



EMPLOYMENT TRIBUNALS

Claimant Mr J Armitage
Respondent Conquest Fitted Furniture Limited
Heard at: Exeter (remotely) **On:** 14 & 15 June 2021
Before: Employment Judge Goraj
Representation
The claimant: Mr D Bunting, Counsel
The respondent: Mrs J Linford, Counsel

RESERVED JUDGMENT

THE JUDGMENT OF THE TRIBUNAL IS that: -

1. The claimant was unfairly dismissed by the respondent in breach of section 98 of the Employment Rights Act 1996.
2. It is just and equitable to increase any compensatory award awarded to the claimant by 20% pursuant to section 207 A (2) of the Trade Union & Labour Relations (Consolidation) Act 1992.
3. Any basic and compensatory awards awarded to the claimant shall be reduced by 20% pursuant to sections 122 (2) and 123 (6) of the Employment Rights Act 1996.
4. The claimant was wrongfully dismissed by the respondent without notice.

REASONS

Background

1. By a claim form presented on 4 May 2020, the claimant complained that he had been unfairly and wrongfully dismissed by the respondent. The claimant's claim form is at pages 2-16 of the bundle.
2. The claimant's ACAS Early Conciliation Certificate records that :- (a) the claimant's EC notification was received on 5 March 2020 (b) the EC certificate was issued on 5 April 2020 (by email) (page 1 of the bundle).
3. The respondent denied the allegations in its response form (including that the claimant had been dismissed).

The Bundle of Documents

4. The Tribunal was provided with an agreed bundle of documents ("the bundle").

The witness statements and associated matters

5. The Tribunal received witness statements and heard oral evidence from the claimant and from Mr Jonathan Adey, General Manager of the respondent.
6. The Tribunal did not receive any witness evidence from Mr John Adey, Managing Director of the respondent, or Mr Simon Keeping, Operations Manager of the respondent regarding their involvement in the matters in issue. Mr Jonathan Adey informed the Tribunal that he had not submitted any witness evidence from them as he believed that his evidence would be sufficient to address the matters in issue. No application was made for them to give evidence to the Tribunal.
7. There were significant factual disputes between the parties concerning, the events between 9 December 2019 and 2 January 2020. The claimant gave unclear/ conflicting evidence regarding some of the matters in issue such as in respect of the issue of the notes of the meeting on 13 December 2019. Overall, however, the claimant's oral evidence was consistent with his pleaded case and Tribunal found the claimant to be a credible witness. The respondent's case was adversely impacted by the fact that they did not call all relevant witnesses to address the matters in issue and in particular that they did not call Mr John Adey to give evidence regarding his involvement in the events of 9 and 13 December 2019.
8. The hearing was conducted remotely. On the first day of the hearing, the claimant's counsel had serious difficulties maintaining full connectivity to the hearing. The claimant's counsel was however fortunately able to resolve the technical issues and the Tribunal was able (with the agreement of the parties) to commence oral evidence at around 3.20pm on the first day. This Judgment was reserved as there was insufficient time on the second day for the Tribunal to make/ deliver its judgment.

The Issues

9. At the commencement of the hearing, the Tribunal identified with the parties, the issues which the Tribunal is required to determine which in summary, are as follows: -

Constructive unfair dismissal

10. Whether the claimant was constructively unfairly dismissed by the respondent pursuant to sections 95 (1) (c) and 98 of the Employment Rights Act 1996 ("the Act").
11. The claimant does not rely for such purposes on the breach of any express terms of his contract of employment. The claimant relies on breaches of the implied term of trust and confidence namely, that the respondent would not, without reasonable and proper cause, act in a manner which was calculated or likely seriously to damage the relationship of trust and confidence between the parties. The breaches relied upon by the claimant are set out in the Conclusions of the

Tribunal below. The claimant confirmed that he relied on a “final straw” namely, the alleged failure of the respondent to contact the claimant’s GP despite this having been agreed on 13 December 2019 and confirmed on 2 January 2020.

12. The respondent denies that there were (viewed objectively) any such breaches on the part of the respondent / says that any established conduct was, in any event, with reasonable and proper cause.
13. If the claimant is able to establish the alleged breaches of the implied term of trust and confidence, the Tribunal is required to consider the question of causation - whether any established repudiatory breaches played a part in the “dismissal” namely whether the breach was (singly or cumulatively) an effective cause of the claimant’s resignation.
14. In the event that the claimant is able to establish any repudiatory breaches/ the necessary causation, the Tribunal is then required to consider whether the claimant waited too long before accepting such breaches and has therefore affirmed the contract. In summary, the respondent contended that any outstanding issues were resolved at the latest by 13 December 2019 and that the claimant had, in any event, waited too long before resigning his employment and had therefore affirmed any such breaches.
15. If the claimant is able to establish that he was entitled to terminate his contract pursuant to section 95 (1) (c) of the Act by reason of the conduct of the respondent (and was therefore dismissed) the respondent contended that it had potentially fair reasons for dismissal for the purposes of section 98 (1)/ (2) of the Act namely some other substantial reason and /or conduct (in the light of the breakdown in the relationship between the claimant and his colleague Mr Mason and/or the contents of the claimant’s Facebook messages on 9 December 2019). The respondent accepts however, that any such dismissal was procedurally unfair for the purposes of section 98 (4) of the Act (only).
16. If the claimant is succeeds in his complaint of unfair dismissal, it was agreed that the Tribunal would also consider at this hearing:-
 - 16.1 Whether any compensatory award should be reduced pursuant to section 123 (1) of the Act on the grounds that the claimant’s employment would, in any event, have come to an end fairly, shortly thereafter. The respondent contended in particular, that having regard to the history of the claimant’s relationship with his colleague Mr Mason/ the outstanding medical enquiries the claimant’s employment would, in any event, have come to an end shortly thereafter.
 - 16.2 Whether any compensatory award should be increased or reduced pursuant to section 207 A of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) for any failure on the part of either party to comply with the provisions of the ACAS Code of Practice 1 Code of

Practice on Disciplinary and Grievance Procedures (2015) (“the ACAS Code”). The claimant contended that there should be a 25 per cent uplift in respect of the respondent's failure to comply with the grievance elements of the ACAS Code. Conversely, the respondent contended that there should be a 25% reduction in any compensatory award to reflect the claimant’s failure to raise a grievance in respect of the alleged breaches between 13 December 2019 and his resignation on 31 January 2020.

- 16.3 Whether any basic and /or compensatory awards should further/ alternatively be reduced pursuant to sections 122(2) and /or 123 (6) of the Act by reason of the claimant’s conduct. The respondent relies for such purposes on the claimant's Facebook messages on 9 December 2019 together with his behaviour towards Mr Mason.
- 16.4 It was agreed that the Tribunal would confine its deliberations to the above matters of remedy (if relevant) at this stage.

17. It was agreed between the parties that notwithstanding the claimant’s summary dismissal on 10 December 2019, he was subsequently reinstated by the respondent and that, as matter of fact and law, his continuity of employment therefore goes back to 3 September 2012.

Complaint of wrongful dismissal

18. The Tribunal is also required to determine whether the claimant was wrongfully dismissed (by reason of any established repudiatory conduct on the part of the respondent) for the purposes of notice. It was agreed however, that this issue was likely to largely academic as any claim for notice was likely to be determined by the findings relating to the alleged contractual breaches by the respondent in respect of the claimant’s unfair dismissal claim / in any event subsumed in any compensatory award.

The skeleton argument/ oral submissions

19. The Tribunal has given careful consideration to the closing submissions of the parties (the oral submissions of the respondent and the skeleton argument and oral submission of the claimant). The Tribunal has also had regard to the legal authorities relied on by the parties both as referred to in the claimant’s skeleton argument and as relied upon during the course of the oral closing submissions.

THE FINDINGS OF FACT

20. The claimant was employed by the respondent from 3 September 2012 until 31 January 2020 which latter date is the effective date of termination for the purposes of the Act. The claimant had also had prior employment with the family business going back to 2006 (including a period of self-employment).

The respondent

21. The respondent is a family business manufacturing bespoke fitted furniture. The relevant directors/ managers at the material time were/ are :- (a) Mr John Adey – Managing Director (b) Mr Jonathan Adey, Director and General Manager (c) Mr Simon Keeping – Operations Manager and (c) Mr David Ferrans – factory/ the claimant's line manager. Mr John Adey (who is in his late 70's) is the founder of the business and the father of Messrs Jonathan and Richard Adey (who is also employed in the business). The respondent employed approximately 30 staff at the time of the termination of the claimant's employment. The respondent does not have its own HR resource.

The claimant

22. The claimant was employed by the respondent as a spray polisher. The claimant was issued with a contract/ statement of terms and conditions dated 3 September 2012. Prior to the events in question, the claimant had not been the subject of any disciplinary action and the quality of his work was highly regarded by the respondent. The claimant worked alongside Mr Chris Mason with whom he shared the spray polishing work. They worked in adjoining spray booths. The claimant and Mr Mason had a difficult working relationship as referred to further below.

September 2016 and subsequent events

23. Mr Mason wrote to Mr John Adey by a letter which is dated 24 September 2016 regarding the alleged conduct of the claimant towards him and another member of staff including alleged verbal confrontations / assaults/ throwing of a piece of wood and contended that the claimant's mannerisms suggested possible physical violence. Mr Mason requested that the matters be recorded in the event of further incidents. This letter is at page 29 of the bundle.

24. The claimant denied the allegations and further contended that he was unaware of the letter from Mr Mason until it was disclosed for the purposes of these proceedings. Mr Jonathan Adey stated in evidence that he did not know whether the claimant was ever told about/ shown a copy of the letter dated 24 September 2016. In all the circumstances, the Tribunal is not satisfied that the claimant was made aware of the letter dated 24 September 2016 or that any further action was in any event taken / deemed necessary by the respondent in respect of such allegations.

25. The relationship between the claimant and Mr Mason continued to be difficult and they both subsequently made informal complaints to management from time to time about the conduct of the other. No further action was however taken/ deemed necessary by the respondent in respect of such complaints.

May/ June 2018

26. In May 2018, Mr Mason requested a meeting with Mr Jonathan Adey to update him on his concerns. The respondent's notes of the meeting on 24 May 2018 are at page 30 of the bundle. In summary, Mr Mason alleged that the relationship between him and the claimant had deteriorated including that the claimant had become unresponsive and uncooperative when asked about work, that he felt intimidated by the claimant's hostility towards him and that he was concerned that the claimant could become violent. Mr Mason asked for his concerns to be recorded.
27. Following the meeting Mr Jonathan Adey discussed the matter with Mr Ferrans who agreed to keep a close eye on the situation and let Mr Jonathan Adey know if matters did not improve. The respondent did not discuss the matter with the claimant.
28. On the following day, 25 May 2018, the respondent received a formal letter of complaint from the claimant in which he detailed a number of grievances against Mr Mason. Neither party has been able to produce a copy of this letter.

The grievance meeting on 30 June 2018

29. Following the receipt of the above concerns/ letter, the respondent convened a formal grievance meeting with the claimant and Mr Mason on 30 June 2018 during which they made allegations against each other. The respondent's notes of that meeting are at page 31 of the bundle. During the meeting the claimant alleged that the relationship between him and Mr Mason had deteriorated over a period of time and that he had been physically pushed and verbally threatened by Mr Mason. Mr Mason also raised grievances against the claimant including that he had been undermined by the claimant. After discussion, the claimant and Mr Mason both accepted Mr Keeping's proposal that the animosity between them would cease, that they would wipe the slate clean and would move on as a collaborative team. The meeting concluded on the basis that the claimant offered his hand to Mr Mason and asked that they wipe the slate clean as suggested by Mr Keeping. This was accepted by Mr Mason, and they shook hands. The claimant did not subsequently raise any concerns regarding the outcome of the meeting.

Meeting on 31 October 2019 and associated matters

30. The relationship between the claimant and Mr Mason however, continued to be difficult. In or around October 2019, Mr Mason raised concerns with the respondent about the volume of the claimant's radio.
31. On 31 October 2019, the claimant reported to the respondent (Mr Keeping and Mr Jonathan Adey) that Mr Mason had used threatening language and gestures towards him including that Mr Mason had pointed his finger in the claimant's face and told him that he would "do you" after work. The claimant stated in evidence that when he reported the matter to Mr Jonathan Adey he was unsupportive and stated that

he had had enough of him and Mr Mason and that he would get rid of them both. The claimant further contended that Mr Jonathan Adey pushed past the claimant on the way to the factory floor to ask Mr Mason into the office in a manner which made the claimant feel like the problem was his fault.

32. Mr Jonathan Adey denied pushing past the claimant as alleged or making the above remarks. Mr Jonathan Adey contended in his evidence that he had said to the claimant that he and Mr Mason needed to work together and that their tit for tat relationship was not doing anyone any good. The Tribunal is satisfied, on the balance of probabilities, that Mr Jonathan Adey expressed his frustration regarding the conduct of both the claimant and Mr Mason including that he had had enough of the situation and that they had to work together. The Tribunal is not however satisfied, in the light of the conflicting oral evidence and what happened at the subsequent meeting (as referred to below), that Mr Jonathan Adey threatened to get rid of the claimant or Mr Mason or that he deliberately pushed past the claimant as alleged by the claimant.
33. Mr Jonathan Adey conducted a meeting with the claimant and Mr Mason on 31 October 2019 to discuss the claimant's allegations. The respondent's notes of the meeting are at page 32 of the bundle. In brief summary, Mr Mason accepted that he had turned down the volume on the claimant's radio (which he said the claimant had increased to an unbearable level) and had threatened the claimant. Mr Mason also accepted that his actions were unacceptable/ wrong and apologised. Mr Mason was issued with a verbal warning by Mr Jonathan Adey that threatening behaviour would not be tolerated and that any future verbal threats would have serious consequences. The claimant volunteered to dispose of his radio and to listen to music via earphones in order to avoid any future complaints about excessive noise. It was also agreed at the meeting that the claimant and Mr Mason would make more of an effort to discuss work in order to ensure that they had an equal share of the available jobs. The claimant did not subsequently raise any concerns regarding the outcome of the meeting.

The events of 9 December 2019

34. In summary, the claimant contended in his witness statement that:-
- (a) when he visited the toilet on 9 December 2019 he was unable to access it immediately as there was a cleaner in attendance
 - (b) that when he and a colleague subsequently attended a meeting with Mr John Adey he was questioned as to where he had been and
 - (c) that he was repeatedly told in response by Mr John Adey to "fuck off" as he did not believe the claimant's explanation. The claimant further contended in his oral evidence that:-
- (a) when he returned from the toilet he was told that Mr John Adey was looking for him to discuss a job
 - (b) when he and his colleague Mr Robbins went into the office to meet with Mr John Adey Mr Simon Keeping was also in attendance
 - (c) Mr John Adey accused the claimant of always being in the fucking

toilet (d) when the claimant offered to show Mr John Adey the photographs of the job in question he continued to tell the claimant to fuck off and (d) that Mr John Adey's conduct left the claimant in a state of shock and distress.

35. The respondent denied the allegations. In the respondent's statement submitted in the proceedings/ the witness statement of Mr Jonathan Adey the respondent contended in summary that on 9 December 2019 :- (a) Mr John Adey noticed, as he had done on previous occasions, that the claimant was not at his workstation and questioned the claimant about his absences (b) when confronted the claimant responded in an offhand manner that he had been on a toilet break (c) Mr John Adey questioned the claimant about the length of time and frequency of his breaks (d) Mr John Adey sensed an escalating aggression in the claimant's replies and walked away from the situation at which point the claimant followed him closely, pointing aggressively and continued with a verbal tirade which only ceased when Mr Adey reached the office and (e) shortly after the confrontation the claimant left the premises.
36. The claimant denied that he had acted inappropriately as alleged including that he had followed Mr John Adey up the corridor or that he was annoyed or abusive. The claimant stated in his oral evidence that during the meeting Mr John Adey, who was accompanied by Mr Keeping, repeatedly told him to "fuck off" which made him upset. The claimant further stated in his evidence that after leaving the office he told his manager Mr Farrans, with whom he had a good working relationship, what had happened including that he was upset and felt unable to remain at work and that Mr Farrans supported the claimant's decision to go home early that day.
37. Having given the matter careful consideration the Tribunal is satisfied, on the balance of probabilities that :- (a) the claimant was questioned by Mr John Adey about his toilet breaks (b) Mr John Adey was not satisfied with the claimant's responses / did not wish to see the work photographs which the claimant tried to show him (c) that Mr John Adey said to the claimant that he was always in the fucking toilet and told him on at least two occasions to fuck off (d) that the claimant was upset by the way in which he had been treated by Mr John Adey but did not become annoyed or speak or act inappropriately towards Mr Adey and (e) the claimant subsequently spoke to Mr Farrans as set out above who supported the claimant's decision to go home early that day and (f) the claimant subsequently contacted his GP who prescribed him medication for stress and anxiety.
38. When reaching the above conclusions the Tribunal has taken into account in particular that, the claimant is the only witness from whom it has heard evidence of, who was party to / was present during the above incident. Although Mr Jonathan Adey refers to the matter in his witness statement, he was not present and cannot therefore give a first-hand account of what happened that day. Further the Tribunal has

taken into account in particular that, the respondent has not called Mr John Adey (who continues to be Managing Director of the business) or Mr Keeping (who was present at the meeting on 9 December 2019 and was in attendance at this hearing) to rebut these potentially serious allegations including as the respondent accepted that the use of such language was not commonplace in the business. The Tribunal has also taken into account that the claimant's account is supported in part by his subsequent Facebook messages referred to below. Further the subsequent letter of dismissal dated 10 December 2019 makes no reference to any alleged aggressive conduct / verbal tirade towards Mr John Adey on 9 December 2019 (page 35 of the bundle and paragraph 45 below).

The claimant's Facebook messages on 9 December 2019

39. On the evening of 9 December 2019, the claimant sent 2 Facebook messages.
40. The first message was sent to Mr Farrans in the following terms (page 33 of the bundle) :-
"Tell the old man it cost him 6 fucking minutes having a shit the damage to the job cost him hundreds...He needs to get his priorities right fed up with being threatened ...And spoke to like a cunt by his son now him....This job has drove me to fucking breaking point ive had to leave for people safty had a fucking gut full"
41. Mr Farrans replied to the claimant expressing concern for the claimant and respect for the claimant and his work. Mr Farrans told the claimant that he wouldn't show the message to anyone as he believed that the claimant might regret it later. He asked the claimant to contact him later when he had calmed down.
42. The Claimant sent a second message to Richard Adey (page 34) with whom the claimant had a good relationship and in which he stated as follows:-
"Not coming back mate... I've been on medication for years to control my aggression... I came of my meds in August but since then I've had to keep my hands off Chris Johnatan and now John. I'm going sick due to mental illness if I come back before I get accessed and back on tablets things won't be pretty as I can't control my aggression....its bad enough battling mental health stuff without battling rude and disrespectful people....Thanks for your freindship it's been priceless x "
43. Mr Richard Adey advised the claimant not to be too hasty as he was brilliant at his job and that he and others would miss the claimant. He further advised the claimant to sleep on it and to give himself time to calm down.

10 December 2019

44. On the morning of 10 December 2019, the claimant contacted the respondent's receptionist and informed her that he would not be attending work that day due to work related stress.
45. On the afternoon of 10 December 2019, the claimant received a letter from Mr Jonathan Adey of the respondent (page 35 of the bundle) advising the claimant of his summary dismissal. The letter of dismissal stated as follows:-

"Dear Jason

TERMINATION OF EMPLOYMENT – GROSS MISCONDUCT

Further to your unauthorised absence from work yesterday we have been made aware of a Facebook Messenger message sent to your line manager. In his message you state :

'I've been on medication for years to control my aggression ... I came off my meds in August but since then I've had to keep my hands off Chris, Jonathan and now John'

Indicating that you are contemplating physical violence towards your co-worker, General Manager and Managing Director, amounts to conduct so serious to justify an immediate termination of your contract without notice.

This threat of aggression is an act of gross misconduct and makes your further employment at Conquest Fitted Furniture UK Limited untenable.

Yours sincerely

Jonathan Adey."

Mr Jonathan Adey stated in this evidence to the Tribunal that he was unable to explain why the claimant was dismissed rather than suspended pending further investigation /consideration of the mental health issues raised in his Facebook messages. The Tribunal has noted that the letter of dismissal makes no reference to any alleged aggressive conduct by the claimant towards Mr John Adey on 9 December 2019.

46. The claimant contacted Mr John Adey by telephone upon receipt of the letter of dismissal expressing shock and concern at his dismissal. Mr John Adey invited the claimant to attend a meeting to discuss the letter.
47. The claimant first contacted ACAS after his dismissal.

The meeting on 13 December 2019

48. The claimant attended a meeting with the respondent on 13 December 2019. The claimant was accompanied by Mr Robbins. The respondent's notes of the meeting are at page 53 of the bundle. The

Tribunal is satisfied that the notes are a broadly accurate but not complete note of the meeting.

49. In summary, the claimant informed the respondent that he had been taking medication for a number of years to control his aggression including that he stopped taking it in August as, until the recent incident, he had felt that he had been coping well. It was agreed at the meeting that in the light of the claimant's disclosures regarding his mental health they should find a way to allow him to continue working. It was also agreed that the claimant's dismissal for gross misconduct would be rescinded, that the claimant would be paid for the period since his dismissal and that he should be allowed to continue with uninterrupted employment provided that a fit to work report was obtained by the claimant from the claimant's GP or a suitably qualified professional. The claimant confirmed that he was happy for the respondent to contact his GP and the claimant was told to return to work on 16 December 2019.
50. There is an issue between the parties as to whether the meeting on 13 December 2019 was recorded. The claimant contends that the meeting was recorded by Mr Keeping on his mobile telephone. This is denied by Mr Jonathan Adey who was present to the meeting and said in his oral evidence that as far as he was aware the meeting was not recorded and further that Mr Keeping had never previously recorded any meetings. The Tribunal has not heard any evidence from Mr Keeping on this issue. There is no reference in the notes of the meeting to any recording by Mr Keeping. After given the matter careful consideration the Tribunal is satisfied that the claimant believed that the meeting was being recorded. The Tribunal is not however satisfied, on the balance of probabilities, that the meeting was recorded by Mr Keeping. When reaching this conclusion, the Tribunal has taken into account in particular the conflicting oral evidence and the notes of the meeting state that the minutes were "compiled" by Mr Keeping (page 36 of the bundle).
51. The claimant further contended that he raised at the meeting his concerns that when Mr Mason had acted in a threatening and aggressive manner towards him he had not been disciplined but when the claimant had walked away from such a situation he was dismissed. The claimant further contended that the Mr John Adey apologised to him at the meeting for swearing at the claimant on 9 December 2019. Mr Jonathan Adey denied in his evidence that there had been any discussion at the meeting about Mr Mason, the alleged difference in treatment or that Mr John Adey had apologised to the claimant for swearing at him on 9 December 2019.
52. After giving the matter careful consideration, the Tribunal prefers the claimant's evidence regarding these matters. When reaching this conclusion, the Tribunal has taken into account that there is no reference to the matters in the minutes of the meeting and that Mr Jonathan Adey denied that there were discussed at the meeting. The

Tribunal is however satisfied, on the balance of probabilities, that such matters were raised by the claimant in the light of the contents of his Facebook messages referred to above and the events of 9 December 2019 /his subsequent summary dismissal for which the claimant would have felt a strong sense of grievance. The Tribunal is further satisfied, on the balance of probabilities, that having had time to reflect on the events of 9 December 2019 Mr John Adey apologised at the meeting on 13 December 2019 for swearing at the claimant on 9 December 2019.

The letter dated 13 December 2019

53. The respondent wrote to the claimant by letter dated 13 December 2019. This letter is at page 37 of the bundle. The letter is from Mr Keeping. In summary, the letter which is headed “ REF. RE-EMPLOYMENT” states that :- (a) following the meeting that day the respondent was pleased to confirm that the claimant would be restarting with the respondent on 16 December 2019 (b) the claimant’s hours, holidays and wage details would remain the same as in the claimant’s previous employment (c) that the claimant had agreed that his mental health would be assessed by his own doctor or other suitable professional and that (c) the claimant’s continued re-employment would be subject to a satisfactory “fitness to work” report.
54. There is a dispute between the parties concerning the circumstances (including the date) in which the respondent issued the letter dated 13 December 2019 to the claimant and the subsequent events.
55. In summary, the claimant contended that (a) he left the respondent’s premises following the meeting on 13 December 2019 without having any further contact with Mr Keeping (b) shortly after he left the meeting he received a telephone call from Mr John Adey during which he advised the claimant that the respondent would not be able to reinstate the claimant as discussed at the meeting but would have to re-employment him. Mr John Adey also informed the claimant that although it would not affect his employment status it would have to be referred to as re-employment (c) the claimant was handed the letter dated 13 December 2019 by Mr Keeping on the claimant’s return to work on 16 December 2019 (however the claimant stated in his claim form/ witness statement that he was sent a letter on 13 December and initially indicated in his oral evidence that he had received the letter on 13 December 2019) (d) he was concerned about references to re-employment and therefore sought advice from ACAS who advised him to ask the respondent to change the letter to reinstatement and he therefore made the manuscript amendments replacing re-employment with reinstatement and associated changes as they appear on the copy of the letter dated 13 December 2019 at page 38 of the bundle.
56. The claimant further contended in his witness statement that on his return to work after the Christmas break on 2 January 2020, he had meeting with Mr Jonathan Adey and Mr Keeping at which he (a)

provided them with contact details for his GP (b) raised concerns about the references in the letter dated 13 December 2019 to re-employment (the claimant however stated in his oral evidence to the Tribunal that this conversation had taken place on his return to work on 16 December 2019) (c) Mr Adey refused to change the letter to reinstatement because the claimant had quit/ the respondent had been advised that it did not need to reinstate him (d) requested a copy of the recording/ minutes of the meeting on 13 December 2019 as he was concerned that the respondent was going back on what had been agreed at the meeting on 13 December 2019 (e) this request was refused as he was told that the recording had been deleted / they were no longer able to recall what had been said (g) Mr Keeping accused the claimant of causing a rift between managers and floor workers.

57. The respondent disputes the claimant's version of events. In summary, Mr Jonathan Adey contended in his witness statement that :- (a) following the meeting on 13 December 2019 the claimant was issued with the letter dated 13 December 2019 confirming the claimant's redeployment and that he would be returning to work on 16 December 2019 on which day the claimant was also issued with the minutes of the meeting (b) upon receipt of the letter dated 13 December 2019 the claimant met with the respondent's management team to present an alternative version as amended in the document at page 38 of the bundle which was agreed by the respondent on 13 December 2019 as recorded in the bottom right hand corner of the document by Mr Adey and Mr Keeping. Mr Adey stated in his oral evidence, that the claimant remained on the respondent's premises on 13 December 2019 and refused to return to work until he had received a letter confirming the position. Mr Adey also stated in his oral evidence that he had no knowledge of any conversation between Mr John Adey and the claimant on 13 December 2019 concerning the claimant's re-employment, that he denied that the letter dated 13 December 2019 was handed to the claimant on 16 December 2019, (or that there was any discussion regarding the letter / the claimant's redeployment/ reinstatement that day) and on 2 January 2020 the claimant signed a consent form allowing the respondent to request medical evidence from his GP which was actioned that day. Mr Adey denied in his oral evidence that there was further discussion on 2 January 2020 regarding the other matters referred to above as alleged by the claimant.

58. After giving the matter careful consideration and having weighed the conflicting oral evidence, the Tribunal is satisfied on the balance of probabilities as follows: -

58.1 The claimant left the respondent's premises after the meeting on 13 December 2019 without any further discussion with Mr Keeping. The claimant was not issued with the letter dated 13 December 2019 or the minutes of the meeting at that time.

- 58.2 Shortly after he left the meeting the claimant received a telephone call from Mr John Adey during which Mr John Adey told the claimant that the respondent would not be able to reinstate the claimant as discussed at the meeting and that it would have to re-employment and made the further comments referred to at paragraph 55 above.
- 58.3 The claimant was subsequently provided with the letter dated 13 December 2019 (either by post or on his return on 16 December 2019). The position with regard to the issue of the notes of the meeting is unclear as the claimant gave conflicting oral evidence as to if and when he received these and the Tribunal is therefore not satisfied on the balance of probabilities that the claimant has established any failure on the respondent to provide him with a copy of such minutes (which were on the balance of probabilities, most likely issued on 16 December 2019).
- 58.4 The claimant returned to work on 16 December 2019.
- 58.5 The claimant was concerned about the respondent's apparent change in position regarding the terms of his return to work and therefore took advice from ACAS on or after 16 December 2019 and thereafter made the manuscript amendments which appear at page 38 of the bundle in the light of such advice.

59. When making these findings the Tribunal has had regard to the respondent's manuscript note at the bottom right-hand corner of the letter dated 13 December 2019 at page 38 which records that the handwritten amendments were made by the claimant and accepted by Mr Jonathan Adey and Mr Keeping on 13 December 2019. The Tribunal has however balanced against such document that (a) there is a marked difference between the language of the notes of the hearing on 13 December 2019 and the contents of the letter dated 13 December 2019 at page 37 of the bundle (the notes refer to the claimant's dismissal being rescinded however the letter refers to re-employment)(b) the Tribunal accepts the claimant's evidence that he received a telephone call from Mr John Adey in the terms referred to at paragraph 55 above on 13 December 2019. When reaching this conclusion the Tribunal has noted that Mr John Adey has not given any evidence to the Tribunal regarding his involvement in the matter and Mr Jonathan Adey was unable to say whether his father had had such a conversation (c) given that there was a change in position by the respondent regarding the basis of the claimant's return which was notified by Mr John Adey during the telephone call on 13 December 2019 the Tribunal does not consider it credible that the respondent reached an agreement with the claimant regarding the changes to the letter before the claimant left the respondent's premises that day as contended by the respondent (and further taking into account that the claimant would have needed time to seek advice from ACAS).

60. Going forward the Tribunal is satisfied, on the balance of probabilities that :-

- 60.1 The claimant worked from 16 December 2019 until the Christmas shut down without further incident.
- 60.2 The claimant met with Mr Jonathan Adey and Mr Keeping on 2 January 2020. At this meeting the claimant provided the respondent with contact details for his GP and subsequently signed the consent form for a request for information to be made to his GP. During this meeting (having taken advice from ACAS) the claimant raised concerns regarding the references to redeployment in the respondent's letter dated 13 December 2019 and submitted the proposed changes to the letter. Mr Jonathan Adey refused to make the changes to the letter for the reasons set out at paragraph 60.2 above and there was a subsequent exchange between the parties regarding the recording of the meeting/ the notes of the meeting. Mr Keeping also made the comment about the claimant causing rifts between managers and the shop floor.
- 60.3 Mr Jonathan Adey prepared a letter to the claimant's GP on 2 January 2020 – this letter is at page 41 of the bundle which he sent to the claimant's GP by post.

61. When reaching the above conclusions the Tribunal has taken into account in particular that :- (a) it is clear from the documentary evidence that there was a discussion between the parties on 2 January 2020 in respect of the obtaining of medical advice and (b) that the claimant would have needed time to take advice from ACAS regarding the respondent's letter dated 13 December 2019. Further as far as the letter to the GP is concerned, the Tribunal is not satisfied that the claimant has established the factual basis of this element of the claim in the light of the following :- (a) it is agreed that the claimant provided the respondent with details of his GP and gave consent for the respondent to obtain a report from his GP (b) the letter to the GP at page 41 of the bundle together with the oral evidence of Mr Jonathan Adey that he sent that letter by post to the claimant's GP and (c) the Tribunal has not received any documentary evidence from the claimant's GP confirming that such letter was not received

Subsequent events

62. The claimant continued to attend for work until 30 January 2020. The claimant took ½ a day's holiday on 23 January 2020 and a day's leave on 31 January 2020. The claimant contacted his GP on 3 occasions during January 2020 to ascertain whether they had received a letter from the respondent but he was informed by the receptionist that it had not been received.
63. The claimant took further advice from ACAS regarding the position and in the light of such advice decided to resign his employment with the respondent. The claimant handed his letter of resignation, which is set out below, to the respondent's receptionist on 31 January 2020. This date is therefore the effective date of termination for the purposes of

the Act. The Tribunal accepts that the claimant's letter of resignation is a true and accurate account of the reasons for the claimant's resignation.

"John Adey/ Jonathan Adey

Please accept this letter as formal notification that I am resigning from my position as a spray polisher with Conquest.

My last day will be 31/01/2020

The reason I am not giving notice is because of the recent issues of Bullying and harassment by a fellow member of staff.

Being spoken to and treated in an unacceptable manor by management

I feel that I am unable to trust management due to being deceived about the recording of the meeting on 13/12/19 and being refused a copy of the minutes.

Since visiting my doctor I have learned that there has been no request for a fit to work letter which Jonathan Adey was adamant he needed as part of my re-employment.

I feel that my consent to contact my doctor was just another example of intimidation and added stress

I feel that the years of loyal employment have been wasted on management

Jason Armitage"

64. The respondent did not acknowledge/ or respond to the claimant's letter of resignation.

Alternative employment

65. The claimant registered with an employment agency on the day he resigned and applied for a new post on 3 February 2020. The claimant commenced alternative employment on 10 February 2020.

THE LAW

66. The Tribunal has had regard in particular to (a) sections 95 (1) (c), 98, 122 and 123 of the Act and section 207A of the 1992 Act (b) the provisions of the ACAS Code and (c) the legal authorities referred to by the parties (as largely recorded in the claimant's skeleton argument) and some of which are referred to below.

THE CONCLUSIONS OF THE TRIBUNAL

The claimant's complaint of constructive unfair dismissal

67. The Tribunal has considered first the claimant's claim for constructive dismissal.

68. Tribunal has considered first whether – (a) viewed objectively, the claimant has established all or any of the alleged repudiatory breaches of contract identified below and if so, (b) whether there was reasonable and proper cause for any such conduct.

Around 24/25 May 2018, Mr Mason asked the claimant, in front of Dave Ferrans, to “go outside and have a fight and sort things out for once and for all”

69. In summary, the respondent denied any breach of the implied term of trust and confidence by the respondent in respect of its actions relating to relationship between the claimant and Mr Mason (including with regard to any incident in May 2018). The respondent contended in particular, that the claimant was equally responsible for any difficulties in the relationship and that they took reasonable and appropriate steps in all the circumstances to ameliorate any such difficulties.

70. The claimant has established on the facts (paragraphs 28 and 29 above) that he submitted a formal letter of complaint to the respondent on or around 25 May 2018 against Mr Mason. Neither party has however been able to produce a copy of that letter. The claimant has further established on the facts that at a meeting on 30 June 2018 he contended that the relationship between him and Mr Mason had deteriorated over a period of time and that he had been physically pushed and verbally threatened by Mr Mason (paragraph 29).

71. The Tribunal has however also found as findings of fact that :- (a) the allegations by the claimant were made against a background of previous complaints by Mr Mason concerning the claimant’s conduct including alleged inappropriate conduct by the claimant in September 2016 (paragraph 23 above) and that in May 2018 Mr Mason had requested a meeting with the respondent regarding the claimant’s conduct including as he said that he felt intimidated by the claimant’s hostility towards him and was concerned that the claimant could become violent (c) the respondent conducted a formal grievance meeting on 30 June 2018 (paragraph 29 above and page 31 of the bundle) at which the claimant and Mr Mason discussed their grievances and, after discussion, accepted the respondent’s proposal that the animosity between them should cease/ they should wipe the slate clean and move forward as a collaborative team and (d) the claimant did not subsequently raise any concerns regarding the outcome of the meeting.

72. In all the circumstances, the Tribunal is not satisfied that, viewed objectively, that the claimant has established any breach of the implied term of trust and confidence in respect of the incident in May 2018 including in particular, as the conduct of Mr Mason and the actions taken by the respondent fall to be considered in the context of the matters refer to at paragraph 71 above. Further, the Tribunal is satisfied that the respondent had reasonable and proper cause for its

action in the light of the competing allegations made by the claimant and Mr Mason.

On 31 October 2019 Mr Mason threatened the claimant again. The respondent's Jonathan Adey and Simon Keeping failed to take appropriate actions against the claimant's colleague Mr Mason, despite its finding that Mr Mason had made a clear threat of physical violence towards the claimant.

73. The respondent relied upon the submissions referred to above.

74. The claimant has established on the facts that:- (a) he reported to the respondent on 31 October 2019 that Mr Mason had used threatening language and gestures towards him as recorded at paragraph 31 above (b) at a meeting on 31 October 2019 Mr Mason accepted that he had turned down the volume on the claimant's radio and had threatened the claimant (paragraphs 31 – 33 and page 32 of the bundle).

75. The Tribunal has however also found as findings of fact that :- (a) the respondent acted promptly in response to the claimant's allegation convening a meeting the same day (b) that Mr Mason admitted his conduct and accepted that his actions were unacceptable/ wrong for which he apologised (c) the mitigating circumstances put forward by Mr Mason-that the claimant but had his radio turned on to an unbearable level (d) Mr Mason was issued with a verbal warning, was told that threatening behaviour would not be tolerated and that any future verbal threats would have serious consequences and (e) the claimant responded positively to the respondent's handling of the matter and volunteered to take action with regard to the future use of his radio and (f) the meeting ended positively and on the understanding that the claimant and Mr Mason would make more effort to discuss work issues and (g) the claimant did not subsequently raise any concerns about the way in which the matter had been handled by the respondent.

76. In all the circumstances, the Tribunal is not satisfied that, viewed objectively, that the claimant has established any breach of the implied term of trust and confidence in respect of the respondent's handling of the incident on 31 October 2019 having regard to the matters identified at paragraph 75 above. Further/ alternatively, the Tribunal is satisfied that the respondent had reasonable and proper cause for the way in which it handled the matter in the light of the matters identified at paragraph 75 above.

On 9 December 2019, John Adey (MD) repeatedly dismissed the claimant's explanation of his whereabouts by telling the claimant to "fuck off"

77. The respondent's position on this matter is that Mr John Adey did not act as alleged and that it was the claimant who acted inappropriately by subjecting Mr Adey to aggressive behaviour/ a verbal tirade.

78. The claimant has established on the facts (paragraph 37):- (a) that Mr John Adey said to him that the claimant was always in the fucking toilet and told the claimant on at least two occasions to “fuck off” (b) that the claimant was upset by the way in which he had been treated but did not become annoyed or speak or act inappropriately towards Mr John Adey.
79. After giving the matter careful consideration, the Tribunal is satisfied that, viewed objectively, the respondent breached the implied term of trust and confidence in respect of such conduct and further that the respondent did not have reasonable and proper cause for such conduct.
80. When reaching this conclusion the Tribunal has taken into account in particular, the following :- (a) Mr John Adey is the founder and Managing Director of the respondent and is therefore in a very senior position within the organisation (b) Mr Jonathan Adey accepted in his evidence that such language was not commonplace in the business (paragraph 38) and (c) the Tribunal accepted that the claimant had not acted inappropriately towards Mr John Adey during the incident and (d) Mr John Adey’s conduct towards the claimant on 9 December 2019 caused the claimant upset prompting him to leave the business early that day.
81. When reaching the above conclusion the Tribunal also took into account the inappropriate nature of the language which was used by the claimant in the subsequent Facebook messages (paragraphs 39 – 42 above). The Tribunal is however satisfied that there is a clear distinction to be drawn between the language used by an employee in what he understood to be an exchange of messages with people with whom he had a trusted relationship and the language used by the Managing Director of the respondent during working hours to a junior employee.

On 10 December 2019, Jonathan Adey summarily dismissed the claimant without any proper process for making what was not in fact a threat of physical violence.

The respondent reinstated the claimant with effect on 16 December 2019, albeit it purportedly for reasons that had already been communicated to the respondent prior to its hasty decision to dismiss the claimant.

82. The Tribunal has considered these two alleged breaches together as they both relate to the claimant’s dismissal. The Tribunal has also taken into account that when identifying the alleged repudiatory breaches relied upon, the claimant also relied upon a flawed rationale in respect of the claimant’s mental health position. The respondent relied on the contents of the Facebook messages and says that the claimant was, in any event, reinstated by the respondent.

83. The claimant has established that :- (a) he was summarily dismissed by letter on 10 December 2019 without prior warning, investigation or disciplinary process (b) Mr Jonathan Adey was unable to offer any explanation as to why the claimant was not suspended at that time pending further investigation rather than dismissed (c) the Facebook messages do not contain any threats of physical violence towards the respondent but rather describe the claimant's mental health issues and his decision to walk away to avoid any aggressive conduct (pages 33 and 34 of the bundle). Further the claimant explained the position to Mr Farrens before he left work on 9 December 2019 and advised the respondent on the morning of 10 December 2019 that he would not be attending work that day and (d) the claimant was subsequently reinstated by the respondent subject to the requirement to undergo a further medical assessment.

84. Having given the matter careful consideration, the Tribunal is satisfied, that viewed objectively, the respondent breached the implied term of trust and confidence in "dismissing" the claimant on 10 December 2019 without any/ proper consideration of the matter and in particular in the light of Mr John Adey's conduct towards the claimant on 9 December 2019, the claimant's decision to walk away from the situation and his notified mental health issues. The Tribunal is further satisfied that it did not have reasonable proper cause for such conduct.

85. When reaching this conclusion the Tribunal has further taken into account in particular that :- (a) viewed objectively, the Facebook messages were messages from the claimant to trusted colleagues explaining his distress and medical issues and his decision to walk away to avoid any risk of aggression towards others (b) Mr Jonathan Adey was unable to offer any explanation as to why the claimant had not been suspended at that time pending further investigation / further consideration in particular of the medical issues raised in the messages rather than being subject to summary dismissal.

On 2nd January 2020, when the claimant raised concerns to Jonathan Adey and Simon Keeping about his continuity of service, based upon the fact that the respondent's letter 13 December 2019 referred to claimant re-starting rather than being reinstated, Jonathan Adey refused to change the letter, stating that he did not need to reinstate the claimant.

86. The respondent denied the factual basis of the claimant's claims in respect of 2 January 2020. In particular, it denied that there was any such meeting/ discussion on 2 January 2020 (other than to the extent that the respondent obtained details of the claimant's GP and the claimant gave consent for the respondent to obtain medical evidence regarding his mental health issues).

87. The claimant has established on the facts that :- (a) the claimant attended a meeting with Mr Jonathan Adey and Mr Keeping on 2

January 2020 during which he raised concerns regarding the references to redeployment in the respondent's letter dated 13 December 2019 and submitted his proposed changes to the letter to reflect his reinstatement (b) Mr Jonathan Adey refused to make the changes to the letter because the claimant had quit/the respondent had been advised that he did not need to reinstate him) (paragraph 60 above).

88. Having given the matter careful consideration, the Tribunal is satisfied that, viewed objectively, the respondent's conduct breached the implied term of trust and confidence and further that it did not have reasonable and proper cause for such conduct.
89. When reaching this conclusion the Tribunal has taken into account in particular :- (a) the context of the previous inappropriate conduct by Mr John Adey on 9 December 2019 (b) the claimant's subsequent summary dismissal without further investigation / consideration of his mental health issues and (c) the respondent's agreement at the hearing on 13 December 2019 to "rescind" the claimant's dismissal which was subsequently resiled from.

On 2nd January 2020, when the claimant asked for a copy of the audio recording and minutes from his appeal on 13th December 2019, he was told that the recording had been deleted and that minutes could no longer be provided because Jonathan Adey and/ or Simon Keeping could not remember what was said in order to create such minutes.

90. The claimant has established that he believed that the meeting on 13 December 2019 had been recorded. The claimant has not however established the remaining factual basis for his claims including that the meeting on 13 December 2019 was in fact recorded.

On 2 January 2020, Simon Keeping told the claimant that he had caused a rift between managers and floor workers (albeit he could not explain how / why?)

91. The claimant has established the factual basis of this allegation (paragraph 60.2).
92. Having given the matter careful consideration, the Tribunal is satisfied, that viewed objectively, such comment constituted a further breach of the implied term of trust and confidence. The Tribunal is further satisfied that the respondent did not have reasonable and proper cause for such conduct. When reaching these conclusions the Tribunal has taken into account in particular: - (a) the nature of the comment which sought to blame the claimant for unspecified conduct (b) the context of the other conduct of the respondent at the meeting on 2 January 2020 and (c) that the respondent denied making the comment and therefore did not seek to offer any explanation to justify any such comment.

Despite the parties having agreed on 13 December 2019 that the respondent would contact the claimant's GP and despite the respondent confirming that it would write to the claimant's GP on 2nd January 2020 the claimant understands that the respondent did not in fact write to the claimant's GP at any time up to the claimant's resignation on 31 January 2020

93. The respondent denied the factual basis of the claim. For the reasons explained at paragraphs 60 and 61 above the Tribunal is not satisfied that the claimant has established the factual basis of this claim.

Overall conclusion on the alleged breaches

94. In all the circumstances, the Tribunal is satisfied that the claimant has, viewed objectively, established a number of breaches of the implied term of trust and confidence in respect of the matters identified above.

95. The Tribunal is further satisfied that having regard to the Employment Appeal Judgment of **Woods v WM Car Services (Peterborough) Limited [1981] ICR 666** that established breaches of the implied term of trust and confidence are to be regarded as repudiatory and therefore (subject to any issues relating to causation and affirmation) entitled the claimant to terminate his employment.

Causation

96. The Tribunal has therefore gone on to consider whether the claimant has established the necessary causal link between the established breaches of the implied term of trust and confidence (identified above) and the claimant's decision to terminate his employment i.e. the claimant's resignation must have been caused by the established repudiatory breaches of contract by the respondent. The Tribunal has however reminded itself of the **Court of Appeal Judgment of Meikle v Nottinghamshire County Council 2005 ICR 1**. The relevant test is whether the breach was an effective cause of the resignation rather than the effective cause. The issue is whether the breach played a part in the resignation.

97. The claimant contended that causation is established in this case as the claimant resigned because of the respondent's breaches of the implied term of trust and confidence including that his letter of resignation made it clear that the reason for his departure was the respondent's poor treatment of him. The claimant further contended that the fact that he got a new job (which the claimant says he obtained after the termination of his employment) had no bearing on the question of causation in this case.

98. The respondent denied that any established repudiatory breaches were an effective cause of the claimant's resignation. In summary, the respondent contended that any differences between the parties were resolved by 13 December 2019 and that the claimant continued to work thereafter as normal from 16 December 2019, and without raising any

further concerns, until his resignation on 31 January 2020. In the circumstances, the claimant's resignation had nothing to do with any conduct of the respondent. The respondent further contended that the claimant left its employment for other reasons namely to take up alternative employment as evidenced by the fact that he started alternative employment immediately following the termination of his employment with the respondent.

99. Having given the matter careful consideration, the Tribunal is satisfied that the claimant has established the necessary causal link namely, that the established breaches by the respondent of the implied term of trust and confidence were an effective cause of the claimant's resignation. The Tribunal is further satisfied that the claimant did not resign the respondent's employment to take up alternative employment.

100. When reaching the above conclusions, the Tribunal has had regard in particular to the contents of the claimant's letter of resignation at page 44 of the bundle (which the Tribunal accepts is an accurate record of the reasons for the claimant's resignation). In summary, the claimant's letter of resignation identifies four main areas of complaint namely:- (a) bullying and harassment by a fellow member of staff (b) being spoken to and treated in an unacceptable manner by management (c) being deceived about the recording of the meeting on 13 December 2019 and being refused a copy of the minutes of that meeting and (d) the actions of the respondent in respect of the request for medical information including the respondent's failure to action such request once consent had been given by the claimant.

101. The tribunal has considered each of those alleged breaches of the implied term of trust and confidence for the purposes of causation as addressed below.

102. (a) Harassment by a fellow member of staff. This is a reference to Mr Mason. For the reasons explained at paragraphs 69 to 76 above the Tribunal is not satisfied that the claimant has established any breaches of the implied terms of trust and confidence by the respondent in respect of such complaints.

103. (b) Being spoken to and treated in an unacceptable manner by management. The claimant has established on the facts that he was treated in an unacceptable manner (and in a way in which breached the implied term of trust and confidence) in respect of (1) Mr John Adey's conduct towards him on 9 December 2019 (paragraph 37 above), (2) the respondent's summary dismissal of him on 10 December 2019 and associated matters (paragraphs 45, 58-59 above) and (3) the respondent's (Mr J Adey and Mr S Keeping's) conduct towards him on 2 January 2020 regarding the refusal to confirm/ resile from the original agreement to reinstate the claimant (paragraphs 60 - 61 above) and (4) the unsubstantiated comments by Mr Simon Keeping regarding the claimant's adverse impact on the

relationship between managers and shop floor workers (paragraph 60.2 above).

104. When reaching its conclusions the Tribunal has also taken into account that the claimant has failed to establish, on facts, the “alleged final straw” relating to the respondent’s handling of its requirement for a medical report from the claimant’s GP (paragraph 61 above) (and the other alleged breaches relating to the recording of the meeting on 13 December 2019 and issue of the notes of that meeting) The Tribunal is however satisfied that this does not mean that the claimant has failed to establish the necessary causal link as the Tribunal is satisfied that the other matters referred to at paragraph 103 above were, in any event, an effective cause of the claimant’s resignation.
105. Further the Tribunal is satisfied on the facts that the claimant did not seek or obtain alternative employment until after he had left the employment of the respondent and that this was not the reason (or an effective cause of the claimant’s resignation (paragraphs 63 and 65 above).

Affirmation

106. The Tribunal has gone on to consider whether the claimant has waited too long before resigning in response to the respondent’s repudiatory breaches of contract and therefore affirmed the contract. As referred to previously above, the respondent contended that the claimant had, in any event, affirmed any breaches of contract as any differences were resolved by 13 December 2019 and that the claimant thereafter worked without any objections until his resignation on 31 January 2020. The claimant denied that he had affirmed the contract including as the claimant says that he had made clear to the respondent on 13 December 2019 and 2 January 2020 his objections to what had occurred in December 2019 in relation to his sudden dismissal and circumstances relating to his reinstatement/ re-engagement. The claimant further contended that he should not be taken to affirm the contract by continuing to work and draw pay for a limited period of time thereafter. The claimant relied on the authorities on **WE Cox Toner (International)Ltd v Crook [1981] IRLR 443, Cantor Fitzgerald International v Bird [2002] 867 HC, Waltons & Morse v Dorrington [1997] IRLR 488 EAT and Marriot v Oxford Co-operative Society [1970] 1 QB 196.**
107. Having given the matter careful consideration, the Tribunal is satisfied, in the circumstances of this case, the claimant had not waited too long before resigning his employment with the respondent and therefore affirmed any repudiatory breaches of contract by the respondent.
108. When reaching such conclusion, the Tribunal has taken into account in particular the following matters:- (a) the claimant was a longstanding employee of the respondent with continuity of

employment since 2012 and previous engagement in the family business going back to 2006 (b) the claimant tried to resolve the issues arising from the events of 9 December 2019 and associated dismissal on 10 December 2019 / subsequent terms of return, with the respondent between 13 December 2019 and 2 January 2020 and (c) the claimant sought during the period thereafter (3 January 2020 to 31 January 2020) to (a) establish on several occasions whether any contact had been made with his GP and (b) obtain advice from ACAS before taking any further action. In all circumstances, and having regard to the authorities referred to above, the Tribunal is satisfied that the claimant did not wait too long before resigning his employment with the respondent and did not therefore affirm the contract.

109. In the light of all the above, the Tribunal is satisfied that the claimant was entitled to terminate his employment with the respondent for the purposes of section 95 (1) (c) of the Act by reason of the identified conduct of the respondent.

Has the claimant been unfairly dismissed for the purposes of section 98 of the Act.

110. The respondent contended that in the event that the claimant succeeded for the purposes of section 95 (1) (c) of the Act, it nevertheless had a potentially fair reason for dismissal (conduct / some other substantial reason) for the purposes of section 98 (1) /(2) of the Act. The respondent relied in support of such contentions on the claimant's difficult relationship with Mr Mason and also on the claimant's conduct/ the contents of his text messages on 9 December 2019.

111. The claimant relied on the repudiatory breaches of contract by the respondent and disputed that the respondent was able to establish a fair reason for dismissal for the purposes of sections 98 (1)/(2) of the Act.

112. The Tribunal is not satisfied that the respondent has established a potentially fair reason for the claimant's dismissal for the purposes of sections 98 (1)/(2) of the Act. The Tribunal is satisfied on the facts of this case that the principal reason for the claimant's (constructive) dismissal was the respondent's breaches of the implied term of trust and confidence in respect of its conduct from 9 December 2019 onwards, as identified at paragraph 103 above. Further, for the avoidance of doubt, the Tribunal is not satisfied that the claimant's relationship with Mr Mason played any part in his constructive dismissal. When reaching that conclusion, the Tribunal has noted the latest incident between the claimant and Mr Mason had been resolved on 31 October 2019 and there was no suggestion in the evidence of any ongoing difficulties at the time of the events in question in December 2019/January 2020.

113. The respondent, in any event, conceded that if the claimant was able to establish that he had been entitled to terminate his employment pursuant to section 95 (1) (c) of the Act such dismissal was unfair for the purposes of section 98 (4) of the Act. The claimant was therefore unfairly dismissed by the respondent.

Whether any compensatory award should be reduced pursuant to section 123 (1) of the Act

114. As agreed in the List of Issues referred to above, the Tribunal has gone on to consider whether any compensatory award awarded to the claimant should be reduced pursuant to section 123(1) of the Act. The tribunal has had regard to the authorities relied upon by the parties as referred to in the attached sheet including the guidance contained in the Judgment of **Software 2000 limited v Andrews and others 2007 ICR,825,EAT.**

115. In summary, the claimant contended that any compensatory award should be limited to compensation for one month on the basis that, on the balance of probabilities, the claimant's employment with the respondent would have come to an end within one month having regard in particular to :- (a) the breakdown of the relationship between the parties (including the ongoing difficulties in the relationship between the claimant and Mr Mason) and (b) the outstanding request for further information from the claimant's GP regarding his aggressive behaviour in the light of the claimant's comments in the Facebook messages dated 9 December 2019.

116. In summary, the claimant contended that it would be inappropriate for the Tribunal to make any reduction for the purposes of section 123(1) of the Act in the circumstances of this case including having regard in particular to the following :- (a) that this is a constructive dismissal case in which the claimant's employment came to an end by reason of the respondent's repudiatory breaches of contract and (b) notwithstanding that there had been difficulties in the relationship between the claimant and Mr Mason over a number of years they had continued to work together and their relationship played no part in the reason for the claimant's constructive dismissal.

117. Having given the matter careful consideration, the Tribunal is not satisfied on the facts of this case that it is appropriate to make any reduction in any compensatory award pursuant to section 123 (1) of the Act. When reaching this conclusion the Tribunal has taken into account in particular the following matters:- (a) this is a constructive dismissal case in which the claimant's employment came to an end by reason of his acceptance of the respondent's repudiatory breaches of contract in respect of the matters identified at paragraph 103 above namely, the conduct of the respondent from 9 December 2019 onwards (b) there is no cogent evidence before the Tribunal that, apart from the claimant's relationship with Mr Mason, the claimant had a difficult relationship with the respondent generally. The claimant's work

was acknowledged to be of high quality and it is clear from the exchange of Facebook messages on 9 December 2019 the claimant was held in high regard by number of managers / staff (c) further, there was no evidence before the Tribunal to indicate that there had been any further incidents between the claimant and Mr Mason after 31 October 2019 (d) the claimant continued to work from 16 December 2019 to 31 January 2020 (after consulting with his GP/ restarting medication) without any sickness absences/ issues relating to his mental health and thereafter took employment with another employer and (e) there was no medical evidence before the Tribunal to suggest that the claimant would have been deemed to have been unfit for work.

Should there be any adjustment to any compensatory award (reduction or uplift for any failure to) adhere to the ACAS Code.

118. Both parties contended that there should be adjustments to any compensatory award for failures of the other to adhere to the ACAS Code.
119. In summary, the claimant contended that :- (a) the ACAS Code applies in constructive dismissal cases as the ACAS Code relates to both disciplinary and grievance procedures (b) the claimant raised grievances in this case regarding his poor treatment by management which it unreasonably failed to address and (c) the Tribunal should exercise its discretion and increase the compensatory award by 25%.
120. In summary, the respondent agreed that the ACAS Code applied in this case but contended that: - (a) the claimant resigned without raising a grievance (b) the claimant acted unreasonably by terminating his employment without raising such a grievance and (c) any compensatory award should therefore be reduced by 25%.
121. Having given the matter careful consideration, the Tribunal is satisfied as follows:- (a) the ACAS Code applies in this case, notwithstanding that it is a constructive dismissal case (b) the claimant raised grievances with the respondent on several occasions namely, during his telephone conversation with Mr John Adey on 10 December 2019, at the meeting on 13 December 2019, at the meeting on 2 January 2020 and in his letter of resignation dated 31 January 2020 (c) the respondent failed to address the claimant's grievance of 2/ 31 January 2019 (concerning the respondent's failure to reinstate rather than re- employ him as agreed at the meeting on 13 December 2019 and associated treatment) (d) such failure was unreasonable (e) it is just and equitable in all the circumstances to increase any compensatory award by 20% and (f) the respondent's application for a reduction in the compensatory award in respect of the claimants alleged failure to comply with the provisions of the ACAS Code should be rejected.
122. When reaching the above conclusions, the Tribunal has had regard in particular to the following matters:- (a) the ACAS Code

expressly applies to disciplinary and grievance procedures - with separate sections devoted to both procedures (b) "Grievances" are defined in the ACAS Code (paragraph 1) as " concerns, problems or complaints that employees raise with their employers" (c) there is no obligation for grievances initially to be raised in writing (albeit that the ACAS Code at paragraph 32 states that if the grievance cannot be resolved informally it should be raised formally with a manager in writing setting out the nature of the grievance) (c) on the facts, the claimant raised a grievance orally with Mr Jonathan Adey/ Mr Keeping on 2 January 2020 regarding the respondent's refusal to reinstate him as agreed on 13 December 2019 and in writing on 31 January 2020 (in the claimant's resignation) regarding the respondent's poor treatment of him (d) notwithstanding the concerns raised by the claimant on 2 January 2020 as subsequently confirmed in writing in the claimant's letter of resignation dated 31 January 2020, the respondent took no steps following the meeting on 2 January 2020 to deal with the grievance in accordance with the ACAS Code and did not respond to (or even acknowledge) the claimant's letter dated 31 January 2020. Further, the respondent did not subsequently invite the claimant to a formal meeting to discuss his grievance in accordance with the provisions at paragraph 33 onwards of the ACAS Code.

123. Such failures on the part of the respondent were both unreasonable and serious in all the circumstances of the case particularly in the light of the treatment of the claimant from 9 December 2019 onwards. In all the circumstances, the Tribunal is satisfied that it is just inequitable to increase any compensatory award by 20%.
124. When awarding this percentage increase the Tribunal has taken into account that the respondent is a relatively small organisation and does not have a discrete HR function. However, the respondent did take advice about the matter by the latest 2 January 2020 as Mr Jonathan Adey informed the claimant as such at the meeting on 2 January 2020.
125. In the light of the above, the respondent's application for a reduction in any compensatory award pursuant to the ACAS Code is rejected.

Contributory fault

126. Finally, as far as the constructive dismissal claim is concerned the Tribunal is required to consider whether there should be any reduction to any basic and/or compensatory award (pursuant to sections 122 (2) and / or 123 (6) of the Act by reason of the claimant's conduct.
127. In summary, the respondent contended that there should be a reduction of 100 per cent to any such awards by reason of the

claimant's conduct in respect of his conduct towards Mr Mason and /or in respect of the threatening and abusive Facebook messages.

128. In summary, the claimant contended that there should be no reduction to any such awards as there was no relevant conduct on the part of the claimant including as the Facebook messages did not contain any threats of violence (but rather intimated the claimant's decision to walk away from the situation in order to avoid any such issue arising).
129. The Tribunal has reminded itself that when considering whether to make any reductions for contributory fault it has to consider whether, on the balance probabilities, the respondent has established that the claimant was guilty of culpable or blameworthy conduct, whether such conduct contributed to his "dismissal" and further whether it is just and equitable to make any such reduction in respect of any such conduct
130. Having given the matter careful consideration, the Tribunal is not satisfied that the claimant's relationship with Mr Mason is relevant conduct for such purposes. When reaching this conclusion the Tribunal has taken into account in particular that the latest incident involving Mr Mason was resolved by the respondent on 31 October 2019 (largely in the claimant's favour) and that there was no evidence before the Tribunal of any ongoing issue involving Mr Mason/ that it played any part in the subsequent events leading to the claimant's resignation/ constructive dismissal.
131. As far as the Facebook messages are concerned, the Tribunal is not satisfied, viewed objectively, that they contained any threats of violence /aggression on the part of the claimant- rather, the claimant was explaining in such messages his mental health issues and his decision to walk away in order to avoid any such situation arising.
132. The Tribunal has however had regard to the contents of the claimant's Facebook messages and the disrespectful/ inappropriate manner in which he refers to senior members of the respondent including Mr John Adey, the founder of the business. Further, although the Tribunal recognises that the claimant intended the messages for people in whom he could trust/ his distress at the relevant time, they were made to his line manager/ a member of the Adey family and the claimant should reasonably have appreciated that they were likely to come into the possession of the respondent. The Tribunal is satisfied that this falls within the wide definition of culpable or blameworthy conduct. The Tribunal is further satisfied that :- (a) the Facebook messages contributed directly to the respondent's subsequent treatment of the claimant which resulted in his constructive dismissal and (b) that it is just and equitable to reduce both basic and compensatory awards to reflect such culpable/ blameworthy conduct.
133. Having given the matter careful consideration, the Tribunal is satisfied that it is appropriate to reduce any basic and compensatory

awards by 20% to reflect such conduct. When reaching this conclusion, the Tribunal has taken into account that the claimant was clearly distressed when he sent the Facebook messages and that his conduct should be considered in the context of the subsequent significant repeated repudiatory breaches of contract on the part of the respondent.

Wrongful dismissal

134. Finally, the Tribunal has considered the claimant's claim for breach of contract for notice (wrongful dismissal). This is a contractual test which requires the Tribunal to consider whether the respondent repudiated the claimant's contract of employment entitling him to accept such breaches and terminate his employment. For the reasons previously explained at length above, the Tribunal is satisfied that this is the case and the claimant was therefore wrongfully dismissed by the respondent and is entitled to damages for his period of notice.

Employment Judge Goraj
Date: 12 July 2021

Judgment and Reasons sent to the Parties: 20 July 2021

FOR THE TRIBUNAL OFFICE

Online publication of judgments and reasons

The Employment Tribunal (ET) is required to maintain a register of judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness