EMPLOYMENT TRIBUNALS

Claimant			**Respondent**
Mr Rasel Ali		**v**	Homes2Inspire Limited
Heard at:	Cambridge	**On**:	16 and 17 March 2020
		In Chambers:	18 March 2020

Before: Employment Judge Foxwell

Appearances
For the Claimant: Mr Hussain, Union Representative
For the Respondent: Mr I Lovejoy, Legal Executive

RESERVED JUDGMENT

The Claimant's claims of unfair and wrongful dismissal are not well-founded and are dismissed.

REASONS

Introduction

1. The Claimant, Mr Rasel Ali, was employed as a Support Worker in a children's and young persons' home in Bedford. His period of continuous employment began on 7 January 2008 and ended on 15 December 2017 when he resigned without notice. At the date of his resignation he was employed by Homes2Inspire Limited which is part of the Prospect Services Limited group.

2. Having gone through Acas Early Conciliation on 23 March 2018, the Claimant presented complaints of constructive unfair dismissal and for breach of contract as to notice to the Tribunal. He named Prospect Services Limited as the Respondent but on their application, Homes2Inspire Limited was substituted as the Respondent by Order of the Tribunal.

3. There has been a substantial delay in this case coming on for hearing due to judicial resource issues within the Employment Tribunal. I apologised to the parties for this. The matter has eventually come on for final hearing before me.

4. At the commencement of the Hearing, I explained that the test for constructive dismissal is a contractual one and confirmed that the Claimant relies on an alleged breach of the implied term of mutual trust and confidence. I clarified and confirmed with the Claimant's representative, Mr Hussain, that the factual allegations relied upon are as follows:

4.1 The Respondent unreasonably reinvestigating an issue already looked at;

4.2 The Respondent doing so because the Claimant had appealed;

4.3 The Respondent unreasonably refusing to deal with the new matter at an appeal hearing concerning the first matter;

4.4 The new matter had been, or should have been, looked into as part of the original investigation;

4.5 The invitation to a second disciplinary hearing did not specify a potential outcome which is said to be a breach of the ACAS Code of Practice;

4.6 The invitation did not include copies of all the documentary evidence relied on by the Respondent;

4.7 The Claimant was given insufficient notice of the second disciplinary hearing; and

4.8 The invitation said that existing disciplinary action would be taken into account within those proceedings (the Claimant had received a final written warning in the first disciplinary procedure).

5. The Claimant relies on these allegations as breaches of the implied term, both singly and cumulatively under the 'last straw' doctrine.

The hearing

6. I heard evidence and submissions over two days to decide the claim. I reserved my decision which I considered on the third allocated day.

7. I heard evidence from the Claimant, but he called no other witnesses. It is notable that his representative, Mr Hussain, did not give evidence and had not prepared a witness statement, despite having been present at some of the key events in this case.

8. The Respondent called four witnesses:

- John Parker - Mr Parker has been employed by the Respondent since 1999 and is currently Director of Children's Services. He heard the Claimant's appeal against a disciplinary sanction.

- Kathryn Keating – Ms Keating is employed by Prospect Services Limited as an HR Business Partner and has been since 2012. She was present at the first disciplinary hearing and at an appeal meeting.

- Kate Scoltock – Mrs Scoltock has been employed by the Respondent, and its predecessor since 2004 and is presently the Registered Manager of one of its homes. She investigated a second disciplinary allegation against the Claimant.

- Nadia Syed – Miss Syed has been employed by the Respondent as a Regional Operations Manager since 2017. Miss Syed conducted the second disciplinary hearing.

9. In addition to the evidence of these witnesses, I considered an unsigned witness statement from Mr Ken Farrimond, who was the disciplinary officer in the first disciplinary hearing. Sadly, Mr Farrimond has passed away. I was nevertheless asked by the Claimant to consider his statement; this had been disclosed to him by the Respondent but it had not put it in evidence as part of its case.

10. Additionally, I considered the documents to which I was taken in an agreed bundle and references to page numbers in these Reasons relate to that bundle.

11. Finally, I received closing submissions from both representatives. I am grateful to them for the care that they took in the presentation of their cases.

The Legal Framework

Constructive dismissal

12. An employee who claims to have been constructively dismissed must show that his employer acted in repudiatory breach of contract. Furthermore, he must show that he resigned in response to this breach and not for some other reason (although the breach need only be a reason and not the reason for his resignation). It is open to an employer to prove that the employee affirmed the contract despite the breach, perhaps by delay or taking some other step to confirm the contract.

13. In this case, as noted above, the Claimant relies on an alleged breach of the implied term of trust and confidence. A breach of this term occurs where an employer conducts itself without reasonable cause in a manner calculated, or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (see *Mahmud v BCCI [1997] IRLR 462*). A breach of this implied term is likely to be repudiatory.

14. The Claimant's claim that his employer acted in breach of the implied term of trust and confidence is also based on the *'last straw doctrine'* (the name of which is derived from the old saying *"the last straw that broke the camel's back"*). This doctrine provides that a series of acts by the employer can amount

cumulatively to a breach of the implied term of trust and confidence even though each act when looked at individually might not have been serious enough to constitute a repudiatory breach of contract. Inherent in the concept of a last straw is that there was one final act which led to the dismissal (*'the last straw'*) and the nature of this was considered in *London Borough of Waltham Forest v Omilaju [2005] IRLR 35* where the Court of Appeal held that the last straw need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of trust and confidence. If the act relied on as the final straw is entirely innocuous however then it is insufficient to activate earlier acts which may have been, or may have contributed to a repudiatory breach.

15. The question whether a repudiatory breach of contract has occurred must be judged objectively (*Buckland v Bournemouth University Higher Education Corporation [2010] ICR 908*); this requires the Tribunal to assess whether a breach of contract has occurred on the evidence before it. Neither the fact that an employee reasonably believes there to have been a breach nor that the employer believes it acted reasonably in the circumstances is determinative of this: the test is not one of 'reasonableness' but simply of whether a breach has occurred. Of course, where parties are acting reasonably it is less likely that there will have been a breach of contract when judged objectively but this is not necessarily so.

16. The Court of Appeal considered the characteristics of a repudiatory breach of contract in the case of *Tullett Prebon plc & ors v BGC Brokers LP & ors* [2011] IRLR 420. Maurice Kay LJ, who delivered the leading judgment, held as follows at paragraphs 19 and 20:

> *"The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693, at page 698F, per Lord Denning MR, who added:*
>
> > *"The circumstances … are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not" (ibid).*
>
> *In other words, it is a highly context-specific question. It also falls to be analysed by reference to a legal matrix which, as I shall shortly demonstrate, is less rigid than the one for which Mr Hochhauser contends. At this stage, I simply refer to the words of Etherton LJ in the recent case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 (at paragraph 61):*
>
> > *"… the legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."*

17. I have taken this guidance into account when determining the Claimant's claim of constructive dismissal. I have reminded myself too that a breach of contract cannot be 'cured' by subsequent reasonable behaviour on the part of an employer: the right of an employee to resign in response to a repudiatory breach only ends when he has acted in a way which affirms the contract despite the breach (for example by delay). I have also noted the guidance on this topic in the decision in *Assamoi v Spirit Pub Company (Services) Ltd [2011] UKEAT 50*, which provides that there is a distinction between steps taken to prevent a matter escalating to a breach of the implied term of mutual trust and confidence and attempting to cure a breach which has already occurred.

18. The Claimant's claim turns, therefore, on the following basic questions:

18.1 When judged objectively, did the Respondent act in repudiatory breach of contract?

18.2 Did the Claimant resign because of this breach (the breach need only be a reason for his resignation)?

18.3 At the time of his resignation had the Claimant lost the right to resign for this breach because of his earlier affirmation of the contract?

Unfair dismissal

19. Consideration of unfair dismissal arises only if the Claimant establishes that he was dismissed within the definition in section 95 of the Employment Rights Act 1996. "*Dismissal*" includes constructive dismissal.

20. If an employee has been dismissed it is for the employer to establish the reason for dismissal and that it is a potentially fair reason within the categories set out in section 98 of the Employment Rights Act 1996. In this case the Respondent does not advance a potentially fair reason for dismissal and concedes that any dismissal established will have been unfair within the provisions in Part X of the 1996 Act.

21. The Respondent nevertheless argues that the Claimant contributed to any such dismissal by his own conduct and seeks a substantial reduction of any compensatory award for unfair dismissal on that basis (see section 123(6) of the 1996 Act). The Claimant's conduct in this regard need not be the sole, principal or even the main cause of his dismissal but it must be culpable or blameworthy. The Tribunal may take a very broad view of the relevant circumstances when determining the extent of contributory fault.

Notice pay

22. The Claimant's claim for notice pay is contingent upon him establishing a repudiatory breach of contract by the Respondent. It turns, therefore, on the same facts.

Findings of Fact

23. I make the following findings on the balance of probabilities.

24. The Claimant was on duty at the children and young persons' home in Bedford where he worked on the night of 23 September 2017, when he was involved in an incident with a colleague, M and two young women in care who I shall refer to simply as X and Y. It is agreed that X and Y were vulnerable.

25. X and Y had been drinking and M became involved in an altercation with them in the early hours of the morning. The Claimant, who was sleeping-in at the home that night, attended to support him. During this altercation X and Y goaded M about his size and racially abused the Claimant who is of Asian heritage. The young women threw tinned tomatoes they were cooking over M and one sprayed an aerosol in the Claimant's face. The police were called.

26. It is an agreed fact that the Claimant called X a *"slut"* during this incident.

27. Following the incident, M and the Claimant were each required to complete an incident report and they both did so. Neither referred to the Claimant calling X a *"slut"* in their reports.

28. The provision of care to children and young people is regulated and overseen by public authorities. Providers, such as the Respondent, have a duty to refer incidents to the Local Authority Designated Officer, or "LADO". The Respondent's witnesses told me, and I accept, that workers in this field are expected to provide a full and accurate account of incidents. They also said, and I accept, that workers are given training on how to complete incident reports as part of their induction.

29. Although the Claimant had been employed for some years in this sector, he had received refresher induction training following a return to work in late 2016 after a period of suspension, (the reason for which has no bearing on this claim).

30. X subsequently complained about the Claimant calling her a *"slut"* and as a result, on 27 September 2017, Ken Farrimond, the Regional Manager, instructed Jo Webb, a Registered Manager, to begin a disciplinary investigation.

31. Ms Webb interviewed X, the Claimant and M on or about 28 September 2017 as part of her investigation. The Claimant made a full and frank admission that he had called X a *"slut"* in his interview but referred to the provocation he had faced including racial abuse and a perfume aerosol being sprayed into his face.

32. Ms Webb completed her report into the incident by 4 October 2017. She recommended disciplinary action against the Claimant and further training for him and M. She also recommended that the Home Manager address racism with staff and young people in the home.

33. Mr Farrimond wrote to the Claimant on Wednesday, 4 October 2017, inviting him to a disciplinary hearing on Friday, 6 October 2017. The charge was that the Claimant had verbally abused a young person in the incident on 23 September 2017. A copy of the investigation report was enclosed.

34. The disciplinary hearing took place on 6 October 2017 as planned. The Claimant was accompanied by Mr Hussain who has represented him in these proceedings. Ms Keating was present as a note taker and to provide HR advice.

35. The Claimant admitted calling X a *"slut"* in this meeting but relied on the provocation he had faced in mitigation.

36. An issue between the parties is whether the content of the Claimant's incident report (in contrast to Miss Webb's investigation report) was considered in the disciplinary hearing. Mr Hussain suggested that the incident report was considered through his questions to the Respondent's witnesses. With Mr Farrimond's death, however, and the fact that Mr Hussain did not give evidence, the only direct accounts I had of the meeting were from the Claimant and Ms Keating. Somewhat surprisingly, the Claimant was uncertain in his evidence about whether the incident reports were referred to. Mr Hussain put in cross examination, that a passage in the minutes of this meeting (page 75) showed that the Claimant's and M's incident reports had been produced but Ms Keating was clear in her evidence that this concerned copies of notes of interviews conducted by Ms Webb as part of her investigation and not the incident reports. Ms Keating explained in her evidence that she was not familiar with the Respondent's reports as she works in another part of the group. She nevertheless maintained that incident reports were not discussed at the disciplinary meeting.

37. I find on the balance of probabilities that Ms Webb looked at the incident reports as part of her investigation as she referred to them in her interviews with the Claimant and M (pages 62 and 64). I find it probable that, given his position within the Respondent, Mr Farrimond knew that the Claimant would have completed an incident report. I shall deal with the question whether this report was produced in the disciplinary hearing in my analysis and conclusions but I note at this juncture that Mr Farrimond said in the meeting that he would consider the allegation of verbal abuse only and this suggests to me that he was aware of the second disciplinary issue which subsequently arose at the appeal.

38. Mr Farrimond found the allegation of using abusive language to X proved based on the Claimant's admission. He decided to give the Claimant a final written warning and confirmed this outcome in a letter dated 10 October 2017, which also informed the Claimant of his right to appeal.

39. The Claimant felt that Mr Farrimond had taken insufficient account of the provocation he had been subjected to and, had this been done, he might not have faced disciplinary action at all. He considered the outcome to be harsh in any event.

40. Mr Hussain did not identify these matters as part of a repudiatory breach of contract but I have nevertheless considered whether taking disciplinary action in these circumstances was so disproportionate as to be a repudiatory breach of contract in its own right or part of one. I am satisfied by the Respondent's evidence that it was not. The young people for whom the Respondent cares are often challenging but remain vulnerable. Some have suffered mental or physical abuse before coming into care. Because of this, workers are expected to be resilient and professional whatever the provocation they face and it is recognised

that, when incidents occur, young people often pick on obvious differences such as size or race. Workers are expected to have regard to the vulnerability of those in their care and not to do anything to add to it; calling a person a *'slut'* is intended to harm self-esteem. Accordingly, while the penalty was a harsh one in my judgment, I do not find on the evidence that it was so disproportionate as to amount to a repudiatory breach of contract or part of one, particularly having regard to the Claimant's long experience in this field.

41. The Claimant appealed against Mr Farrimond's decision by letter dated 11 October 2017. Mr Parker was the appeals officer. He acknowledged the Claimant's appeal on 20 October 2017 and invited him to an appeal meeting on 2 November 2017. The Claimant attended the meeting with Mr Hussain and Mr Parker was accompanied by Ms Keating. Minutes are at pages 85 – 86 and the Claimant's amendments to these are at pages 109 – 113. The Respondent's minutes were prepared by Ms Keating within a short while of the meeting from handwritten notes which had not been disclosed before but which she produced at this hearing and which the Claimant and Mr Hussain had an opportunity to consider.

42. Mr Hussain had prepared a written statement on behalf of the Claimant which he presented at the beginning of the appeal (pages 81 – 84). He argued that the outcome of the disciplinary hearing had been too harsh, took insufficient account of the provocation the Claimant had faced and of the openness and honesty of his response to the disciplinary investigation.

43. The Respondent's minutes suggest that, after Mr Hussain had presented this statement, Mr Parker said that, while he accepted that the level of provocation was a mitigating factor, he was concerned about the omission from the incident report and that this brought into question the Claimant's honesty and integrity. Mr Hussain's response was that no one was obliged to admit misconduct. In answer to a question from Mr Parker, however, the Claimant confirmed that the incident report should have stated exactly what happened at the time.

44. The Claimant's proposed amendment to the minutes changes the sense of key paragraphs completely. He says that it should have included the following passage, acknowledging expressly that the incident report has been referred to in the disciplinary hearing before Mr Farrimond:

> "*Disciplinary Appeal Meeting on 2.11.17*
>
> **2 – SH* [Mr Hussain] *stated that they had seen the incident report as it was provided at the Disciplinary on 6.10.17. JP* [Mr Parker] *asked if SH and RA* [the Claimant] *had read it and if we were happy to refer to it. SH confirmed that was fine".*

45. The Respondent's minutes record Mr Parker as saying that the Claimant's omission from the investigation report raised serious concerns which could not be ignored and could lead to a separate investigation. Mr Hussain is recorded as saying that this would be *"grossly unfair"* and that the issue had not formed part

of the original hearing. The Claimant's amended version of this passage reads as follows,

> *"*3 – SH stated that there cannot be a separate investigation and that this is only happening because* [the Claimant] *has dared to appeal, which is his right. This is only being done because he has asserted his right of appeal under the Acas Code of Practice.*
>
> *JP stated this would be investigated separately.*
>
> *SH said that was grossly unfair and RA is now suffering a detriment because he appealed. SH also stated that the incident report was part of the original disciplinary and both KK* [Ms Keating] *and KF* [Mr Farrimond] *had access to it but did not mention this because it was not a real issue. KK then asked whether SH accepted that RA's incident report / summary was not part of the disciplinary pack.*
>
> *SH said it was not part of the pack issued but was part of the disciplinary meeting as it was given at the beginning of the meeting and both parties then reviewed it. If there was an issue, KK and KF should have raised it then. They didn't because there was no real issue – this is only happening because RA has dared to appeal.*
>
> *KK stated, ok, but you accept it was not part of the original pack?*
>
> *SH said it wasn't part of the pack, but it was part of the disciplinary hearing".*

46. Other amendments proposed by the Claimant were consistent with his case that the incident reports had been considered by Mr Farrimond at the disciplinary hearing. I note that one proposed amendment read as follows,

> *"*6 – SH said that they are acting in a way to destroy the trust between RA and yourselves and if this proceeds, we will take this case to an Employment Tribunal."*

47. I have had to decide which version of the minutes is more likely to be accurate while bearing in mind that minutes provide no more than a gist or summary of a meeting. It is nevertheless common ground that, when Mr Parker raised the matter of the omission from the incident report at the appeal, Mr Hussain asked him to deal with it there and then, but that Mr Parker declined to do so. Mr Parker's explanation for this was that the new matter concerned not only the Claimant but also M who had omitted any reference to the word *"slut"* too. I was told, and accept, that M was the subject of a disciplinary process in respect of this aspect of the incident at the same time as the Claimant.

48. Following the appeal hearing, Mr Parker emailed Mr Farrimond, copying in Ms Keating and Ms Webb, to inform him of his decision to dismiss the appeal, but also raising his concern about the Claimant's and M's omission from the incident reports; he said as follows,

> *"However, something more concerning has arisen from the appeal is that it appears that neither the incident report from* [M] *or* [the *Claimant*] *was considered as evidence in the fact-finding investigation.*
>
> *The concern around this non-inclusion is immediately apparent on review, is that although* [M] *and* [the Claimant] *highlight in detail in their interviews with Jo Webb that inappropriate and unprofessional language was used towards this young person there is no mention of it in their formal incident and behavioural management reports which both completed on 24 September.*
>
> *This clearly would question their integrity into sharing the comments made and recording on this document accurately it would also question whether it wasn't included deliberately to prevent any further investigation, it appears if it hadn't been for the young person making the allegation we would not be aware of these comments made.*
>
> *Therefore, there will need to be a second investigation into why both* [M] *and* [the Claimant] *excluded these significant points from their incident reports.*
>
> *There is also a question why this was not picked up in the fact finding or in the disciplinary hearing?"*

49. Mr Farrimond acknowledged the email and said that he was happy for there to be a further investigation.

50. Mrs Scoltock was appointed to investigate the new allegation and she met the Claimant to discuss it on 13 November 2017. Minutes of this are at pages 90 – 91. The Claimant did not dispute the omission (it was beyond dispute) but explained that he had been very tired at the time having been on shift for 20 hours and had been subjected to racial and physical abuse. He also referred to the fact that he had admitted using the word *"slut"* as soon as it was put to him.

51. While I have not been shown a written invitation to the meeting with Mrs Scoltock, this invitation must have been given to the Claimant either in writing or verbally prior to their meeting on 13 November 2017.

52. On 22 November 2017, Mr Parker wrote to the Claimant to say that his appeal against the disciplinary sanction had been unsuccessful.

53. Mrs Scoltock did not produce a formal investigation report, as her investigation simply comprised her interview with the Claimant and a telephone interview with one other worker present on 23 September 2017. She passed her materials onto Nadia Sayed who had been appointed as the disciplinary officer by Mr Parker.

54. Ms Sayed wrote to the Claimant on Wednesday, 13 December 2017 inviting him to a disciplinary hearing fixed for Monday ,18 December 2017. The Claimant's evidence, which I accept, is that he did not receive this letter until the

afternoon of Friday, 15 December 2017. He relies on this letter as the 'last straw' in his complaint of constructive dismissal.

55. Ms Syed said this in her letter,

> *"The hearing will be to consider the allegation of failing to accurately record an incident on home documents. It will also take into account previous disciplinary action".*

56. Ms Syed included copies of Mrs Scoltock's notes of interview with the Claimant and the other support worker (not M) as well as a copy of the disciplinary procedure (which was that of the Respondent's parent company). She then continued as follows in her letter,

> *"The incident report will also be referred to during the meeting, this will be shared with you during the meeting. We will adjourn for a reasonable time in order for you to review the minutes prior to re-convening the Hearing."*

57. The Claimant submitted his resignation without notice by email that evening, Friday, 15 December 2017. He also sent this letter by post. He said as follows,

> *"I am writing to inform you of my resignation, with immediate effect. Having received and read the disciplinary invitation today, for the meeting on Monday 18 December 2017, it is clear to me that Homes2Inspire is acting in a way to destroy the mutual trust and confidence of our employment relationship. As well as not getting a fair hearing, I am being punished for something that the company has already dealt with. In fact, it is because I dared to appeal the previous disciplinary decision.*
>
> *The way the company is acting, it is clear that it is a repudiatory breach of my contract and I can no longer trust that the company will act fairly or reasonably with me. If it was going to be fair, it would not use a disciplinary appeal meeting as the basis to form new charges of a case that has already been dealt with; one where the company was aware of all the relevant facts at the initial disciplinary meeting. The company has constructively dismissed me by its actions, which were compounded by me receiving the disciplinary letter today, with the meeting scheduled for Monday.*
>
> *Additionally, the invitation mentions that relevant evidence has not been disclosed to me in advance and that it would be given to me at the Hearing to review. This is a a further example of the company acting in a way to frustrate the contract of employment and treating me unfairly, contrary to the implied duty of good faith. I have no choice but to resign immediately and take my case to an Employment Tribunal.*
>
> *Please arrange to pay me any outstanding holiday pay owed to me as soon as possible."*

58. The Claimant did not attend the disciplinary hearing on 18 December 2017, and Ms Sayed proceeded in his absence. She was aware that he had resigned. In a letter dated 20 December 2017, Ms Sayed told the Claimant that, having reviewed the evidence, she had decided to take no further action. I was told, and accept, that there was a similar outcome in M's case, although Ms Sayed did not deal with this.

59. Karen Heir, an HR officer, responded to the Claimant's letter of resignation by letter dated 2 January 2018. She said as follows,

> *"We deny breaching your contract of employment. In a regulated environment we are required to check that all appropriate records are created and that they are completed to a high standard. No decision had been taken in advance as to what the outcome of the new disciplinary hearing would be, we simply asked you to respond to the issue of whether the incident reports were completed to the necessary standard."*

60. The Claimant emailed Ms Heir on 15 January 2018, challenging aspects of her correspondence and requesting the minutes of the disciplinary and appeal meetings held in October and November 2017 respectively. These minutes were not provided at the time. One passage in the Claimant's email is notable,

> *"The second letter I would like to respond to is one from Karen Heir dated 02.01.18. Karen mentions that the matter of the incident reports was not dealt with at the original disciplinary and that whether the company had knowledge of it at the time of the original disciplinary is not the issue. I disagree with this as the reports were part of the case against me and as a minimum, the Investigation Manager, Kath Keating (HRBP), Ken Farrimond (Hearing Manager) and anyone else who reviewed the paperwork and made the decision to discipline me had this knowledge. My Trade Union Rep (Saqib Husain* (sic)*), who was with me at both the original disciplinary and the appeal is witness to the fact that the incident reports were part of the original disciplinary. He is prepared to attend the Employment Tribunal as a witness to confirm this."*

61. As stated previously, Mr Hussain has not provided a witness statement nor given evidence at this hearing, nevertheless, this passage is consistent with the Claimant's case that the incident reports were dealt with in the original disciplinary hearing.

Findings of fact and submissions relating to remedy

62. Following the Claimant's resignation, he had a period of unemployment before taking a job with the Prison Service on 26 March 2018. His period of unemployment lasted 14 weeks. His new job was as well paid as that with the Respondent, therefore his loss of earnings ended then.

63. In September 2018, the Claimant left the Prison Service to become a self-employed taxi driver and this is his current occupation.

64. The Claimant has claimed a basic award for unfair dismissal, compensation of 14 weeks' net pay (which will be subject to recoupment) and £500 for loss of statutory rights in his complaint of unfair dismissal. He has a claim for 9 weeks' statutory minimum notice but this is co-extensive with and not in addition to his claim for loss of earnings.

65. It is agreed that the Claimant's gross weekly pay with the Respondent was £442.21 and his net weekly pay £375.53. Subject to arguments about contributory fault, the quantum of the basic award is agreed at £3,979.89 and loss of earnings at £5,257.48. The claim for loss of statutory rights is disputed on the basis that, by choosing to become self-employed, the Claimant has elected not to acquire the rights compensated for by the award of a conventional sum under this head.

66. Mr Hussain argued on behalf of the Claimant that the Respondent failed to comply with paragraph 9 of the ACAS Code of Practice by not including as enclosures to Ms Sayed's letter of 13 December 2017 all the evidence relied on, in that copies of the incident reports had not been provided, and by not specifying possible outcomes of the disciplinary process. He also argued that there had been a breach of ACAS Guidance as the appeal had been used as an opportunity to increase a penalty. Mr Lovejoy disputed this and argued on behalf of the Respondent that the Claimant had failed to comply with the Code of Practice by not attending the disciplinary hearing. On these bases they respectively asked for a 25% increase or reduction of any compensation awarded.

Analysis and Conclusions on liability

67. A key factual dispute concerns whether, and the extent to which the incident reports were dealt with or even referred to at the disciplinary hearing. My assessment of this is hampered by the sad demise of Mr Farrimond, Ms Keating's unfamiliarity with incident reports and the Claimant's decision not to call Mr Hussain as a witness. Nevertheless, piecing the evidence together as best I can, I make the following findings on this factual issue:

67.1 Ms Webb looked at the incident reports;

67.2 Having regard to his role as Regional Operations Manager, I find that Mr Farrimond was aware that there would be incident reports produced by the Claimant and M and that he probably looked at them before the disciplinary hearing;

67.3 I also find it more likely than not that they were produced in the disciplinary meeting of 6 October 2017, perhaps with other documents, but that Ms Keating did not realise they were something different from the investigation report;

67.4 I find it probable that Mr Farrimond was aware of the omission in the incident reports but decided to turn a 'blind eye' to this. I base this on his comment after extra documents, which I find included the incident reports, were fetched during the meeting. The minutes say,

"KF reopened the hearing by explaining that he would only be considering the verbal abuse allegation". This part of the minutes was unchallenged and the inference is that there was something else that could have been considered – which I find to be the omission from the incident report – but was not;

67.5 I find that Ms Keating, the note taker, would not have understood the significance of this comment, namely that Mr Farrimond was going to turn a 'blind eye' to this aspect of the Claimant's conduct, but that the Claimant did.

67.6 I do not find that Mr Farrimond dealt with the issue of the omission from the incident reports. As noted above, he stated expressly to the Claimant that he was dealing simply with what he had said to X on 23 September 2017.

67.7 For these reasons, there was nothing in the record of the disciplinary hearing to suggest that the omission from the incident report had been raised or addressed.

68. I find that in these circumstances it was reasonable for Mr Parker to conclude on appeal that the matter of omissions from the incident reports had not been addressed. The Claimant is probably right when he says that this issue is unlikely to have been pursued as a disciplinary matter had he not appealed but that does not mean that this was done because he appealed, rather it was pursued because it did not appear to have been dealt with before. Mr Farrimond had stated expressly in the disciplinary hearing that he was dealing with the *"slut"* comment only and Mr Parker's subsequent email to him shows that he was unhappy that the incident reports had not been considered. Mr Farrimond did not reply to Mr Parker saying that they had been considered.

69. I find more generally that it was necessary to deal with all aspects of a potential disciplinary situation in a regulated environment such as a children and young persons' home. There may have been an innocent explanation for the omission from the incident report but it was also possible that the Claimant and/or M had supressed this information in the hope of avoiding any investigation of their conduct at all.

70. A second conflict in the evidence I must address is which version of the minutes of the appeal is the more accurate and, based on this, whether it was the case that the Claimant said then that the matter of the omission from the incident report had been considered and dealt with by Mr Farrimond.

71. I do not accept the Claimant's case on this for the following reasons:

71.1 Ms Keating prepared minutes of both meetings shortly after they had taken place. In contrast, the Claimant's amendments were not made until June 2018, 8 months or so after the event and following disclosure as part of this litigation.

71.2 I think it unlikely that the reference to potential Employment Tribunal proceedings in the proposed amendment would have gone unminuted by the Respondent had it been said at the time.

71.3 Mr Parker's email to Mr Farrimond immediately following the appeal meeting is predicated on the matter of the incident reports not having been dealt with at the disciplinary hearing which is inconsistent with the Claimant's case that Mr Hussain stated expressly that they had.

72. I do not think that the Claimant's amendments were proposed in bad faith, rather I find that they reflect an elision in the Claimant's and Mr Hussain's recollection of what was said in the meetings and what was said in the Tribunal proceedings subsequently.

73. I turn then to the critical question, whether judged objectively this sequence of events amounted to a repudiatory breach of contract?

74. I find that Mr Parker instigated an investigation into the omission in the incident report on appeal because there was nothing to show that it had been investigated and dealt with before. I accept the Respondent's case that the omission from the incident report is a separate matter to the event itself, albeit that they arise from the same incident. I also accept the Respondent's case that the omission was significant because it might serve to supress information giving rise to a risk of harm to a vulnerable person. I find that in a regulated environment the Respondent is obliged to demonstrate that it has addressed issues such as this correctly. For these reasons, while I understand the Claimant's sense of having been placed at double jeopardy by Mr Parker's decision and that this may have affected his confidence in the Respondent, I reject his case that this was treatment without cause.

75. I concur with the Claimant's view that the omission should have been dealt with in the original disciplinary investigation, but the evidence shows that it was not and this became apparent on appeal. I find that the Claimant knew it had not been dealt with previously because Mr Farrimond had said as much.

76. It is an agreed fact that Mr Parker refused to deal with the new issue at the appeal. This may also have served to dent the Claimant's confidence in the Respondent but it was treatment with cause. The new disciplinary issue had not been investigated in accordance with the Respondent's disciplinary procedure and it affected M as well as the Claimant. I do not find that this decision is a component of a repudiatory breach of contract.

77. For these reasons, I do not find the issues at paragraphs 4.1 to 4.4 are established as components of a repudiatory breach of contract.

78. If I am wrong in this, I would nevertheless find that the Claimant affirmed the contract despite these matters by delay and by his participation in the second disciplinary investigation. He was aware of Mr Parker's intention to pursue a second disciplinary investigation at the beginning of November 2017 and he was invited to and attended the investigatory meeting which happened on 13

November 2017, but he did not resign until over a month later. In the circumstances of this case, judged objectively that is sufficient to indicate affirmation despite any potential breach.

79. The Claimant's remaining allegations at paragraphs 4.5 to 4.8 focus on the terms of Ms Syed's letter of 13 December 2017 and the time when it was received.

80. While there is no direct evidence about when the letter of 13 December 2017 was sent, the reasonable inference is that it was sent that day and that there was an expectation of it being delivered the next. For some reason it was delayed in the post.

81. I do not find that the time of the Claimant's receipt of the letter was a component of a repudiatory breach of contract. The letter appeared to give the same or more notice than the original disciplinary hearing in October 2017 (letter dated 4 October 2017 delivered by hand for a meeting on 6 October 2017) and it was open to the Claimant to request a postponement in any case if he had had insufficient notice of the hearing.

82. I do not find that the letter was defective in not including copies of the relevant incident reports. The ACAS Code of Practice simply requires that evidence is made available to an employee and does not prescribe how or when this is done. Ms Syed explained in her letter that the Claimant would be given access to the reports and I accept her evidence that there were data protection reasons for not simply sending these in the post. In any event, the Claimant knew the allegation concerned what was missing from these reports, which was admitted, and not their contents.

83. For these reasons these aspects of the Claimant's complaints, paragraphs 4.6 and 4.7, fail as components of a repudiatory breach of contract.

84. I have been concerned by the ambiguity of the sentence in Ms Syed's letter which reads,

> *"* [The Disciplinary Hearing] *will also take into account previous disciplinary action."*

85. I accept that her intention was to reassure the Claimant that the fact this was a matter linked to something for which he had already been disciplined would be considered favourably. Unfortunately, given the Claimant had received a final written warning, the sentence could be construed in entirely the opposite way, namely that a further disciplinary finding would lead to dismissal. I find that this is how the Claimant construed the letter and his conclusion was reinforced by the absence of any indication in it of likely outcomes of the disciplinary process.

86. While I acknowledge that it was concerning for the Claimant, when judged objectively, I do not find that these aspects of the Respondent's conduct were sufficient to constitute a repudiatory breach of contract. For example, it was consistent with the Respondent's disciplinary procedure to state that previous disciplinary action would be taken into account.

87. The Respondent was in breach of paragraph 9 of the ACAS Code of Practice, in that Ms Syed did not identify the range of possible sanctions in her invitation to the disciplinary hearing; but not every breach of the Code is repudiatory and, judged objectively, I do not find this one aspect is sufficient to amount to a repudiatory breach.

88. I find that there was sufficient wrong with Ms Syed's letter for it to be a *"last straw"* if other aspects of the Claimant's claim had succeeded but, when judged objectively, it was not sufficient to amount to a repudiatory breach of contract in its own right. The Claimant's concerns were of a type which could have been addressed simply by requesting extra time or clarification and, as such, do not have the character of conduct designed to or having the effect of undermining the contractual relationship in a fundamental way.

89. For these reasons, I do not find that the Claimant has established a repudiatory breach of contract and therefore the complaints of constructive unfair dismissal and breach of contract as to notice are dismissed.

Provisional conclusions on remedy

90. As I received evidence on Remedy, I make the following findings in that regard. They are predicated on findings of wrongful and unfair dismissal which I did not make.

91. Having regard to the facts of this case, I would not have found it to be in the interests of justice to increase or decrease the award for non-compliance with the ACAS Code of Practice. Both sides failed to comply fully with the Code (the Claimant by not attending the disciplinary hearing). Failure to comply with an ACAS Guide does not lead to any additional or reduced award.

92. I would have awarded the Claimant 9 weeks' notice pay and credit would have had to be given for this against the compensatory award for unfair dismissal.

93. I find that the Claimant contributed to his dismissal by his own culpable conduct. The reason arose from his admitted omission from the incident report. In this case the level of contribution is high in my judgment and I place it at 60%. I find it just and equitable to reduce the basic award to reflect this conduct to the same extent as the compensatory award.

94. I agree with Mr Lovejoy's submission that it would not be appropriate to make an award for loss of statutory rights in this case. The Claimant suffered such a loss when he was dismissed but this was extinguished when he chose to embark on self-employment for reasons unconnected with his dismissal.

95. In short, therefore, I would have awarded the Claimant his notice pay and 40% of a basic award for unfair dismissal but nothing by way of a compensatory award for unfair dismissal once contributory fault was accounted for and credit given for notice pay received.

96. The judgment of the Tribunal, however, is that the claim fails on the facts and is dismissed.

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Employment Judge Foxwell

Date: 9 April 2020

Sent to the parties on: 30/7/20..

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For the Tribunal Office