and that it resulted in Ms Callaghan leaving the Crew Room in tears in considerable distress.
43. On the evening of 23 March 2016, one of Mr Mundy's crew members had reported to him that he had observed Ms Callaghan visibly upset and emotionally distressed near the stage door area. Mr Mundy then spoke to Ms Callaghan and she told him that there had been a row between her and the Claimant. Mr Mundy spoke to the Claimant and told him that it sounded as if he needed to apologise, to which the Claimant agreed. The Claimant attempted to apologise to Ms Callaghan but Ms Callaghan was not having any of it.
44. Both the Claimant and Ms Callaghan told Mr Mundy that the incident had involved a chair; however, their accounts differed in the detail. Specifically, Ms Callaghan told him that the Claimant had picked up a chair and advanced towards her whereas the Claimant admitted to Mr Mundy that he had grabbed hold of a chair and had rocked it back and forth at ground level.
45. Although it was unknown to the Respondent until the disclosure exercise in relation to this hearing, the Claimant took legal advice on 24 March 2016, the

day after the Incident. The narrative in the solicitor's bill dated 24 March 2016, which we have seen in the bundle, states that the advice concerned an "alleged altercation at workplace ROH" and that "Ms Lucy Callaghan accused [the Claimant] of alleged harassment".

46. After 23 March 2016, Ms Callaghan had a number of scheduled days off work but on 29 March 2016, her next working day, she did not turn up for work but asked Mr Mundy to contact her. She told Mr Mundy that she was not happy with the Claimant's behaviour and wanted to take the matter further. As a result, Mr Mundy, on 29 or 31 March 2016, telephoned Mr Steven Foulston, the HR Manager at the Respondent whose remit was the technical team, and explained that he was approaching Mr Foulston in his capacity as Ms Callaghan's line manager to find out what her options were in the circumstances and convey them to her. Mr Foulston told Mr Mundy that Ms Callaghan could make a complaint against the Claimant in order to initiate a formal investigation. Mr Mundy spoke to Ms Callaghan after that. She informed Mr Mundy that she wanted some time to think about this, so no further action was taken at this juncture.
47. On 3 April 2016, Mr John Callaghan emailed Ms Sally O'Neill, the Respondent's Chief Operating Officer. Mr Callaghan is the Respondent's principal Trade Union Representative for the Broadcasting, Entertainment, Cinematograph and Theatre Union (BECTU). He is also an employee of the Respondent. He is also Ms Callaghan's father. His email to Ms O'Neill stated:-

"Sally

Not sure if you are aware of this particular situation? Steven Foulston is and pretty much the whole of the stage technical and stage management are concerning my Daughter Lucy Callaghan. The issue is that she was subjected to a serious threat of violence by a permanent member of the stage crew on Wednesday 23rd March, and in that attack my name was also mentioned. I am not happy how this situation has been handled to date by the ROH.

I would like to take you up on your offer re a chat over a cuppa about my concerns about this matter, and of course any other.

I am happy for you to get some background info from Steven. However, Lucy must not be aware please!.

..."

48. The suggested conversation with Ms O'Neill over a cuppa did not in the end take place.
49. Ms O'Neill forwarded this email to Mr Foulston later on 3 April 2016.

50. Mr Foulston was very concerned about the Incident, particularly given how it had been described to him by Mr Mundy. He was also aware that Ms Callaghan was absent from work on 6 and 8 April 2016. On 8 April 2016, therefore, he asked Mr Mundy to contact Ms Callaghan to follow up on their previous conversation and to ask whether she wished to lodge a formal complaint. Mr Mundy did so and, in response, Ms Callaghan stated that she needed further time to make a decision.
51. Mr Foulston also told Mr Mundy on 8 April 2016 that he was happy to have a discussion with Ms Callaghan to answer her concerns. Mr Foulston wrote to her on 11 April 2016 offering to talk to her and explain the formal and informal processes to deal with the incident. Ms Callaghan contacted him by phone on 12 April 2016, to arrange a one to one meeting. During this meeting, Ms Callaghan informed Mr Foulston that:-
1. The Claimant had made a derogatory comment about another female employee (Fiona Cressey), which Ms Callaghan took offence at;
 2. As a result, she asked the Claimant to stop and described the Claimant as a "cunt";
 3. The Claimant got upset and started shouting at her, stating he was not afraid of her or her father, a Trade Union Representative;
 4. The Claimant then picked up a chair and advanced with it across the room towards her, which frightened and upset her and brought her to tears; and
 5. She subsequently left the room, with the Claimant attempting to apologise to her sometime afterwards, but she waived him away and said she could not talk to him.
52. Mr Foulston then asked Ms Callaghan how she wished to proceed and informed her of her options under the Respondent's procedures. He told her that if she submitted a brief note raising a complaint, a formal investigation would be launched as the Respondent's policies required an "on the record" complaint to be made before any further action could be taken. Alternatively, he said that if she was not willing to give a formal statement, the matter could be dealt with informally and a meeting with the Claimant could be arranged to ask him to apologise to her. During the conversation, Ms Callaghan appeared genuinely concerned for the Claimant and stated that she did not want the Claimant to lose his job and she was keen to avoid being seen as a "snitch". She asked for more time to decide what she would do.
53. On 15 April 2016, Ms Callaghan contacted Mr Foulston by telephone and confirmed to him that she did not want to complain formally but wanted an apology from the Claimant.

54. The Respondent's harassment policy, which Mr Foulston considered applied here, states that:-

"Where the employee seeks the advice of the Personnel Department, the matter remains at the informal stage. The discussion will be confidential and no further action will be taken until the employee concerned gives consent for the complaint to be investigated".

55. Mr Foulston considered, therefore, that Ms Callaghan's decision not to make a formal complaint meant that he was therefore bound by this confidentiality requirement of the harassment policy and that, as a result, he could not formally investigate the matter.
56. Mr Foulston felt it was important to progress towards a resolution. However, given that Ms Callaghan was not willing to give a formal statement, he thought that it would not be possible to launch an effective investigation into the incident, as she was unlikely to provide a witness statement and assist the investigator. He was also conscious that this would go against her wishes. Ms Callaghan had made it clear that she wished for the matter to be dealt with informally.
57. On 15 April 2016 Mr Foulston telephoned Mr Callaghan. The Respondent aims to maintain good relations with its recognised trade unions and, to that end, Mr Foulston regularly contacted Mr Callaghan to inform him of informal or formal actions instigated against BECTU members. As such, he informed Mr Callaghan that he would be arranging an informal meeting with the Claimant to discuss the incident and that it was possible that the Claimant, a member of BECTU, would want to be accompanied to the meeting by a Union Representative. Mr Callaghan agreed he would appoint someone if the Claimant did request this.
58. Separately, on 15 April 2016, Ms Cressey contacted Mr Foulston. Although she had not been present or heard the alleged comment about her by the Claimant in the crew room, she told Mr Foulston that she had heard about it through the workplace "grapevine". Mr Foulston asked Ms Cressey what she wished to do in relation to this and explained how she could raise a grievance. She was keen to know what Ms Callaghan planned to do and, as Mr Foulston could not tell her given issues of confidentiality, he suggested she contacted Ms Callaghan herself.
59. On 20 April 2016, Mr Callaghan wrote a further email to Ms O'Neill and, this time, also to Ms Jane Crowther, the Respondent's Director of Human Resources. He also copied in two officers of BECTU. The email stated:-

"This email is for putting on the record. I believe that the ROH have failed to date in their duty of care to my daughter Lucy Callaghan! This is in respect of a serious threat of violence to her well being whilst in the ROH workplace. Should anything happen to Lucy whilst at work as a result of the ROH's failure, I will hold the ROH responsible!

John Callaghan

Lucy's Father.”

60. Ms Crowther and Mr Foulston spoke and agreed that this email, in their opinion, constituted a formal complaint and, as a result, it was necessary to initiate a formal investigation into the Claimant's behaviour.
61. Mr Foulston was aware from his conversations with Ms Callaghan and Mr Mundy that, if proven, the incident was likely to have involved an unusually heated argument and a perceived threat of physical harm by Ms Callaghan. He also noted that Ms Callaghan had been very upset by the incident and was absent from work as a result. He therefore considered that it was appropriate to suspend the Claimant in these circumstances pending the outcome of the investigation and he advised Mr Dakin that it was necessary to suspend the Claimant accordingly.
62. By an email of 20 April 2016 in reply to Mr Callaghan's email, Ms Crowther thanked Mr Callaghan for, as she put it, “putting this formally on the record”. She explained that the Respondent would treat this as a complaint and start a formal disciplinary procedure immediately and that she was arranging for Mr Dakin to see the Claimant and suspend him on full pay pending the outcome of an investigation. She also referenced that Ms Cressey had approached Mr Foulston on 15 April 2016 to raise a concern about alleged derogatory comments made about her by the Claimant and that they would also be informing her that a formal investigation would be undertaken.
63. In a further email of 21 April 2016 to Ms Crowther, Mr Callaghan explained:-

“Just to let you know that I have now had to tell Lucy. Not pleased with me at all and now fears that the blame will all be put at her door. Her main fear is the bullying and the sent to Coventry treatment she has been experiencing by certain members of the crew will just intensify. I am just making you aware of the fear culture that exists within Stage Technical.
...”
64. The email correspondence referred to above between Mr Callaghan and Ms O'Neill and then Ms Crowther was not provided to the Claimant during the subsequent disciplinary proceedings; however, the fact that Mr Callaghan had made a complaint was referenced in the investigation report for the disciplinary hearing which was provided to the Claimant so he was made aware that Mr Callaghan had raised a complaint.
65. On 22 April 2016, Mr Dakin and Mr Foulston met the Claimant and suspended him and handed him a suspension letter of that date. The letter warned him that the allegation was extremely serious, as the behaviour described may amount to harassment/bullying which, if substantiated, may constitute gross misconduct.
66. The Claimant did not seem surprised that this was in relation to the incident and said “oh that's what this about”, which was indicative that he clearly recalled the event (and which, when questioned in cross examination, he

confirmed that he did). Mr Foulston told the Claimant that the best course of action was to write down everything he remembered, to be honest and that he could give a formal statement at an investigation meeting that would be held in due course and the Claimant thanked him for this advice.

67. Ms Chloe Lake, the Respondent's Head of Business Affairs, who is a lawyer by training, was appointed as the investigator into the Incident and began her investigation.
68. Ms Cressey contacted Mr Foulston (some 10 days after her initial approach to him). He told her then that a formal complaint against the Claimant had been received and that an investigation into the incident had been launched. Ms Cressey did not make a separate complaint or raise a grievance in relation to the Claimant's alleged offensive comment, so this aspect of the Claimant's behaviour was only dealt with in due course to the extent that it was relevant to how the Claimant acted towards Ms Callaghan (and Ms Cressey was in due course interviewed as part of the investigation).
69. Mr Callaghan sent a further email, dated 3 May 2016, to Ms Crowther, in response to her email of 20 April 2016. It stated:-

"Another one for the record. I did not make a formal complaint against Mark Abberley. In fact the on the record email I sent in relation to this matter was in regard to how, in my opinion, the ROH failed in their duty of care towards Lucy Callaghan. It does not matter what spin ROH wants to put on it that is entirely up to you. The point is it is not true to tell people that a formal complaint has been made. My original on the record email still stands. Lucy Callaghan continues to get the backlash as a result of the ROH's incompetence (in my opinion) in the first place. Thanks. John."
70. Ms Lake carried out an extremely thorough investigation. She conducted interviews with the following: Ms Cressey, Mr Foulston, Ms Callaghan (twice), the Claimant (twice, the latter interview by telephone), Mr Mundy, Mr Bruno Ventura, Mr James Parmenter, Mr Michael Banks, Mr Sam Ryder, Mr Thomas Mardon, Mr Jack Bullock and Mr Pete Watson.
71. Other than the Claimant and Ms Callaghan, the only other individuals who were in the Crew Room at the time of the Incident were Mr Thomas Mardon, Mr Bullock, Mr Watson, Mr James Parmenter, and Mr Billy Parmenter. All of these were interviewed as set out above with the exception of Mr Billy Parmenter. The reason why Mr Billy Parmenter was not interviewed was because he was on annual leave and then would not answer the phone and Ms Lake was therefore unable to interview him. There was also reluctance on the part of many of the witnesses to come forward. This was one reason, as well as the complexity of the investigation and extent of it, why it took as long as it did to complete the investigation.
72. The notes of the investigation meeting between Ms Lake and Ms Callaghan of 12 May 2016 record that Ms Callaghan's account, in summary, was that she was sitting on a sofa across the room from the Claimant; she overheard

the Claimant talking about Ms Cressey, commenting that Ms Cressey was “fat” and had put on weight; that Ms Callaghan found this offensive, considering that she had heard him make comments about her and others previously and that Ms Cressey was not there to defend herself; that she told him this was out of order and swore at him; that while she remained seated, the Claimant came across the room towards her with a black office chair which he raised in a threatening manner; that she said “what you’re going to hit me with a chair?”; to which he slammed the chair next to her, shook it and continued to shout and spit; that she recalled that he continued to spit onto her knee as she repeatedly asked him to stop shouting and spitting; that she felt his spit on her face and stood up to shout “you are a bully”; the shouting continued although she could not remember the exact words used; that the Claimant shouted “I am not scared of you, or your dad”; that she was visibly upset, shaking and crying and shocked that no one in the room said a word or came to help her.

73. In his first investigation meeting with Ms Lake on 1 June 2016 (face to face), the Claimant was asked to give an account of the events and read out a statement that he had prepared for the meeting which was:-

“On Friday 26 February 2016, I was in the crew room with James and Billy Parmenter, Jack Bullock and Thomas Mardon. We were discussing how difficult it is to lose weight. I said FC had done well to have lost 4 stone. Then one of my colleagues said to me “remember when you were a fat bastard?” as I myself had lost a lot of weight. Generally, I was just taking the piss out of myself. We were all laughing at that point.

Then Lucy walked in and called me a cunt and said “everybody else in the Opera House thinks you a cunt”. My response was “who are you calling a cunt?” Then Lucy shouted “we’ll have you finished and out of here”.

I was standing at the back of a chair, and at that point rocked the chair forwards, then banged it down on its back legs and told her I didn’t give a shit about her threats.

I then left the room.”

74. Without going into the detail of all of the many statements which were collated as part of this investigation, certain key points come out of those statements which we set out below:-

1. There was no doubt that there had been an incident on 23 March 2016.
2. Ms Callaghan maintained from the outset that the incident had involved the use of a chair by the Claimant. The Claimant accepted that he had used a chair but maintained that he had variously “picked it up and slammed it down” or “rocked it forwards and banged it down” (it varied between his statements).
3. Ms Callaghan always admitted that she had used foul language towards the Claimant but maintained that this had been prompted by

the Claimant having referred in a derogatory way to the weight of one of her female colleagues.

4. The Claimant's claim that he had been involved in a jokey conversation with male colleagues at the time regarding weight was not supported by those colleagues. None of those interviewed admitted being in conversation with the Claimant at the material time. One witness, Mr Watson, thought the argument between the Claimant and Ms Callaghan was about Ms Cressey. The Claimant did not put forward any credible explanation as to why Ms Callaghan would have reacted in the way she did if his account was correct; in other words, why would Ms Callaghan come into the room and approach him and say out of the blue that he was a "cunt" if he was merely having a jokey conversation about weight with his colleagues.
5. Although the Claimant said that Ms Callaghan had walked into the conversation and begun swearing at him, it was confirmed by other witnesses (for example Mr Mardon) that Ms Callaghan had come in and was sitting on the sofa. The Claimant at his later interview (the telephone interview) accepted that Ms Callaghan was seated on the sofa when she shouted at him.
6. Mr James Parmenter stated that at the time of the altercation, the Claimant and Ms Callaghan were over on the other side of the room by the sofas. The Claimant accepted in his telephone interview (in contrast to his initial interview) that he and Ms Callaghan had started the altercation some 15 to 20 feet apart and had ended up a few/couple of feet or 4 to 5 feet apart. The Claimant then stated that he had walked back and banged the chair. This indicated that he had in fact advanced towards the Claimant.
7. Ms Callaghan was absent from work following the incident which resulted in her not being paid and was observed to be upset for some considerable time after the incident, which is indicative that whatever happened was extremely upsetting for her.
8. Although the other witnesses in the room did not report the use of a chair at all, there was, as was noted in the investigation, a deep reluctance on the part of these individuals to cooperate and it was not credible to accept given their close proximity to what had occurred that they had not seen anything material.
9. Other witnesses to the investigation, in particular Mr Mundy, reported sexist and bullying behaviour on the part of the Claimant particularly towards casual staff generally.
10. Ms Callaghan's two statements before the investigation (and indeed her subsequent statement to Mr Dakin at the disciplinary hearing stage)

were in their material respects internally inconsistent. By contrast, the Claimant's was not; as evidenced by the account in his first statement where everything appears to have occurred at the table at which he was sitting and the account in his second statement which indicated that he got closer to the Claimant who was sitting on the sofa at the other side of room.

11. Of the other five individuals who were in the room, not one of them said that Ms Callaghan came in and immediately launched into an unprovoked verbal attack on the Claimant; that is highly surprising if indeed that was what happened.

75. Ms Lake put together a thorough and very detailed investigation report in which she went through the evidence and analysed in detail what she had investigated. For a variety of reasons, she concluded that on balance Ms Callaghan's account should be preferred and that it warranted disciplinary action. She placed emphasis on a wide variety of relevant factors, including the consistency of Ms Callaghan's account, inconsistencies in relation to the Claimant, the fact that all witness accounts claimed to have seen nothing or very little whilst the room layout and their position in the room belied most of those statements and the reluctance of witnesses to come forward to sign statements with the phrase "don't want to be a grass" or similar concern and "don't want someone to lose their job" repeated by many.

76. Ms Lake set out detailed conclusions and recommendations in her investigation report. The most significant, for the purposes of this claim, were that:-
 1. The Incident, on the balance of probabilities, was likely to have occurred as reported by Ms Callaghan, on the basis of credibility and consistency of her account and therefore the particular incident with the chair was likely to have taken place as she described, with an immediate threat of physical violence;
 2. The incident was serious, with both the verbal and physical threat being above the normal range of behaviours;
 3. There was reasonable evidence of bullying behaviour by the Claimant and he, as a senior, older male of permanent employment attempted to intimidate and/or dominate Ms Callaghan, a young junior female of casual employment status and that "there are potential discriminatory factors within this incident"; and
 4. There was a case for the Claimant to answer and "he should be invited to attend a disciplinary hearing".

77. Ms Lake produced her investigation report on 14 September 2016.

78. On 27 September 2016, the Claimant lodged a grievance. Ms Crowther started off dealing with this herself, although ultimately it was dealt with within the disciplinary hearing.
79. Mr Dakin was appointed as the officer to hear the subsequent disciplinary hearing in relation to the Claimant. Ordinarily, the person who would hear the disciplinary hearing would have been Mr Mundy's manager, Mr Gary Mardon. However, particularly in the light of the allegations which were the subject of the hearing, there was a perception at the Respondent that, in the light of the close relationships and long service that there was in the stage department, Mr Mardon might be perceived as less independent and, furthermore, the Respondent thought that Mr Mardon was also a personal friend of the Claimant. Mr Dakin, by contrast, was Mr Mardon's manager and was new to the organisation and viewed as more independent from the stage department. It was therefore decided that Mr Dakin would be the appropriate person to chair the disciplinary hearing in relation to the Claimant.
80. By letter of 6 October 2016, Mr Dakin invited the Claimant to attend a disciplinary hearing with him on 17 October 2016. The letter explained that the purpose of the hearing was to discuss allegations that the Claimant "took part in verbally and physically aggressive bullying, harassing, threatening behaviour towards a junior work colleague" and "acted in such a way as to create a perceived immediate threat of physical violence at work". The letter warned the Claimant that, if substantiated, the allegations would be considered acts of gross misconduct and could lead to disciplinary action being taken against him, up to and including summary dismissal. The Claimant was advised of his right to be accompanied. The letter attached the investigation report and the notes of the witness interviews taken during the investigation. However, two statements, those of Mr Pete Watson and Mr Jack Bullock, were inadvertently not included with the letter. Mr Foulston realised the mistake almost immediately and sent copies of those two statements to the Claimant the following day, 7 October 2016, with apologies.
81. The email correspondence between Mr John Callaghan and the various people at the Respondent, which we have referred to earlier in our findings, was not included with this other information sent to the Claimant.
82. By letter of 12 October 2016 to Mr Dakin, Mr Blankson, who by this time was writing purportedly on behalf of the Claimant, sought an adjournment of the disciplinary hearing on the grounds of the Claimant's ill-health and on the basis that the information had been provided to the Claimant without enough time to prepare for the hearing scheduled for 17 October 2016. Instead, Mr Blankson proposed "a new date in the second week of November 2016 which will be around 15 November 2016". Mr Blankson enclosed with his letter a letter from the Claimant's doctor, Dr Kieran O'Flynn. Dr O'Flynn's letter stated that the "extremely protracted disciplinary process" was "having a profound and deleterious impact upon [the Claimant's] mental health" and "the disciplinary process which [the Claimant]

is undergoing is harming my patient, and I would be grateful for a speedy conclusion". Mr Dakin took this recommendation seriously.

83. A similar letter was sent by Mr Blankson to Ms Crowther in relation to the grievance.
84. Both the disciplinary and grievance hearings were postponed in the light of this correspondence.
85. By letter of 14 October 2016, Ms Crowther wrote to the Claimant and informed him that she would arrange for Ruby Grierson the Respondent's Occupational Health Advisor, to contact the Claimant and to carry out an appropriate assessment so that she could advise the Respondent whether, in her opinion, the Claimant would be able to attend a meeting, or what alternative or special arrangements the Respondent might put in place to facilitate progressing the matter, in the light of the Claimant's doctor's request for a speedy conclusion. It was noted that whilst and accompanying doctor's certificate provided by the Claimant confirmed that he was not well enough to attend work and to carry out his normal duties, there was no note saying that he could not attend a hearing.
86. Mr Dakin also wrote to the Claimant.
87. Both Mr Dakin and Ms Crowther addressed their letters to the Claimant and not to Mr Blankson. Ms Crowther also referred to the fact that Mr Blankson had suggested that he was acting for the Claimant, under a "power of attorney". Mr Blankson had provided the Respondent with a very basic document that did not meet the legal criteria for a lasting or enduring power of attorney (and Ms Crowther suggested in her letter to the Claimant that the Claimant should take legal advice in relation to this). In any event, there were no grounds in the Respondent's policies for a third party to act on behalf of an employee going through a disciplinary and/or grievance process and Ms Crowther made that point in her letter as well. She also thought that she should address her letter (and other letters from the Respondent) directly to the Claimant as the Respondent was his employer and they owed him a duty of care to communicate directly with him. Ms Crowther took the view that it was the Claimant's choice to then read the letter or pass it on to Mr Blankson.
88. Ruby Grierson made a number of attempts to contact the Claimant via his home phone, mobile phone and text but all of these went unanswered. Therefore, by letter of 26 October 2016, Ms Crowther formerly instructed the Claimant to contact Ruby Grierson to arrange an assessment to take place by 31 October 2016. She also informed the Claimant that his failure to arrange the assessment would result in the disciplinary hearing occurring via written submissions rather than requiring him to attend in person. She felt that she had to adopt this stronger tone due to the Claimant's lack of engagement in arranging the assessment to date.

89. On 28 October 2016 Ms Crowther received a letter from Dr Alexander Hall (who was stated to be a friend of the Claimant) informing her that he had taken her previous letter of 26 October 2016 from the Claimant's address and passed it unopened to Mr Blankson as the Claimant had "been advised not to open [the Respondent's] correspondence in the light of the distress that it causes him". Dr Hall did not elaborate on who had advised the Claimant in this manner, and the Respondent had not received any request from the Claimant not to contact him on the basis of this causing him distress.
90. Ms Crowther received a further letter from Mr Blankson, dated 31 October 2016. In that letter, Mr Blankson suggested that either he or Dr Hall should liaise with Ruby Grierson to organise the Claimant's health assessment and he stated that the Claimant would be undergoing a GP examination on 7 November 2016. The Respondent's data protection obligations prevented it from allowing Mr Blankson or Dr Hall, both of whom were third parties, to discuss the Claimant's medical conditions with Ms Grierson and Ms Grierson herself was prevented from doing so on the grounds of patient confidentiality.
91. As the Claimant did not contact Ms Grierson by 31 October 2016 as instructed, Mr Dakin wrote to the Claimant. He explained that Ms Grierson could not liaise with Mr Blankson or Dr Hall and that the Respondent felt that it had to take Dr O'Flynn's recommendation of a "speedy conclusion" into account and that a further delay to the hearing would not assist this. As such, Mr Dakin stated that the disciplinary hearing would go ahead on 9 November 2016 and, after the Claimant's GP check up (stated to be on 7 November 2016), he could attend in person or provide written submissions by noon on 8 November 2016.
92. On the afternoon of 8 November 2017, Ms Crowther received by email from Mr Blankson a "skeleton argument" on behalf of the Claimant. Later on the evening of that day, three copies of the Claimant's "bundle" (which was 217 pages long) were delivered to the Respondent's stage door. One copy was addressed to Ms Crowther and the other two were addressed to Ms O'Neill and to Mr Alex Beard. Given the other two individuals were not involved in the disciplinary process at this stage, Ms Crowther did not pass on copies of the bundle to them. In addition, it would have been inappropriate for Ms O'Neill to be given a copy of this bundle at this stage, as she was the individual who ultimately heard the Claimant's appeal.
93. Ms Crowther passed on her copy of the bundle to Mr Dakin. He was the disciplinary officer. Much of the Claimant's bundle was plainly irrelevant to the issues Mr Dakin had to decide. Nonetheless it contained a very large volume of information (217 pages) for him to consider and, as Mr Dakin is dyslexic, he struggles to read long documents. Additionally, the Claimant's actual written submissions in the "skeleton argument" (which were around 25 pages long) were confusing and difficult to read. Having read them ourselves, we agree that they are confusing for anyone to read. However, Ms Crowther was especially aware that Mr Dakin would struggle with them

as a result of his dyslexia. As a result Mr Foulston reviewed the Claimant's bundle in its entirety, to identify the most pertinent information for Mr Dakin to review, and produced two documents outlining the key points for Mr Dakin to consider. He then provided this to Ms Crowther who reviewed it and she provided it to Mr Dakin, nevertheless stating in her covering letter that he still needed to read and take into consideration each of the documents submitted and these summaries were simply a guide to give him "some directions to where [he] might best focus [his] attention to identify the key relevant points". The document produced, we find, was a balanced document which genuinely sought to pull out of the confusing submissions the key points and to identify what was relevant. In particular, in numerous instances, the document identifies points which are in the Claimant's favour, for example stating that "you should take his long service, good record and personal references into account when considering the matter, and any sanction which may be applied". Furthermore, this exercise was done by way of an adjustment to enable Mr Dakin better to carry out the task before him.

94. Mr Dakin did in fact read all of the documents and he did so over two weekends in a row as well as the week in between.
95. Mr Dakin also conducted further interviews, firstly with Ms Callaghan and secondly with Billy Parmenter (the only individual in the crew room at the time of the incident who had not yet been interviewed (for the reasons set out earlier in our findings)). Mr Parmenter did not have a great deal of input and stated he left the room shortly after the incident began.
96. In the interview with Ms Callaghan, Mr Dakin asked Ms Callaghan to recount her version of the incident which she did in great detail. We have read the notes and they are in their material respects consistent with what she was saying earlier.
97. Mr Dakin set out his initial thoughts in an email of 18 November 2016 to Mr Foulston and Ms Crowther. In that email he asked for a brief pause as, given the seriousness of the matter and the potential ramifications, he wanted to take some time over the next weekend of 19/20 November 2016 to "take a step back" and re-read the documents provided to him to ensure that he was certain of his decision. However, he set out his initial thoughts in that email which reads:

"I am clear having considered the evidence of the investigation that there is fault on both sides.

However, the key point for me is that whatever the provocation, there was a point in the chain of events where MA as a senior technician of many years service could and should have chosen to speak to his junior colleague in a totally different way.

In actively choosing confrontation and adopting excessively aggressive behaviour which in all probability included advancing with a chair towards LC, he is in my opinion guilty of gross misconduct and should be dismissed.

This is not acceptable behaviour of a senior colleague towards a junior colleague (... indeed anyone towards anyone else ...) ... this is not "just crew room banter" ... this is indicative of a nasty technical department tendency of misogynistic behaviour of senior men towards junior women ... this is not behaviour to nurture an inclusive workplace.

However, LC is not without blame in the way she reacted to the initial provocation. She too had choices about how to react to the original sexist comment. In choosing to use the C word in an assertion about MA, she too carries guilt in the situation and it is my opinion that she should be sanctioned with a final written warning. ..."

98. A further reason for Mr Dakin wanting the pause is that he wanted to take Mr Foulston's and Ms Crowther's advice on how to sanction Ms Callaghan (given she was a casual worker).
99. Having conducted his further review of the documentation, Mr Dakin's view remained the same. He decided to summarily dismiss the Claimant and set out his reasons for his decision in a detailed outcome letter of 21 November 2016 to the Claimant.
100. In summary his findings were:
 - (a) While the Claimant had alleged that there had been serious breaches of the disciplinary procedure, he concluded these contextual and procedural points were not directly relevant to his decision making and he did not accept any decision he made would be rendered unfair as a result.
 - (b) The Claimant made a comment (which may or may not have been derogatory towards Fiona Cressey) that Ms Callaghan took exception to leading her to swear at the Claimant using a particularly offensive word. The Claimant did not attempt to de-escalate the situation and, if he felt it was necessary, to report the incident in the appropriate manner. Instead, the Claimant escalated the situation by shouting and swearing at Ms Callaghan. While both individuals were in the wrong, the Claimant was a senior individual and Ms Callaghan a more junior team member. Ms Callaghan was subsequently reduced to tears and, according to some witnesses, frightened.
 - (c) Regarding the aspects of the incident involving the chair, Mr Dakin agreed with Ms Lake and found Ms Callaghan to be a credible witness on the basis of her accounts of this issue to him and to Ms Lake being consistent with her accounts to other individuals. He found that the Claimant's account of the chair was less credible as there were inconsistencies between his versions of events. He acknowledged that it was not possible to verify beyond reasonable doubt that the incident with the chair had occurred in the manner Ms Callaghan claimed but concluded that on the balance of probabilities it did occur.

- (d) He found that the Claimant took part in verbal and aggressive bullying, harassing, threatening behaviour towards a junior work colleague and acted in such a way as to create a perceived immediate threat of physical violence at work.
- (e) He considered the Claimant's conduct therefore amounted to gross misconduct. He concluded that this was sufficiently serious to warrant summary dismissal. He took into account mitigating factors such as the fact that he had no previous warnings on file and his long service. However he also took into account: the seriousness of the behaviour, which amounted to a threat of physical violence; that the Claimant was a senior member of his team and that the Respondent should have been able to rely on him to set a positive example; that the person he threatened was a more junior, female, temporary casual member of staff in a more vulnerable position and refused to accept culpability and offer any sort of restitution; and that rather than addressing the key issues around his own behaviour, the Claimant constructed his submissions to Mr Dakin around a series of unsubstantiated theories and allegations regarding that the Respondent and his work colleagues and that this suggested a fundamental breakdown in trust and confidence between the Claimant and the Respondent and meant that even if a final written warning was considered appropriate, it would not have been possible to manage his return to the workplace.
- (f) Taking into account all the factors, the Claimant's behaviour was so serious that he considered termination with immediate effect was the appropriate sanction.

101. The Claimant's employment terminated on 21 November 2017.

102. As Ms Callaghan was a casual worker and the Respondent's disciplinary policies did not apply to her, Mr Dakin could not issue a written warning under the Respondent's policies. However, he did sanction Ms Callaghan for her behaviour during the Incident. He met with her on 24 November 2016 and told her that the language she used during the incident was unacceptable and that, had she been a permanent member of staff, she would have been issued with a final, formal warning. On 30 November 2016, he wrote to her to confirm this discussion and inform her that that letter would remain on her file.

103. The Respondent had also regarded the email sent by Mr Callaghan on 20 April 2016 as a complaint against the Respondent and treated it from that perspective as a separate grievance. The complaint was essentially that the Respondent failed in its duty of care in relation to Ms Callaghan. Ms O'Neill was tasked to look into this. By letter of 22 November 2016 to Mr Callaghan, she set out her outcome and summary of her decision. In summary she stated that there were some recommendations that she would be making to review the Respondent's procedures in the event of reported incidents of this kind and that this would allow management to take action earlier, once the

gravity of the situation was established, without waiting for the individual to make a formal complaint. This addressed the provision in the Respondent's harassment policy which had, in the eyes of the Respondent's HR, precluded it from commencing a formal investigation earlier than it did pending the receipt of what it considered to be a formal complaint.

104. By letter of 25 November 2016 from Mr Blankson, the Claimant appealed. He did not set out any grounds of appeal and Ms O'Neill, who was appointed as the appeal officer, wrote back on 28 November 2016 asking him to provide them. The grounds of appeal and "skeleton argument", prepared by Mr Blankson, were received by Ms O'Neill on 5 December 2016. The grounds of appeal were again in a convoluted form. However Ms O'Neill identified what she thought were the key points which were trying to be made in them.
105. Ms O'Neill invited the Claimant to attend an appeal hearing on 15 December 2016.
106. In further correspondence, Dr Hall and Mr Blankson sought to accompany the Claimant at the appeal hearing. However, the Respondent turned this request down as neither of them were either a trade union representative or a work colleague.
107. The appeal took place on 15 December 2016 and the Claimant was accompanied by Nick Havell (BECTU representative). Ms O'Neill was accompanied by Greg Jauncey of HR (Mr Jauncey provided HR support to Ms O'Neill at the appeal stage, where Mr Foulston had provided HR support to Mr Dakin at the disciplinary stage). We have seen the notes of the appeal hearing and the Claimant was given every opportunity to make his case. During the appeal, it became clear that the Claimant had not even seen the grounds of appeal which had previously been submitted by Mr Blankson. Ms O'Neill therefore adjourned to give the Claimant and Mr Havell the chance to read those grounds of appeal before they continued. However, Ms O'Neill was keen to ensure that the Claimant still considered the grounds of appeal reflected his appeal after the appeal hearing. She therefore, in her letter of 21 December 2016, enclosed a copy of the grounds of appeal and asked the Claimant to provide his "personal assurance that the grounds of appeal document is accurate" and stated that if it was not accurate "we would be happy to meet with you again in order that we can discuss the points that you would like us to consider". The Claimant did not raise any concerns with the ground of appeal further to Ms O'Neill's letter.
108. In connection with the appeal, Ms O'Neill carried out further interviews with: Chloe Lake; Jane Crowther; Steven Foulston (twice); Mark Dakin and Ingrid Firminger (the HR Manager who had provided HR support at the investigation stage).

109. In an interview with Mr Dakin, Ms O'Neill wanted to find out why Mr Dakin took the decision that he took. The interview was reasonably extensive. However it contained the following, in the notes of the interview:

"SO asked MD how credible he thought LC's account was. MD responded "I hadn't really spoken to her before the meeting. She was very clear that she had used inappropriate language, therefore allowing me to sanction her, which was one of the things I wanted to gauge from her". MD said "I thought there was fault on her side, the way she spoke, she knew there was fault on her side. The key thing for me was when MA was speaking to her, she said she was being spat on, that is key, that he was that close". MD said "It was credible, the way she remembered him spitting. She was pretty credible. She clearly wasn't trying to nail Mark. She was being careful and considered".

SO referred back to MD's letter in which he states the reason for dismissal as "gross misconduct". SO asked how he had come to this decision that MA's behaviour amounted to gross misconduct not misconduct.

MD responded that there were three things:

1. "The seniority of MA to LC. MA is a grade 6 and has been there for many years. LC is more junior and a casual".
2. "He's a bloke and she's a woman. I think MA's and others behaviour on stage, that sort of culture towards women is distasteful".
3. "The way things are phrased as 'Oh Its just banter'. When MA was first suspended he characterised events in the crew room as just banter. This is just not banter if someone is upset".

MD said "these are three things that tipped me. If you take them seriously as an employer it moves from final written warning to dismissal".

110. The above is a record of what was said by Mr Dakin at this interview. In his evidence before this Tribunal, which we have no reason to doubt and therefore accept, he clarified that he did not mean that he considered the Claimant's actions were gross misconduct simply because he was man and that he would not have come to the same conclusion if a female employee acted in the same manner but that, instead, he meant that he considered that his behaviour might have been motivated by sexual discrimination against Ms Callaghan because she was female and he did not consider it likely that he would have acted in the same manner towards another man. He also emphasised in evidence that the issue was principally about seniority and that, if the situation had involved a senior women bullying a junior man, he would have acted in the same way.
111. Ms O'Neill also wished to interview Ms Callaghan in the context of the appeal as she had a number of questions she wished to ask her about the details of the incident. She wanted to ask her in particular for her account of what happened during the incident and her perception of the threat of physical violence by the Claimant. While Ms Callaghan had been interviewed by both Ms Lake (twice) and Mr Dakin, Ms O'Neill wanted to hear these details first

hand. She asked Mr Jauncey to contact Ms Callaghan to arrange this but he was unable to reach her via email or telephone. Ms O'Neill therefore wrote to her on 23 December 2016 to request an interview. She did not receive a response from Ms Callaghan directly. Instead, on 13 January 2017, she received an email from Anastasia Ahern, Ms Callaghan's BECTU representative. Ms Ahern informed her that Ms Callaghan found it "extremely upsetting" that the Claimant had appealed his dismissal and as a result she was failing to turn up to work. The result was that Ms Ahern could not say when Ms Callaghan would be available for an interview. Ms O'Neill responded to Ms Ahern on 16 January 2017, expressing her concern and stating that she would respect a request not to be interviewed and that she would base her decision on the statements she had already given during the investigation and the original disciplinary hearing.

112. Ms O'Neill did not uphold the appeal and set out her outcome and reasons for it in a very detailed letter of 17 January 2017. In that letter, she goes through point by point and answers all the grounds of appeal which she could discern. We do not go through every single point in that letter. However, Ms O'Neill responded to all of the points raised in a clear and thorough manner and we consider that this was an exemplary appeal.

113. As noted, it is agreed that the Respondent's holiday year, which applied to the Claimant, was 1 September to 31 August. The Claimant's contract of employment states at paragraph 6:

"The 'Holiday Year' runs from 1 September to 31 August. Holiday entitlement in a holiday year depends on the length of time worked during that year. Staff are expected to take their holiday and payments will not be made in lieu of holiday unless the employment ends. Annual holiday entitlement for one year can **not** be carried forward to the following year other than in exceptional circumstances and with the permission of Senior Management."

114. There is no evidence before us that the Claimant was permitted by senior management to take forward any holiday from the 2015/2016 holiday year to the 2016/2017 holiday year (which was the year in which his employment terminated).

115. The Claimant admitted in cross-examination that he had been paid any accrued but untaken holiday in relation to the 2016/2017 holiday year and this is backed up by the payslips which we have seen in the bundle to this effect.

Conclusion of the issues

116. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Unfair dismissal

117. There is no doubt that the reason for the Claimant's dismissal was conduct, which is a potentially fair reason for dismissal for the purposes of the ERA. We heard the evidence of the Respondent's witnesses, in particular Mr Dakin, the Dismissing Manager, and Ms O'Neill, the Appeals Officer. Having regard to their evidence and the documentation in the bundle, the reason for the Claimant's dismissal was plainly conduct in that the Claimant was found to have been involved in an altercation with Ms Callaghan on 23 March 2016 in the Respondent's Crew Room which involved a heated argument outside the bounds of normal interactions and a perceived threat of physical violence on the part of the Claimant towards Ms Callaghan through the use of a chair.
118. There is no question, having heard their evidence and read the contemporaneous documents, that both Mr Dakin and Ms O'Neill genuinely believed that this happened and in the Claimant's guilt.
119. Turning to the issue of whether they had a reasonable belief, we consider that that belief was on reasonable grounds. We refer back to our findings at paragraph 74 of our findings of fact above which demonstrate this. It is acknowledged that this is not a case where there could be a finding beyond reasonable doubt that the Claimant carried out the conduct for which he was dismissed but, as we believe both representatives acknowledge, that is not the standard of proof required. The standard is merely that the Respondent had a reasonable belief on the balance of probabilities. As Ms Thomas submitted, in this case where there is a dispute of evidence between the protagonists and the other five individuals in the room made no reference to the chair incident in their statements, it is superficially plausible that, on the basis of that fact alone, the Claimant's version might be preferred. However, when, as happened in the very thorough investigation and disciplinary and appeal analysis, one looks at the totality of the evidence and those witness statements, the conclusion that Mr Dakin and Ms O'Neill came to that they did believe that the misconduct had taken place is entirely reasonable. We therefore find that there was a reasonable belief that the conduct took place as alleged.
120. We note that Ms O'Neill also gave evidence that, even if you took Claimant's own version of events in relation to his action and the chair (that he lifted it and slammed it down etc), that alone amounted to aggressive actions on his part which would lead to a perceived threat of physical violence on the part of the Claimant and that she would have considered that too to have amounted to gross misconduct.
121. As far as the question of whether the Respondent had carried out such investigation as was reasonable in the circumstances goes, the Respondent's conclusions were reached after a comprehensive investigation. At the investigation stage Ms Lake undertook a thorough investigation. All relevant witnesses were interviewed including the Claimant

and Ms Callaghan twice (with the exception of Mr Billy Parmenter who was contacted but was not available). At the disciplinary hearing, Mr Dakin ensured Mr Billy Parmenter was interviewed and re-interviewed Ms Callaghan. Mr Dakin sought to interview the Claimant and invited him to more than one hearing but he did not attend. A careful analysis of the Claimant's written submissions was undertaken to ensure all relevant matters were considered. At the appeal stage Ms O'Neill conducted numerous further interviews in order to address the specific points that the Claimant had raised. The investigation was therefore entirely reasonable and, in our opinion, a particularly thorough one.

122. We turn to the question of fairness and procedure.
123. Criticism has been made that the Respondent did not immediately launch an investigation on 23 March 2016. However, the Respondent did not do this as it felt constrained by the wording of its internal harassment procedure policy and Ms Callaghan's reluctance to file a formal complaint against the Claimant. However, it was clear to the Respondent that a significant factor in Ms Callaghan's reticence was fears regarding a backlash from other members of staff should she "go on the record". We also note that the issue of the harassment policy and whether it constrained the Respondent from investigating was something addressed by Ms O'Neill in her response to Mr John Callaghan's complaint and that this policy was to be reviewed. We consider that there may be circumstances where a Respondent feels it ought to start an investigation notwithstanding that a formal complaint has not been raised and that the wording of the policy perhaps ought to be more flexible to allow this if the circumstances are appropriate. However, given that that was their policy, we do not consider it that it was unreasonable for them to follow their policy as it was at the time and not to instigate an investigation at a point where no formal complaint had been raised and the complainant was unwilling to go on the record.
124. For these reasons, we do not consider that any delay between the date of the incident and the commencement of the investigation was unreasonable.
125. A second criticism made by Mr Blankson is that the Respondent did start a formal investigation at the point after Mr Callaghan raised his complaint by his email of 20 April 2016. Mr Blankson points out that that complaint is essentially about the way the Respondent has handled the situation rather than specifically about the Claimant. However, within his email correspondence, whilst Mr Callaghan does not name the Claimant, he clearly references the incident between the Claimant and his daughter and refers to it as "a serious threat of violence to [Ms Callaghan]". Therefore, whilst the complaint is about the Respondent's handling of the incident, it is obviously related to the incident itself. Mr Blankson maintains that this was not therefore a "formal complaint" about the incident. However, even if it was not, the information set out in that email and the fact that it was entirely related to that incident in our opinion makes the Respondent's decision to conduct a formal investigation at that point entirely reasonable and

appropriate. The Respondent has a duty of care to its staff and here was an email referencing a serious threat of violence to an employee of the Respondent. Regardless of the fact that Ms Callaghan had not formally complained at that point, the Respondent was entirely justified and reasonable in deciding to commence a formal investigation, particularly given the seriousness of the allegation involved.

126. In terms of the decision to suspend the Claimant, we consider that, in circumstances where the allegations are ones of a perceived threat of violence in the work place, they are serious enough for the decision to suspend to be a reasonable one in the circumstances.
127. The Respondent's witnesses confirmed that the question of whether, instead of being suspended, the Claimant could be transferred elsewhere was considered but that, given that the allegations were about a perceived threat of violence, they did not consider that the decision to suspend was unreasonable.
128. The Claimant knew fully what the suspension meeting was about given his response to being suspended of "oh that's what this is about" (and the fact that he had taken legal advice on the Incident only the day after the Incident occurred, thus showing that he knew the Incident was a serious one).
129. It has also been suggested that the Respondent acted inconsistently by not suspending Ms Callaghan. However, her circumstances are very different to those of the Claimant. Firstly, she was a casual worker who could not be suspended anyway. More pertinently, no complaint had been raised about her and there was no suggestion that she had done anything which led to a perceived threat of violence on the part of anyone, in contrast to the Claimant. It was not, therefore, unreasonable not to suspend Ms Callaghan.
130. The investigation took some time due to complexity, the large number of witnesses which the Respondent reasonably considered should be interviewed, the reluctance of witnesses to co-operate and the absence of staff on tour and on holiday. Even then, it was not possible to interview every witness (Mr Billy Parmenter was not interviewed). Therefore, whilst the investigation did take a long time, there were good reasons for it and we do not consider that any delay in completing the investigation was unreasonable.
131. Criticism has been made of the Respondent for writing to the Claimant directly rather than to Mr Blankson and Dr Hall, but given the lack of any proper legal authority and the uncertain official capacity of these individuals, we accept that the Respondent acted appropriately and indeed responsibly in seeking to communicate directly with its employee.
132. We also accept the Respondent dealt with the attendance of the Claimant at the disciplinary hearing in a proportionate manner. It postponed the initial

hearing on the grounds of the Claimant's ill-health and sought to obtain appropriate advice regarding the Claimant's fitness to attend the hearing. The Claimant's refusal to attend an occupational health assessment or provide alternative medical advice about his fitness to attend a hearing was not reasonable and, coupled with medical advice that the disciplinary hearing needed a swift conclusion, the decision to invite a written submission was entirely proper and reasonable.

133. Mr Blankson has suggested that Mr Foulston's involvement in the internal proceedings was too great. However, the Respondent only has four senior HR professionals in its organisation and they were divided up amongst the four elements of the issues considering the Claimant: Ms Firminger provided HR advice to the investigation, Mr Foulston to the disciplinary, Mr Jauncey to the appeal, and Ms Crowther on the grievance. That was an entirely reasonable division of resources and we do not find that Mr Foulston's involvement was excessive.
134. Furthermore, Mr Blankson has criticised the fact that Mr Foulston, in relation to the disciplinary hearing, produced a breakdown of the compendious submissions and bundle provided by the Claimant. However, we do not find that this was unreasonable. Mr Dakin, who was to hear the disciplinary hearing, is dyslexic and would have therefore had more difficulty than someone without dyslexia with this vast amount of information, often in a scarcely comprehensible form, and it was entirely reasonable, as an adjustment for his benefit, for Mr Foulston and Ms Crowther to carry out this exercise. Furthermore, as we have found, the way Mr Foulston did it was proportionate and frequently drew points out of the mass of incomprehensible material provided for Mr Dakin to consider which were to the Claimant's advantage.
135. Mr Blankson has suggested that it was not reasonable that the various emails from Mr Callaghan to Ms Crowther and Ms O'Neill (which we have referenced in our findings of fact) were not provided with the information given to the Claimant in advance of the disciplinary hearing. However, the fact that it was Mr Callaghan who made a complaint which triggered the investigation was referenced in the investigation report so the Claimant, who had that report, was well aware of that. If he had wanted to see the email behind that complaint, he or Mr Blankson could have asked; however they did not do so. Furthermore, it was not necessary for these documents to be included for the Claimant to have before him all the necessary material on which to make his case against the charges put. We do not, therefore, consider that it was unreasonable not to include these emails.
136. Mr Blankson has complained that two of the witness statements from the investigation were not included with the letter sent to the Claimant on 6 October 2016. However, this was clearly an omission which was rectified by Mr Foulston the following day without any prompting from the Claimant. The Claimant therefore had these documents. Only at this hearing, has it been suggested by the Claimant and Mr Blankson that the respective last

pages (the signature pages) of these witness statements were not on the versions provided on 7 October 2016. This was not put to any of the Respondent's witnesses and we do not therefore accept that as a fact. However, even if there was a page missing from either of those witness statements, it was entirely open to the Claimant or Mr Blankson to request them; they did not do so. We do not therefore find anything unreasonable on the part of the Respondent in relation to this issue.

137. Mr Blankson has suggested that, when the three copies of the Claimant's bundle were sent to Ms Crowther on 8 November 2016, it was unreasonable not to pass on the two other copies to, amongst others, Ms O'Neill. However, Ms O'Neill was not the officer conducting the disciplinary hearing so it was not necessary for her to have the bundle at this stage. In fact, had she been given it at this stage, it would have made it harder for her to conduct the appeal later if she had had this involvement at an earlier stage. Ms Crowther's decision simply to pass one of the bundles on to Mr Dakin, the Disciplinary Officer, was therefore entirely reasonable.
138. In terms of the conduct of the hearings, Mr Dakin did take the time to digest all the material before him and reach his own conclusions.
139. At the appeal stage the Claimant was given a full opportunity to put forward all matters that he wished to and these were carefully examined by Ms O'Neill. It is, as we found, notable that having been informed by the Claimant that he had not even seen his own grounds of appeal prior to the appeal hearing, he was expressly given the opportunity to add to those grounds or, if necessary, meet with Ms O'Neill again, which shows particular thoroughness and a real concern on Ms O'Neill's part that the Claimant has every opportunity to make the case he wanted to. He did not take up those offers. As we have found, the appeal was conducted in an exemplary manner.
140. Mr Blankson has submitted that Ms Callaghan had an "established history" of complaining about members of staff. This was raised during the internal proceedings and was investigated by Ms O'Neill. Ms O'Neill found no history of Ms Callaghan raising complaints, save that back in 2009, she had brought a complaint of sex discrimination against the Respondent in relation to casual workers' shift patterns, which was unsuccessful. Ms O'Neill referred to the fact that she had found no evidence of a history of raising complaints from Ms Callaghan in the appeal letter. In terms of the Tribunal claim she made, she was, as the Claimant acknowledged in cross-examination, perfectly entitled to raise such a complaint. The fact that she raised such a complaint, and many years previously, is not relevant to the issues of the proceedings involving the Incident between the Claimant and Ms Callaghan. This aspect was therefore properly investigated and there was nothing unreasonable about the Respondent's conclusions in this respect.
141. Mr Blankson in cross-examination made a lot of his suggestion that the Crew Room was a room with a relatively low ceiling and that it would not be

possible to hold a chair above one's head in it. However, we note that, whilst others who were not in the room and whose evidence was therefore second hand, had referred to the chair being held above the Claimant's head, Ms Callaghan did not say that in any of her three witness statements. In any event, the point is irrelevant. Whether the chair was at the Claimant's side or higher, the conclusion which the Respondent reasonably reached was that he advanced towards Ms Callaghan with a chair and that this amounted to a perceived threat of violence.

142. In terms of the reasonable range of responses, the Claimant had been found to have been committed a serious act of misconduct which had been found to have involved the use of a chair in a way that caused Ms Callaghan to perceive a threat of physical violence. Even in an environment where bad language, banter and arguments amongst colleagues sometimes occurred, this incident stood out as being out of the ordinary.
143. Ms Callaghan was recognised also to have acted wrongly and, had she been a permanent employee, Mr Dakin would have issued her with a sanction just short of dismissal, namely a final written warning. In the event, due to her casual status, she was issued with a formal letter. The Claimant's conduct was far more serious than Ms Callaghan's and had aggravating features. The Claimant was in a position of significant seniority and status and behaved in an unacceptable fashion towards a much more junior colleague. Mr Dakin concluded that the Claimant's conduct also had a discriminatory element. This was in a context of a heavily male dominated workforce. The Claimant did not acknowledge any wrong doing and Mr Dakin had genuine concerns that should he remain employed by the Respondent there could be a repeat of this incident. The Respondent took into account any relevant mitigation, such as the Claimant's length of service and clean disciplinary record but, in the light of the above factors, considered reasonably that dismissal was still appropriate.
144. Mr Blankson has submitted that Mr Dakin and Ms O'Neill should have considered as an alternative to dismissal either an alternative position or retraining for the Claimant. However, in the light of the serious conduct which they found to have occurred, relocating the Claimant in an alternative position would clearly not be an appropriate sanction if he was someone that they considered might act in this way again; similarly, in the light of the Claimant not acknowledging any wrongdoing, retraining would also not have been appropriate. We therefore consider that it was not unreasonable to dismiss the Claimant and not to offer either of these two options as an alternative.
145. We note that Mr Dakin came to the Respondent relatively recently and that he was brought in to change the culture and acknowledged that there was a problem culturally in the technical department. However, we do not consider that this in anyway meant that, in approaching this specific case, he came with a prejudicial mind set. In the light of the evidence before him and the thorough investigation and the facts of the case, and his own very thorough

consideration of the matter, he was entirely entitled to come to the decision he was.

146. For all of the above reasons, we consider that the decision to dismiss was within the reasonable range of responses and that the dismissal was not therefore unfair. The unfair dismissal complaint therefore fails.

Contributory conduct/Polkey

147. In the light of our decision, it is not therefore strictly necessary to consider issues of contributory conduct and Polkey but we do so for completeness' sake.

148. We consider that the Claimant's own actions contributed to his dismissal for all the reasons set out above and the conclusions that the Respondent came to. In addition, we would add the following points which have arisen, not all of which were necessarily before the Respondent's decision makers at the time when they were coming to their decisions, and which Ms Thomas has invited us to take into account in this respect. Those matters are:

1. None of the Claimant's friends/colleagues would admit to having had the "jokey" conversation with the Claimant and he changed his account about who exactly he was talking to even during the course of his cross-examination. The Claimant described the conversation prior to the incident starting as "man talk". It is more likely that Ms Callaghan reacted to such "man talk" i.e. speaking in a derogatory manner about the weight of a female colleague than that she launched into an astonishing and unprovoked attack on the Claimant for no reason.
2. The Claimant's description of his use of the chair in the heat of a "screaming match" is again inherently unlikely. The Claimant went from sitting to standing and at least one witness other than Ms Callaghan described him as being over by the sofas (where Ms Callaghan was).
3. The Claimant covertly recorded (with Dr Hall) his second (by telephone) interview with Ms Lake in the investigation. In it he referred to having ended up a couple/four to five feet from the Claimant and walking back to the chair. His attempt to explain this in cross-examination by suggesting he step to the side and rocked the chair next to him made little sense.
4. The Claimant's attitude towards women is evident in the language that he uses. He describes other female colleagues as "girls". Furthermore, in the investigation interview which he recorded and which is therefore verbatim, he refers to Ms Lake, the female investigating officer, as "darling" and "honey". He admitted in cross-examination that he found the use of the word "cunt" by Ms Callaghan more shocking because Ms Callaghan was a woman rather than a man. All of this indicates the

likelihood of a sexist attitude and increases the likelihood of the events, as described by Ms Callaghan, having taken place.

5. Both Mr Mundy and Mr Cressey in the investigation identified the Claimant as displaying sexist and inappropriate physical behaviour.
6. Whilst the Claimant sought to suggest that Ms Callaghan's accounts were inconsistent, there is no doubt that she consistently admitted her own wrongdoing. The Claimant's accounts were not consistent or truthful. His evidence repeated in his witness statement significantly played down his behaviour.

149. Based on the above and our earlier findings of fact, we conclude that on the balance of probabilities the alleged behaviour occurred and that the Claimant was guilty of gross misconduct and contributed entirely to his own dismissal. Therefore, had the dismissal been unfair, we would have made a reduction to both the basic and compensatory awards for unfair dismissal of 100%.

150. As regards Polkey, we have not identified any procedural defects in relation to the dismissal. However, if there had been any, we consider that the Claimant would, for the reasons given by the Respondent, have been fairly dismissed no later than he was in any event and would, if the dismissal had been unfair, therefore have made a 100% reduction to the compensatory award for unfair dismissal under the principles in Polkey.

Wrongful dismissal (breach of contract in respect of notice pay)

151. For the reasons set out above, we find that the Claimant's conduct did take place as alleged and amounted to a repudiatory breach of his employment contract as a result of which the Respondent was entitled to dismiss him without notice. The Respondent did not therefore breach the Claimant's contract by doing so and the wrongful dismissal complaint therefore fails.

Sex and age discrimination

152. Firstly we deal with the Claimant's choice of actual comparator, which is Ms Callaghan. We accept that she is not a suitable comparator for the purposes of any discrimination claim as there were material differences between herself and the Claimant other than the relevant protected characteristics. The Claimant was a permanent member of staff and a senior grade. Ms Callaghan was a casual employee. Ms Callaghan had contacted her manager and spoken to HR about concerns regarding the Claimant's conduct. The Claimant had not made such a complaint about her. Ms Callaghan had made an allegation regarding a threat of violence and the Claimant had not. The Claimant was subject to the Respondent's formal disciplinary procedure (including the ability to suspend on full pay) and Ms Callaghan was not. These are material differences which mean that Ms Callaghan cannot be an appropriate comparator.

153. No allegation of discrimination was really pursued with the Respondent's witnesses and, when questioned in cross-examination, the main matter the Claimant relied upon was the comment by Mr Dakin, quoted in our findings of fact above, at his appeal interview with Ms O'Neill, about the Claimant being a bloke and Ms Callaghan being a woman. As we have found, Mr Dakin confirmed in evidence that this comment was in relation to the fact that Mr Dakin concluded that there was an element of sexism on the part of the Claimant towards Ms Callaghan in that he was of the view that the Claimant would not have reacted in the same way had been Ms Callaghan been a man. He took this as a potentially discriminatory behaviour on the part of the Claimant, which had also been identified during the disciplinary investigation by Ms Lake. It was relevant to the decisions which Mr Dakin and Ms O'Neill had to take. It did not however amount to less favourable treatment of the Claimant on the grounds of the Claimant's sex.
154. In his submissions, Mr Blankson suggests that the grounds of a resistance admit that there were potential discriminatory factors within the incident. However, those references were to aspects of discrimination committed by the Claimant and not by the Respondent. Mr Blankson's submission seems to misunderstand this.
155. Furthermore, there was no evidence of age discrimination. There was recognition that the Claimant was a senior member of staff and Ms Callaghan was a "casual" member of staff without the same job security. However, this was an issue not of age but of seniority and power. The Respondent's evidence on this point was not challenged.
156. Therefore, turning to the various allegations in the list of issues:
1. The Respondent did not accept Ms Callaghan's account rather than the Claimant's at the start. It merely put in place an investigation which ultimately led to a disciplinary hearing. It is not, therefore, made out that the Respondent accepted Ms Callaghan's account and this allegation therefore fails.
 2. The Respondent did subject the Claimant to the disciplinary process. However it did so for the very good reasons outlined above in our findings. There is nothing to suggest it did so either because of the Claimant's sex or age.
 3. The Respondent did dismiss the Claimant. However, again, it did so for the very clear non-discriminatory reasons outlined in our findings above. There is nothing in the evidence presented before us which suggests that it was because of either sex or age.
 4. We do not accept that the Respondent was biased in the investigation and favoured Ms Callaghan. As set out above, the Respondent carried out a thorough investigation and went where the investigation took it

without bias to either the Claimant or Ms Callaghan. It did not “favour” Ms Callaghan. Therefore, as these allegations are not even made out, this complaint also fails.

157. In summary, therefore, all of the complaints of direct sex and age discrimination fail.

Holiday pay

158. As noted in our findings of fact, the Claimant accepted that he was paid his accrued holiday pay for the year in which his employment terminated. As there was a contractual prohibition on transferring holiday from one holiday year to another absent permission from senior management (and no such permission was given), and there is no right under the WTR to do so either, the Claimant had no right to transfer any untaken holiday (to the extent that he even had any) from the 2015/2016 holiday year to the 2016/2017 holiday year. Therefore, as the Claimant was paid for any accrued but untaken holiday up to the date of his dismissal on 21 November 2016 in the 2016/2017 holiday year, he has no further entitlement to paid holiday pay. Accordingly, his complaint in relation to holiday pay also fails.

159. During his submissions, Mr Blankson started to suggest that there was a custom and practice of allowing individuals of the Respondent to carry over holidays from one holiday year to the next. However, we have not been presented with any evidence of this so we cannot and do not make any findings of fact that there was such a custom and practice. In any case, there would need to be as a matter of law some extremely powerful evidence of such a custom and practice in order for it to amount to an implied term. Furthermore, an express term in a contract (and there was an express term in the Claimant’s contract prohibiting him from carrying over holiday from one holiday year to the next) will override an implied term.

160. On a general point, a lot of the written and oral submissions of Mr Blankson were incomprehensible and/or irrelevant and it has therefore been neither relevant nor in some cases possible, due to the incomprehensibility, to deal with these. To the extent that any of his submissions have not, therefore, been dealt with, it is for this reason. However, nothing we have read or heard in anyway affects the decisions we have reached above.

Conclusion

161. The Claimant's complaints of unfair dismissal, wrongful dismissal, direct age and sex discrimination, and for holiday pay all fail.

Employment Judge Baty
18 October 2017