



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Lowe

**Respondent:** WM Morrison Supermarkets Limited

**Heard at:** Liverpool ET (via CVP)

**On:** 10,11 November 2022  
and 6 January 2023

**Before:** Employment Judge McCarthy

## Representation

Claimant: In Person

Respondent: Mr Liberadzki, Counsel

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

The complaint of unfair dismissal is not well-founded and is dismissed.

# REASONS

## Introduction

1. By a claim form presented on 27 June 2022 (having entered early conciliation on 9 June 2022 and received a certificate against the respondent dated 13 June 2022), the claimant complained that he had been unfairly dismissed (by way of a “constructive dismissal”). He complained that he had been unfairly dismissed by the respondent from his post of Store Manager when his resignation took effect on 12 May 2022. A cumulative breach of the implied term of trust and confidence was identified.
2. By a response form (including grounds of resistance) dated 1 August 2022 the respondent resisted the complaint. It denied that there had been any fundamental breach of contract which had entitled the claimant to resign. There had been no dismissal and the reason the claimant had resigned was to take up a new role at another supermarket chain.

## Complaints and Issues

3. At the outset of the hearing, the claims and issues were discussed and agreed with the parties.
4. The claimant confirmed that the only claim he was bringing was unfair constructive dismissal, within the meaning of sections 95(1)(c) and 98 of the Employment Rights Act 1996 (ERA), in contravention of section 94 of the ERA.
5. The complaint of unfair dismissal stands or falls with the question of whether or not the claimant was constructively dismissed. If he was, the dismissal was unfair. At the start of the hearing, the respondent's representative, Mr Liberadzki, indicated that he would not seek to advance a potentially fair reason for dismissal. Although there were Polkey issues which the respondent would seek to advance if remedy was appropriate.
6. It is the claimant's case that the respondent breached one term of the contract, which is commonly referred to as "the implied term of trust and confidence". The claimant alleged a series of acts on the part of the respondent which he claimed cumulatively amounted to a breach of his contract of employment. He did not argue that each of the acts were individual and separate acts of breach of contract.
7. Although the **Polkey** issues concerned remedy and would only arise if the claimant's complaint of unfair dismissal succeeded, I agreed with the claimant and Mr Liberadzki that I would consider them at this stage and invited them both to deal with these issues in evidence and submissions.

### *Unfair constructive dismissal*

8. What I have to decide is:
  - 8.1 Was the claimant dismissed?
    - 8.1.1 Did the respondent do the following things?
      - 8.1.1.1 From that date forward (i.e. 13 May 2021) the claimant was bullied and gaslighted into believing his performance could and should be better, yet none of his reviews, nor his stores performance was out of the ordinary and he was disliked from the meeting on 13 May 2021. This resulted in the claimant having two anxiety attacks and going off on sick leave for the first time in 15 years.
      - 8.1.1.2 The claimant's welfare meetings were dealt with appallingly throughout the situation, only one of which was held with a regional manager and ultimately no support was apparent.
      - 8.1.1.3 For three weeks, the claimant did not receive any response (other than it would be investigated) to the formal complaint he submitted on 23 March 2022 to the Respondent's CEO and People Lead. He chose to resign from his position given the fact that his need for support and intervention since being on sick and that of his formal complaint had seen nothing what so ever improve or change. There was no response to his

formal complaint in three weeks and his formal complaint did not lead to any change. The claimant identified this as the “last straw”.

For clarity, it was agreed that the “last straw” was how the claimant’s formal complaint was dealt with after its submission, i.e. that the claimant had received no response to his grievance in three weeks and nothing had changed.

- 8.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
  - 8.1.2.1 Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
  - 8.1.2.2 Whether it had reasonable and proper cause for doing so.
- 8.1.3 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant’s resignation.
- 8.1.4 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant’s words or actions showed that they chose to keep the contract alive even after the breach.

*Remedy*

- 8.2 In the event of a finding of unfair dismissal:
  - 8.2.1 Does the claimant wish to be reinstated to their previous employment?
  - 8.2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
  - 8.2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
  - 8.3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
  - 8.3.5 What should the terms of the re-engagement order be?
  - 8.3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
    - 1. What financial losses has the dismissal caused the claimant?

2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

- 8.3.7 If not, for what period of loss should the claimant be compensated?
- 8.3.8 is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- 8.3.9 If so, should the claimant's compensation and any basic award payable to the claimant be reduced? By how much?
- 8.3.10 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 8.3.11 Did the respondent or the claimant unreasonably fail to comply with it?
- 8.3.12 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- 8.3.13 Does the statutory cap of fifty-two weeks' pay or £93,878 apply?
- 8.3.14 What basic award is payable to the claimant, if any?

### **Preliminary Issues**

9. Once the issues had been discussed and clarified, I had to deal with two preliminary issues regarding specific disclosure.

#### *Respondent's application for specific disclosure*

- 10. The first related to an application for specific disclosure from the respondent. On 13 October 2022 the respondent had made an application to the Tribunal for specific disclosure which had not been determined or resolved by the first day of the hearing. The application concerned disclosure of the following documents:- 1) interview arrangements for the claimant's current role; 2) Job offer and when issues for the claimant's role 3) employment contract for the claimant's role. At the hearing the respondent also applied for disclosure of the claimant's application for his current role and when the claimant had made his application.
- 11. The respondent considered that these documents were relevant to the claimant's case and disclosable as they were relevant to issue 8.1.3 (whether the alleged breach of contract was a reason for the claimant's resignation). The claimant had commenced his current role the day after his employment with the respondent had ended (having provided his contractual notice). The respondent considered that the claimant was not relying on the alleged repudiatory breach but was waiting for his new role to be offered to him before he resigned. The claimant confirmed he had one of the documents immediately available but said he did not have some of the documents and that he would have to ask his current employer for a copy of his contract of employment.
- 12. For the reasons I gave at the hearing, having regard to the overriding objective, I granted the application of the respondent for the four documents and ordered

that the claimant provide any such documents in their possession or control that morning whilst I was reading into the case as the respondent's counsel would need to have an opportunity to consider them for the claimant's cross examination. I was satisfied that the documents requested would be disclosable under standard disclosure provisions in CPR 31.6, in that they would support or undermine a party's case in relation to an issue to be decided by the Tribunal and that disclosure of such documents was necessary for a fair disposal of the proceedings.

13. As the claimant was unrepresented, I explained that documents included electronic and hard copy documents but also electronic messages such texts, and what's app messages.
14. The claimant provided some of the documents requested to the respondent but confirmed to me that he did not have any documents proving when he made his application for his current role or when he was invited to interview, as such records were no longer in his new employer's system, and he didn't have any records of his own. He said he had disclosed everything he had access to.
15. During the claimant's cross examination on the second day, it became apparent that the claimant had texts from 25 March 2022 concerning his interview for his current role but had not disclosed these documents. I reminded the claimant of his obligations and that I had reminded him earlier in the proceedings that texts were "documents" and so disclosable. The claimant explained that he had not thought that texts to family and friends were disclosable. I reminded the claimant of the order for disclosure I had made the previous day, his obligations and the overriding objective, in particular how one party withholding documents could potentially give rise to unfairness. I adjourned the hearing for fifteen minutes to give the claimant an opportunity to check that there was not anything further in his possession or control that he was obliged to disclose and to disclose them before the end of his cross examination. The claimant disclosed some texts for 25 March 2022 and some phone messages. I invited the respondent to make submissions at the end of the hearing on disclosure and the claimant's credibility should he wish to do so.

*Claimant's application for specific disclosure*

16. At the start of the afternoon session of the first day, the claimant decided to also make a request for specific disclosure of documents. He asked for disclosure of all his company results regarding shrinkage (unaccounted loss from a store) across his career to demonstrate that his performance in relation to shrinkage was second to none and would show to the court his "character" and that he "wouldn't go off sick" in relation to the October 2022 shrinkage result. His request for such documents had been rejected by the respondent prior to the hearing date on the basis that they were not relevant to his case.
17. The respondent objected to the claimant's application on the basis that the documents were not relevant to the issues in dispute- the respondent accepted that the claimant's performance in audits was good and it did not dispute that past shrinkage records would show good performance. It was also not being alleged by the respondent that the October 2022 shrinkage result was poor, just that the metrics had slipped a little. For the reasons I gave at the hearing, having regard to the overriding objective, I decided not to grant the application of the claimant for the documents requested. I was not satisfied that the documents requested would be disclosable under standard disclosure provisions in CPR 31.6, in that they would support or undermine a party's case in relation to an issue to be decided by the Tribunal and that disclosure of such

documents were necessary for fair disposal of the proceedings. The request did not relate to a matter in dispute between the parties.

### **Procedure/Documents and evidence heard**

18. This was a hearing where all parties participated via CVP.
19. I considered documents in an electronic bundle notionally ending at page 237, in addition to some further documents which were provided by the claimant during the hearing in response to an order for specific disclosure which were put into a supplementary electronic bundle.
20. I heard oral evidence from the claimant on his own behalf. For the respondent, I heard oral evidence from Ms Sarah Ford (Regional manager, North West) and Mr Brian Marshall (Regional People manager, East Scotland). Witness statements were provided by the claimant, Ms Ford and Mr Marshall.
21. At the conclusion of the evidence each party made oral submissions.

### **Factfinding**

22. The relevant facts are as follows. Where I have had to resolve any conflict of evidence I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.
23. The claimant, Mr Lowe, was employed by the Respondent, WM Morrisons Supermarkets Limited WM from 1 July 2016 until his resignation became effective on 12 May 2022. The respondent is a large chain of supermarkets. It operates approximately 490 stores and employs around 105,000 employees.
24. The claimant resigned from his employment on 12 April 2022 with one month's notice which expired on 12 May 2022. At the date of his resignation, the claimant was a Store Manager at the respondent's Swinton Store but had been on sick leave from 4 November 2021 and remained on sick leave as at the termination of his contract on 12 May 2022.
25. In May 2021, Ms Sarah Ford became the Regional Manager of the respondent's Manchester and Liverpool Group (the "Group"). The store that the claimant managed at the time (and subsequently moved to in week commencing 17 May 2021) were both located within the Group and so Ms Ford became the claimant's new line manager. Ms Kay Ashley was the People Partner (Human Resources) for the Group until it was expanded in 2022.
26. The claimant first met Ms Ford, at a meeting on the 13 May 2021 and his last direct contact with Ms Ford was an exchange of emails on 19 and 20 December 2021 and when he was sent a letter from Ms Ford on 30 December 2021 inviting him to a meeting to discuss his sickness absence.
27. The respondent confirmed that the claimant's performance was not in dispute. It was agreed that he was a good performer and Ms Ford was happy with the way that he ran the Swinton Store when she was his line manager. The respondent also confirmed that absence was not a relevant issue in this case. It was accepted that the claimant did not have any recorded absences during the six months that he was line managed by Ms Ford and his absence was not an issue. Whilst he had attended hospital appointments during this time, these were accommodated with the support of Ms Ford and not formally recorded.

*Meeting on 13 May 2021*

28. Whilst the claimant did not rely on this meeting as one of the acts/omissions ( the alleged bullying and gaslighting was said to have “followed” this meeting of 13 May 2021) I agree with Mr Liberadzki (the respondent’s counsel) that it is part of the relevant background and, indeed, was also referred to in the claimant’s submissions and his witness statement.
29. It was not in dispute that the respondent had contractual discretion to move the claimant to another store within the Group under his contract of employment- clause 1.6 at page 41 in the bundle. The claimant accepted, during cross examination, that the respondent had a right to change his place of work under his contract and he had worked at a number of different stores/offices since joining the Respondent in 2016. As at 13 May 2021, the claimant was a Store Manager at the respondent’s Poynton store. It was also not in dispute that the respondent had previously requested the claimant to move from Poynton to another store in the Group on more than one occasion, but he had refused to move due to “personal circumstances”. The claimant had remained at Poynton after these requests and the claimant made no allegation that such refusal had led to any type of detrimental treatment.
30. In May 2021, the respondent wanted the claimant to move to a larger store in the Group – Swinton. Initial conversations were had with the claimant about the move with Ms Ashley and Ms Wall (158). Ms Ashley considered this move to be positive one for the claimant but given his refusal to move in the past, she explained that this move was not an optional move (131). The claimant did not accept the move but did not decline it and agreed to visit the store. He asked for a pay rise was then invited to a meeting with Ms Ford and Ms Ashley so that they could discuss the proposed move with him.
31. Ms Ford had been made aware that the claimant had previously refused requests to move from Poynton and asked for a copy of the claimant’s signed contract. Ms Ford said it “*would be helpful for our discussion with him*”(133). She expected that he would again refuse to move stores (150).
32. In cross examination, the claimant put to Ms Ford that her asking for a copy of his contract, was proof that his job was at risk at this meeting. Ms Ford denied this. She did not know the claimant and said the reason she had asked for the claimant’s contract was to establish whether it contained any “exceptional clauses” regarding store moves as he had rejected previous moves. Ms Ford established that the claimant’s contract contained the standard clause 1.6, providing the respondent with a contractual discretion to move the claimant between stores.
33. I prefer Ms Ford’s explanation for why she asked for a copy of the claimant’s contract. In the email requesting the contract (133) she explains that the contract will be helpful for her discussion with him. Ms Ford had just started managing the claimant, he had rejected recent requests to move stores despite Store Manager’s contracts usually containing a standard clause giving the respondent the contractual discretion to move store managers and Ms Ford was expecting the claimant to again refuse to move stores. Ms Ford needed to know what the claimant’s contract said about moving stores to be fully able to discuss the proposed store move with him.
34. In his claim form the claimant said “*I’d be brought to the meeting to be dismissed from the business.*” In his witness statement (and formal complaint) the claimant said that he believed this meeting was “*basically to tell me that I’d refused jobs in the past (based on personal circumstances as agreed with the boss who’d gotten to know me) and my position was at risk if I defended my*

*right to be remunerated for the increase in store size. Given the disgraceful way in which the meeting was held, the way in which I was asked whether I was recording the meeting - it left me under no illusion that had I defended myself further and the events and discussions that had preceded this meeting I would have been exited out of the business. I accepted the store move and subsequently this meeting with Sarah Ford and Kay Ashley was the start of the victimisation towards me (157-162)".* In cross examination he said the conversation was along the lines of "do it or else."

35. The respondent's denied that the claimant had been *brought to the meeting to be dismissed from the business*. The meeting was to discuss a move to the Swinton store at which the claimant agreed to move early on in the meeting. The claimant requested an increase in his salary (as Swinton was a bigger store), whilst Ms Ford did not agree to increase his salary, she did commit to review the claimant's salary mid- year 2021. The claimant accepted in cross examination that non one had said to him at this meeting that his position was at risk or that he would be dismissed but said it was the "way things were implied."
36. I was referred to a contemporaneous note of the meeting of 13 May 2021, taken by Ms Ashley (157-162). The claimant did not allege that these notes were inaccurate but noted in his witness statement that "*they were not verbatim*" and "*do not reflect the aggression towards me*". The claimant requested and received a copy of these notes in August 2021 and did not ask for any amendments to be made to these notes.
37. I could see from the notes of the meeting that, before any discussion took place regarding the respondent's contractual discretion to move him to Swinton, the claimant confirmed that he would move to Swinton but asked for "financial remuneration" as he was being "*asked to do a bigger role*." There was no discussion about him having to move or his contractual obligations. It was also notable that the claimant gave evidence that when he asked what would have happened if he had not agreed to move stores he was told "*no need to go there as [he] had agreed to move stores*". Viewed objectively, the respondent appears keen to move forward positively and not enter into a conversation which could have become, unnecessarily, contentious. There are references in the notes to Ms Ford telling the claimant that she wanted him to "*feel good*", that this was a "*natural next step*" for him and a "*supportive offer*." When he raised that he was looking at other opportunities internally, which he was expecting to take up within 8-10 weeks, Ms Ford reassured him that if he is able to secure another role she would "*not block*" him but she would "*support*" him. At the end of the meeting the claimant said to Ms Ford "*This conversation is an indicator of strong leadership and that's what I crave*." In cross examination the claimant accepted that he may have made this comment. Ms Ford ended the meeting with "*Want you to love the job and enjoy working together*" (162).
38. Ms Ford did not agree to an increase in his pay as the claimant was already receiving a similar salary. In oral evidence she said that it was not usual for a person moving stores to be given a pay rise and it would depend on their current salary. Ms Ford said she had looked up the claimant's salary and despite running the third smallest or least complex store in the Group he was the fourth highest in terms of salary out of the 23 stores managers in the Group at that time. The claimant had no contractual right to a pay review or increase upon a store move. However, Ms Ford agreed to a salary review at mid- year if the claimant meet certain performance levels. This salary review commitment was recorded in an email sent to the claimant on 13 May 2021 (58).



39. Ms Ford described her first meeting with the claimant as “amicable” and was surprised to discover that this meeting was an issue with the claimant.
40. Having had the benefit of the oral evidence of the claimant and Ms Ford, I find that these notes are an accurate record of the meeting. The claimant’s characterisation of this meeting or his claim that he’d be bought to the meeting to be dismissed was not borne out. The claimant was briefly asked at the outset of the meeting whether he was recording the meeting (which the claimant says he was upset by) but viewed objectively, this was an amicable, reasonable and supportive meeting, with the claimant agreeing to move without the need for a discussion about his contractual obligations and Ms Ford willing to show some flexibility regarding pay given the claimant’s request for a pay increase. The oral evidence and contemporaneous documents did not support the claimant’s perception that his job was in “jeopardy” or “at risk”, that the meeting was held in a “disgraceful way” or that Ms Ford or Ms Ford were acting in an “aggressive way” towards him.

### **Bullying and Gaslighting Allegations**

41. The claimant alleged that following the meeting on 13 May 2021 he was bullied and gaslighted Ms Ford and Ms Ashley into believing my performance could and should be better. I asked the claimant what he meant by the term gaslighting and he explained that it was “*saying the opposite of what they are saying to your face*”. He said “*someone says to you they want you to be great, want you to be here and want you to feel supported but doing the opposite in the background.*”
42. The claimant made a subject access request for his data, including his personnel file and data concerning his formal complaint. This request was made on 13 June 2022, after he had left the respondent’s employment. I noted that the claimant refers in his witness statement and his submissions to information which was contained in the response to his subject access request but would not have been in his possession prior to his resignation. I have indicated where such information was not available to the claimant prior to his resignation within these findings of facts.
43. The claimant said that during the six months he was managed by Ms Ford he had seen Ms Ford “*maybe a handful of times.*” Some of this time was when Ms Ford had asked him to support her with a piece of work concerning Manchester stores (which the claimant spoke positively of) and when Ms Ford had visited his store three times. The claimant also specifically referred to a meeting with Ms Ford on 27 October 2023 at the Eccles Store. He said there had been some phone calls between him and Ms Ford, there was a weekly conference call with other store managers, but their main form of contact was via email. Ms Ford felt it was probably right that she had only undertaken three store visits during these six months. She explained that she was responsible for 23 stores at the time and the Group was a challenging region. She said that she had stores with more issues and more in need of her support so had not met the claimant very often.

#### *Store visits – 18 June 2021, 19 July 2021 and 2 September 2021*

44. It was not in dispute that Ms Ford conducted three store visits in the six months when Ms Ford was the claimant’s manager (before he was signed off on sick leave). These store visits took place on 18 June 2021, 19 July 2021 and 2 September 2021. He said in his witness statement that two of the three visits were “*extremely uncomfortable*” with the second visit being “*slightly better in*

conduct.” He said that “*at no point did [Ms Ford] and [Ms Ashley] try to build any sort of relationship with me – it felt like get in, get out and leave him feeling the effects of it.*”

45. Following the first store and third store visit Ms Ford shared with the claimant a folder which was a list of concerns identified during Ms Ford’s walkabout such as “*biggest issue – \*\*\*\*\*hygiene\*\*\*\*\**”, “*bins not emptied first thing*”, “*poor banana quality etc*” “*escalate PFS pumps etc.*” (59-60 and 62-63).
46. The list from the first visit was the longest and it was direct in style. In cross examination, Mr Liberadzki asked the claimant whether the points raised by Ms Ford, in the folder shared with him on 22 June 2021, “were reasonable and fair points to raise and were not nitpicking. The claimant responded “*absolutely.*”
47. Following the second store visit on 19 July 2021, Ms Ford raised some of the same issues she had raised following the June store visit and sent the claimant some photographs of issues she had highlighted. In cross examination, the claimant accepted that this was “*fair*” feedback and the Ms Ford was “*just doing job*” and that he agreed that Ms Ford was picking up on issues not dealt with. In relation to all the store visits, the claimant accepted that it was reasonable for Ms Ford to undertake store visits and to point out to the claimant issues she had identified.
48. In cross -examination the clamant admitted that Ms Ford had conducted the walkabout during her third store visit without the claimant as it was late in the day. Before she had conducted this walkabout, she had conducted a positive mid-year performance review with the claimant in which she had already told him that she was happy with the way that he was running the store and had given him the same performance rating as he had proposed for himself.
49. In cross-examination the claimant accepted that providing lists of concerns following a store visit was the way in which Ms Ford worked. Swinton, nor the claimant was not being treated differently in this respect and the claimant accepted that Ms Ford’s lists raised issues that were raised with other stores.
50. The claimant also accepted that the issues highlighted on the lists were minor points and that Ms Ford had never told him that these issues put him on track for a poor performance rating or a performance procedure and that Ms Ford had recognised his good performance by giving him a positive mid-year performance review on 2 September 2021.
51. Having listened to the claimant’s oral evidence, the claimant’s concerns with Ms Ford’s lists were that they only included issues that Ms Ford had identified and did not include any references to what was being done well in the store. He believed that it would be better for the lists to include positive and negative points from the store visit. However, the claimant acknowledged in cross examination that there were other opportunities and ways in which Ms Ford could communicate the positives, such as she did during the mid – year review on 2 September 2022. The claimant accepted that the store’s standards could be better on any day and that the inspection was only a small part of his job. He also accepted in cross examination that the lists of issues he was sent by Ms Ford were not an example of “*gaslighting*” – which he said, in this context, was “*doing something wrong when you haven’t.*”

*Petrol Filling Station – 19 July 2021*

52. In July 2021 there was a refit of the petrol station forecourt at the Swinton store. The claimant said in his witness statement that this was “*lead shambolically*

*from the contractors” resulting in half the forecourt being closed for weeks and the petrol filling station trading in the bottom 20 stores. Following a visit to the store on 19 July 2021, Ms Ford also raised concerns about the way the petrol filling station refit was being managed and the impact on customers. In her witness statement she explained how she supported the claimant by escalating her concerns to Ben Piece (PFS Specialist) and copied the claimant.*

53. In his statement the claimant said that he had *“multiple heated telephone calls on the back of my updates regarding this.”* When I asked the claimant about these telephone calls he said he did not have any evidence of these telephone calls and did not provide me with any further oral evidence regarding them.

*Contacted on holiday – 26 July 2021*

54. The claimant was contacted whilst on holiday by Ms Ashley and asked to release one of his night managers to support a local store (Eccles) with immediate effect. The claimant told Ms Ashley that he would not remove a night manager from his store whilst he was on holiday as this would leave his store vulnerable and impact his team.
55. The claimant said that his explanation was *“not good enough”* and Ms Ashley asked him why he thought she and Ms Ford were not supporting him. The claimant said that *“I now know that I suffered a panic/anxiety attack at this point as I was having words put in my mouth when all he wanted to do was to be able to share my concerns at their requests and safeguard my operation whilst I was out of the business”*. The claimant told Ms Ashley that this was not something he had said and that evening sent an email to Ms Ashley reiterating what he had said on their call (61).

*“As per our call just- I don't feel like I'm not being supported by yourselves and have reiterated that that comment hasn't come from myself. What I have said- is that I can't put my team at the back of that of Eccles, given we're in peak holidays/covid and as a store manager – that's my job. ”*

He said that he would come back to Ms Ashley on Monday when he could review some relevant matters. At the end of his email he said *“to have thrown in my face the above, whilst putting the thoughts and feelings of a store team at the heart of the decision is disappointing. Especially sarcasm around the business decision for nights/twilights.”*

56. There were no further email exchanges that evening, and the claimant came back to Ms Ashley upon his return from holiday. Ms Ford said in cross examination that she had not been closely involved in this matter and was unaware the claimant had been contacted about this whilst he was on holiday. However, she noted that the claimant had always been supportive of Eccles and other stores.

*Manchester Stores work- August/September 2021*

57. In evidence the claimant told me that during August and September 2021, Ms Ford asked the claimant to support her with a piece of work concerning the Manchester stores. In his witness statement and formal complaint (84-88), the claimant spoke positively of his time working with Ms Ford on this piece of work. *“I supported Sarah with a piece of work for the Manchester stores and I genuinely believe that we'd made strides within building a relationship. We started to communicate in a more adult to adult way.”* In oral evidence he told me it had *“helped that relationship as forced them to work together.”*

Mid – Year Review – 2 September 2021

58. The claimant accepted that by the time of his mid- year performance review, “*positive progress*” was being made.
59. It was agreed by both parties that, on 2 September 2021, the claimant received a positive mid- year performance review (186- 193). The review was attended by Ms Ford and Ms Ashley. Ms Ashley attended as notetaker. The claimant received a 2 rating (meaning “expectations met”). This was the same performance rating as the claimant had suggested for himself. (192)
60. The claimant accepted, in cross examination, that Ms Ford’s comments in his mid-year performance review were generally supportive and the criticism was constructive (191). However, he said that this was “*not the case day to day which is a shame*”. Ms Ford had commented that the claimant looked like “a lamb to the slaughter” as she was surprised by his facial expression and demeanor. Ms Ford said that she knew it was not going to be a difficult discussion and could think of no reason why the claimant would think he would get a poor appraisal. Ms Ford said she spent a significant amount of time trying to build the claimant’s confidence during the review. The performance review contains supportive references of this nature.
61. The claimant accepted in evidence that he had been surprised by the mid- year review “*as it was an adult to adult conversation – it was better than he had expected but knew that his performance was not bad, knew he had had visits and knew that the trajectory of his store was on the right track*”. He mentioned that it was not “*belittling*” and he had expected to fight through it. Mr Liberadzki asked the claimant where the evidence of belittling behaviour by the respondent was. The claimant said that he had not given any examples of belittling behaviour.
62. The claimant said that he was asked to provide feedback during this meeting and referred to a reference in the his mid -year review where Ms Ford says “*I don’t want you to be noise, but where you can add value we absolutely want to. You are very analytical and you are clearly passionate about it.*” (189) The claimant said he then started sending feedback emails to Ms Ford and felt “*empowered*” to send such feedback.

Shrinkage- 20 October 2021

63. Ms Ford was contacted by Andrew Halderthay, Head of Loss Protection, saying that he would like to meet with her and others to agree and sign off a plan to improve the latest shrink results for the Swinton Store (66). Mr Halderthay had asked Ms Ford to invite the claimant (as the Store Manager), the People and Operations Managers from Swinton. Shrinkage is unaccounted loss from a store. The claimant and others were invited to the meeting. This The meeting was due to take place on 30 November 2021.
64. Ms Ford explained that she did not consider these shrinkage results were particularly bad and given when the claimant had taken over management of the store he could not be held responsible for them. The claimant had a good record with regard to shrinkage, the metrics had fallen but Ms Ford was not overly concerned and the next steps would be to have a meeting and discuss a plan to improve results.
65. The claimant does appear to have been concerned with the shrinkage results for Swinton. I was referred to a witness statement and note of a meeting with Richard Gale (75-77 and 81), the claimant’s Operations manager at Swinton.

66. At a meeting on 6 December 2021, Mr Gale had made a number of unsolicited comments about the claimant, these comments were recorded in a note of the meeting (75-77). At the meeting he said the claimant had said, with regard to shrinkage *“if the shit hits the fan I’ll just go on the sick, he said I’ll just go off sick before I leave.”*(76). The claimant suggested that that the notes should be “dismissed” as they were unsigned, had been typed by Ms Ashley and differed from the statement later submitted by Mr Gale.
67. However, Mr Gale emailed a written statement to Ms Ashley. In this statement he said that the claimant had had a *“verbal altercation”* with someone from Regional Support regarding shrinkage just before he went onto sick leave. He also said he believed that the claimant’s absence on sick leave was *“premeditated”* as the claimant had made a comment to him that *“he would go on sick and leave the company should he get any criticism or disciplinary action following our poor shrink result”*. (81) The claimant even refers to his shrinkage record in the social media post he posted at the end of his employment with the respondent (93). *“Not many store managers get to leave saying their teams delivered the companies best performance on shrinkage in a calender year, or without failing a single audit in the entire 6 year! But I guess I’m just the lucky one”*.
68. On 6 December 2021, Ms Linda Poole the People Manager in the Swinton store gave a witness statement (78-79) about the claimant and described how, shortly before going off on sick leave, the claimant had said that *“he would find another job and in the interim would go on the sick and take his entitlement.”* Ms Poole did not link this to shrinkage but that the claimant’s mood had deteriorated after a recent meeting with Ms Ford at another store.
69. The claimant denied he had made such comments, that his absence was premeditated and/or linked to shrinkage. The claimant acknowledged that “he had a great working relationship” with both Mr Gale and Ms Poole, they were the two colleagues he was closest with. He considered Mr Gale a friend. When asked why two managers, with whom he had a great working relationship would make such comments up, he said they were frustrated and disappointed in him for going off on sick leave.
70. Ms Ford was aware of these statements but did not withhold his sick pay. When the claimant asked why she had not withheld his sick pay, Ms Ford said because his GP note said he was he was suffering from anxiety. She did not say in cross examination that she did not believe Mr Gale and/or Ms Poole.
71. The claimant had included in the bundle examples of electronic communications (97-130) he had had with the two colleagues to demonstrated there were inconsistencies between some of the things they had said in their statements (such as about roted days off) and these communications. I could not make the inference regarding credibility the claimant invited me to make (and they were not witnesses). However, it was clear from these communications that the claimant enjoyed a close and good working relationship with these two managers. I also noted that the written statement from Mr Gale was balanced by positive comments about the claimant. He talked about how he got on really well with the claimant, they had a good rapport and that the claimant *“was very articulate and knew the job well, he taught me things I didn’t know about before and I am now able to do the job with ease. I also know [the claimant] to be a very confrontational person and he did not have time for people in authority and there were times he made his feelings known to me.”*

Phone call on 27 October 2021

72. The claimant said that his absence record and time management had never been raised with him, but he had thought that Ms Ford had tried to catch him out when she had telephoned the Swinton store early on 27 October 2021 and he answered. The respondent confirmed that absence management was not something that was raised with the claimant and was not an issue. The claimant had not alleged that his absences were unfairly managed in his claim.
73. Whilst it was not in dispute that the claimant had attended some hospital and doctor appointments during the six months leading up to his sick leave, these had not been recorded as absence and Ms Ford explained that she had instead given permission for the claimant to attend these appointments without them being formally recorded as absence each time in order to be supportive.
74. The claimant referred to an email exchange on 27 October between Darren Monk, Ms Ford and an unidentified person (136). This email exchange does appear to suggest that Mr Monk (at least), had a concern about the claimant's absence and that he had shared these concerns with Ms Ford. There is a reference to Mr Monk asking for a call to be made to the Swinton store, ostensibly to check the freezer floor has been cleaned, but saying in his email "*you both know the real reason for call, is he in as per rota?*" The email does suggest that, on this morning, management was checking whether he was in the store. However, these emails were provided as part of the response to his subject access request and were not available or known to the claimant until after he had resigned and left the respondent's employment.

*Meeting on 27 October 2021 (page 68-71)*

75. Ms Ford was being assisted in the Group by Darren Monk who had been a Store Manager. He had been asked by Ms Ford to complete a "store walk" of the Swinton store and provided his feedback was provided to the claimant on 27 October 2021. The claimant was not happy with the feedback, particularly the comment "Yard needs attention", it "*aggravated*" him and he sent Ms Ford an email in which he made sarcastic and derogatory comments about Mr Monk's record as a Store Manager and his feedback (165). During cross examination, the claimant agreed the "*tone of his email was not good, the tone was disrespectful and way written disrespectful – own that*". Ms Ford did not respond to this email. When the claimant had not received a response to his email for some hours and "*given how blunt [his] feedback had been*" he decided to go the Eccles store and see if he could discuss it with Ms Ford.
76. Ms Ford was working at the Eccles store and made herself available to speak to the claimant. Ms Ford made a note of this meeting (68-67). In her note, Ms Ford records that the claimant said that "*he wanted to have a conversation with [her] as he knew what had written in response was wrong.*" During the meeting the claimant said he had no respect for Mr Monk or his opinion of his store. Ms Ford records in her note that she asked the claimant if he could envisage himself doing the role [Mr Monks] had been performing and "*he stated that other people wouldn't like it because he was too opinionated and too challenging of the Morrisons way of working.*" Ms Ford raised with the claimant the email he had sent that day and that the tone and his approach in the email was one that he had used several times recently in emails both to herself and other people. Ms Ford said that she had put some examples of these emails to one side to talk through with him. The claimant referred to these emails as feedback emails and said that Ms Ford had not responded to them when he had sent them.
77. The claimant said he was "*not saying that Ms Ford should not have raised [the emails]*" but was saying that she should have raised each email at the time over the phone- not "store them up". He said that accepting the email and the delay

in time was not a good way of dealing with it, it was not good management and was bullying and gaslighting. If an email was disrespectful, he said Ms Ford should have picked up the phone – “be adults.” He mentioned that he and Ms Ford had had a “good conversation” about energy conservation, it was adult to adult. When cross -examining Ms Ford about her approach, he appeared to suggest that she had acted unreasonably by not disciplining him if she was concerned about the emails. Ms Ford said that this situation was not serious enough for formal action, she felt that informal feedback on language and tone was the appropriate approach, she didn't feel anything warranted formal action or serious conversation. On the basis of the evidence before me, I do not accept the claimant's evidence that he was “*threatened*” that he needed to be very careful.”

78. The claimant said his feedback emails were an example of gaslighting as Ms Ford was saying on conference calls with the Store Mangers that she wanted to make changes but no one was sending her feedback, but he knew he was sending her feedback.
79. The claimant admitted that he spoke about not having a great relationship with Ms Ashley. Ms Ford's note records that the claimant said that he would “never have any respect for [Ms] Ashley and that [Ms Ford] should not waste [her] energy trying to get him to form a good working relationship with her. Ms Ford asked the claimant why and he stated that this was “*because she was everything that an HR manager shouldn't be because she does not care about people other than herself at all. Examples being not asking after the welfare of his family in the way that [Ms Ford] , it was her job to do this not [Ms Ford's] , and that to this day after returning from paternity leave she had not asked after [his] welfare*”
80. Ms Ford said that she was pleased that the claimant had taken it upon himself to come and talk things through with her but that though the other things she felt she should discuss. The note records that she discussed other areas of concern such as feedback she had received from other store managers about a meeting he had attended and his body language on conference calls with the store managers which she thought was negative- he was seen talking to other people, looking at his phone and rolling his eyes. Some of the feedback was communicated in a direct style. Ms Ford recorded that the claimant apologised that she felt this to be the case and stated that he had the upmost respect for me. She noted that on the conference call after this conversation there was a notable change in the claimant's behaviour during the call and he was clearly making a conscious effort not to come across as he had done previously. Ms Ford said she tried to reassure the claimant she was happy with how he was running the Swindon store but felt he should inspect the store in more detail than he currently did. She said that his results were good in the main but that she had noticed that Swindon had recently started to appear on some “*outrider/naughty lists.*” The claimant disagreed with this and so Ms Ford and I said that she would send him some examples as when this occurred.
81. The meeting finished with a discussion about the claimant's health. Ms Ford was concerned that the hospital had cancelled the claimant's scheduled scan to get to the root cause of his medical problems she asked him what he thought it was and he stated that the most likely cause was a hernia. Ms Ford asked if claimant needed any support from her and he said no, at the moment just to let him attend his appointments Ms Ford had been doing.
82. Ms Ford's note records that the claimant said he felt “*much better for talking everything through with Ms Ford.*” The claimant ended on a positive note as the claimant (without being asked) insisted on returning to Swindon to pick up some Halloween pizzas which he had been informed Ms Ford wanted to buy for her

son. The claimant also mentioned picking up the pizzas to Mr Marshall during one of his welfare meetings. In his formal complaint, the claimant said that “*I simply asked that the emails that got sent to me not be provocative language*” and that both he and Ms Ford agreed that the conversation on 27 October 2021 “*was absolutely necessary and we were both glad it had taken place.*” (87)

*Email on 2 November 2021 re petrol filling station*

83. The claimant sent an email to Ms Ford and Mr Monk summarizing the next phase of works on the petrol filling station. Ms Ford replied to this email with the words – “*I hope its better managed than last time*”.
84. The claimant considered this a “*provocative reply*” and perceived that this was a comment about his management. In oral evidence, the claimant said that following the meeting of 27 October 2022, with communications being better, he wouldn’t have expected this response. He said it was a “*loaded response*” In his witness statement he said that he “*knew that what [Ms Ford] wanted me to do, was to react by defending myself, something which unsettled me for the rest of the day.*”
85. In cross examination, Ms Ford said that the comment was about the contractors who managed such projects not the claimant. She explained she had been responding to the claimant’s email about the work the contractors were undertaking. Ms Ford also referred to how supportive she had been of the claimant with regard to the petrol station refit in July 2021 and how she had sent a number of escalations to the contractors. Given the background referred to in paragraphs 52 and 53 above, the fact Ms Ford was responding to the claimant’s email about what the contractors were doing and the claimant was not responsible for managing the project, I accepted Ms Ford’s explanation that the comment was not about the claimant.
86. The claimant referred to getting “*snappy*” emails from Ms Ford (and “possibly others”). I asked the claimant to refer me to the emails from Ms Ford that he considered “*snappy*”. He referred me to this email only. When cross examining Ms Ford, he directed her again to this email as an example of a “*snappy*” email and also to an email at page 165 which said “*not good feedback about your shops at all.*” I noted that the email at 165 was sent to two managers, not just the claimant. Ms Ford denied that these emails were snappy but I found they were direct.

*Other interactions with Ms Ashley*

87. The claimant raised a formal complaint about his treatment by both Ms Ashley and Ms Ford and claims that she bullied and gaslighted him following the meeting of 13 May 2021. However, I noted that the references to Ms Ashley were limited in the evidence after 13 May 2021. Ms Ashley appears as a notetaker, calling the claimant on 26 July 2021 and initially providing welfare support (voicemails, sending welfare meeting invite) to the claimant in November and December 2021. Other than the conversation on 26 July 2021, no specific allegations of inappropriate behaviour were made for the period after 13 May 2021.

**Welfare support**

88. The claimant emailed the claimant on 4 November 2021 to advise that he was unwell and later sent an email. On 6 November 2021, he provided a sick note by email which said that he was not fit for work due to “anxiety”. The claimant



did not return to work before he left the respondent's business on 12 May 2022.

*4 November 2021– 2 January 2022*

89. A list of the initial welfare support provided to the claimant is at page 83 in the bundle. The claimant confirmed in cross examination that there was no reason to doubt the accuracy of this list. On 6 November 2021, Ms Ford asked the claimant to call her as she didn't want to disturb him. Having not heard further from the claimant, Ms Ashley and Ms Ford tried to contact the claimant by telephone on 12 November 2021 to check in on his welfare but left a voicemail. The claimant emailed on 13 November 2021 to say he was unable to talk to them about how he was feeling and would provide a weekly update via email until he felt ready to talk.
90. The claimant continued to state that he was not ready to call when voicemails or emails were sent to check in on his welfare. On 23 November 2021, Ms Ford reminded the claimant by email to use Vita Health or the My Morri resources if he needed them. On 14 December 2021, Ms Ford and Ms Ashley left another voicemail for the claimant to check on his welfare, as they had not received a weekly update from the claimant. On 19 December 2021, the claimant emailed to say that he had listened to the voicemail but was still not able to talk and wished Ms Ford "*all the best for Christmas.*" On 20 December 2021, Ms Ford emailed the claimant to wish him a good Christmas and to confirm that she would be in touch to have a welfare meeting in the first week of January. Before this date, Ms Ford said that they had raised having a welfare meeting on one of the voicemails they left for the claimant, but she and Ms Ashley had interpreted that the claimant was not ready for a welfare meeting. He had said he would send weekly updates until he was ready to talk and Ms Ford said the claimant had not requested to have a welfare meeting in November or December 2021.
91. On 30 December 2021, Ms Ashley sent a letter (dated 28 December 2021) from Ms Ford to the claimant inviting him to a welfare meeting. The letter explained that the meeting was to allow the claimant to update the respondent on how he was feeling and to allow the respondent to understand whether there was anything it could do to support his return to work. The claimant was informed that he may be asked for his consent to refer him to the respondent's occupational health provider (Medigold) and was reminded of the support available via Vita Health (80).
92. On 2 January 2022, the claimant emailed Ms Ashley and requested an independent manager to conduct his welfare meeting. Ms Ashley emailed the claimant and informed him that his request would be accommodated, and someone would be in touch with him. Ms Ford denied that the claimant had indicated in November and December that he felt uncomfortable speaking with her and wanted to speak with someone else. There is no reference to the claimant asking to speak with someone else before 2 January 2022.
93. The claimant did not have any further contact with either Ms Ashley or Ms Ford after this point in time.
94. The claimant argued that the welfare meeting should have taken place before Christmas and he should have been prioritised. However, at this time the claimant was telling his manager and/or people manager that he was not ready to talk and responded to call by email. He was only comfortable with giving weekly updates by email, he did not ask for a welfare meeting, and had not indicated or asked, at this stage, for his welfare process to be dealt with by independent managers.

11 and 12 January 2022

95. On 6 January 2022, Mr Brian Marshall Regional People Manager, East Scotland was asked to conduct a welfare meeting with the claimant. Mr Marshall is responsible for leading a team of 27 Store People Managers and planning and implementing the respondent's people agenda and had been in his role for 7 years. An initial call was held with the claimant on 11 January 2021, attended by Mr Marshall, together with Mr Tim Dearing who was the Regional Manager for North East and Cumbria. During this call the claimant referred to not being happy with his relationship with his manager and his Regional People manager. They discussed with the claimant attending a meeting with the respondent's occupational health provider (Medigold) and the following day, Mr Marshall sent the claimant a referral to occupational health consent form (197). The claimant was asked to complete the form and confirm he was happy with the respondent proceeding with the medical review. The claimant was also invited to a welfare meeting on 18 January 2022. The claimant did not return the consent form at any point during the welfare process.

18 and 19 January 2022

96. On 18 January 2022, the claimant sent Mr Marshall the following email – *"I think it is best that I submit my formal complaint for investigation before continuing with the welfare process. Although from our first conversation – yours and Tim's part in this is to return me to work, I don't believe this is possible without my concerns being fully investigated and communicated back"*. (196-197).
97. In his email, the claimant also said that he was in the process of finalising his complaint and it should be shared with Mr Marshall by the close of the week. Mr Marshall emailed the claimant back saying he was sorry the claimant would not be attending the welfare meeting. However, Mr Marshall asked if the claimant could call him so he could ask the claimant the couple of questions he had for him. (196). The claimant responded on 19 January 2022 and asked for Mr Marshall to tell him what his questions were in advance so he could prepare them and not worry what the questions were.
98. On 19 January 2022, Mr Marshall responded by explaining his role in the welfare process. He explained that his role was *"to support [the claimant] from a welfare perspective"* and that he wanted to catch up with the claimant to check in with him, to ask how he was and get an understanding of where the claimant's thoughts were currently with how he was feeling. The claimant responded that he was happy to pick up a call to discuss his rationale with regards to submitting a formal complaint. Later that afternoon, a welfare conversation took place between the claimant and Mr Marshall. The claimant told Mr Marshall he was still feeling the same, which was the reason behind his decision to raise the formal complaint, and that he was also concerned about his company sick pay entitlement being exhausted and asked if it could be extended. Mr Marshall told him that he'd come back to him.

26 and 31 January 2022

99. The claimant emailed Mr Marshall on 26 January 2022 to say he was finalising his formal complaint and should be able to provide Mr Marshall with a copy by the end of the week (211). The claimant said that the welfare process had started after eight weeks and asked again for his company sick pay to be reviewed. Mr Marshall was on annual leave so didn't come back to the claimant until the 31 January 2022 when he advised the claimant that he was still considering this and would let him know.

9 February 2022

100. On 10 February 2022 Mr Marshall spoke to the claimant and thought it would be beneficial for him and the claimant to speak again but face to face. It was agreed that they would meet at the respondent's Carlisle store on 1 March 2022, as it was a central point between where the claimant and Mr Marshall were located.

1 March 2022

101. Mr Marshall held a welfare meeting with the claimant on 1 March 2022. Ms Hamilton (Training Manager) was also in attendance to take a note of the meeting (172-178). Mr Marshall confirmed that the claimant had run out of contractual sick pay and that he was not in a position to extend this. He explained that if the claimant wanted to take this further, he would need to raise it as part of his formal complaint.
102. The claimant shared a summary of his complaints about Ms Ford and Ms Ashley. Mr Marshall reiterated that his role was concerned with the welfare of the claimant and asked the claimant where he was from a welfare point of view as they needed to see how to move forward. Mr Marshall said *"Know you have some concerns but this is me dealing with your welfare, you have mentioned a complaint but this needs to be separate as this is about your welfare."* The claimant described how he was feeling and said that, in terms of welfare, he *"didn't see how to move forward as yet not sent in the complaint and I don't know how this will move forward without this being thoroughly investigated."* He said he would put his complaint in that day. When discussing a return to work, the claimant confirmed that he knew that the respondent's regions had moved and he did not have the option of another region. He said he was 99% sure he could not work with Ms Ford again. Ms Marshall confirmed the regions had changed and Ms Ashley had moved.
103. Mr Marshall discussed with the claimant whether he had the support of his doctor, whether he was on medication, and whether he had explored things like Vita. The claimant said that he talked to those who were close to him and that he thought his welfare would move forward when his complaint was resolved.
104. The claimant was asked whether he wanted the respondent to refer him to occupational health. The claimant declined this as he did not feel *"at this moment in time it would be beneficial."* Mr Marshall summarised that the claimant was in a place where an investigation needed to take place and asked *"what can I do and how can I help"*. The claimant responded, *"I feel that you have supported as listened to me so felt supported"*. He said when he submitted a complaint it needed to be heard in 28 days as he knew the money will not continue for long. The claimant confirmed that the only help he needed was *"monetary at the moment"*. He said he would put in his complaint that afternoon. Mr Marshall again suggested that the claimant talk about the extension of his sick pay in his complaint.

2 and 4 March 2022

105. The claimant emailed Mr Marshall on 2 and 4 March 2022 to ask what was agreed regarding his sick pay. Mr Marshall emailed the claimant on 4 March 2022 and reiterated what he had told the claimant at the meeting on 1 March – that his enhanced company sick pay had now run out and it was not possible to extend his enhanced sick pay. (221-225). The claimant received his full contractual entitlement to enhanced sick pay. In his email of 4 March 2022, Mr Marshall says *"I would like to clarify that my role is to support your welfare but*

*equally as part of that we need to review next steps as you are saying you cannot return and not sure of what the future looks like at the moment". (223)*

106. In his email response of 7 March 2022, Mr Marshall explained that he had raised the claimant's request to extend his sick pay back with the business, giving the context of his concern and had made the claimant aware of the outcome of this (that it could not be extended) and noted that he had now ran out of sick pay. He also said that he was clear that his role was to support the claimant's welfare and not to deal with his complaint but equally felt that their meeting face to face had allowed the claimant to get some things off his chest and was hopeful that they could start to move forward. (221)
107. The claimant accepted in cross- examination that Mr Marshall had never promised to extend his sick pay entitlement.

*23 March 2022: Formal Complaint*

108. The formal complaint "*regarding the conduct of Ms Ford and Ms Ashley*" and the handling of his welfare was submitted by the claimant to David Potts (CEO) and Claire Grainger (Group People Director) on 23 March 2022. The complaint appeared at pages 84-88 of the bundle and the claimant's covering email is at page 142. A number of paragraphs from the formal complaint are reproduced in the claimant's witness statement. In his covering email, the claimant said "*I'm sorry to bring this directly to the both of you, however, I have become disillusioned with the leadership teams handling my welfare and have lost confidence that a supportive resolution can be found.*" The formal complaint was dated 1 March 2022 and addressed to Mr Marshall. The claimant sent a copy of his complaint to Mr Marshall on 27 April 2022, which was the first time he had seen the written complaint.
109. The claimant made a number of allegations about inappropriate treatment by Ms Ford and Ms Ashley covering the period May 2022 to 4 November 2022. He also made a number of allegations about how his welfare was being supported and said he was being "*gaslighted*" by Mr Marshall with regard to what had been discussed concerning the extension of his sick pay.
110. The claimant had first told Mr Marshall that he planned to submit his complaint in the week of 18 January 2022. At further meetings/calls the claimant indicated that he would be submitting his formal complaint imminently. When asked why the claimant had not submitted his complaint until 23 March 2022, the claimant said he had struggled with it and having told Mr Marshall about his complaint he imagined it would escalated. He said that if Mr Marshall was trying to get him back to work and he could not return before his complaint was dealt with then Mr Marshall should have raised his concerns, so they were removed. In cross - examination, the claimant accepted that it was not Mr Marshall's role to escalate his formal complaint and that the welfare process was not a grievance process.
111. The claimant sent a copy of his complaint to Mr Marshall on 27 April 2022, which was the first time he had seen the written complaint. The claimant's formal complaint was acknowledged, and he was informed that it would be investigated. The claimant was informed that the individual who would be investigating his complaint was currently on holiday but would start the investigation upon her return. (146)

*25 March 2022*

112. Mr Marshall contacted the claimant again on 25 March 2022 to arrange a further welfare meeting with him and to work through a return to work plan. The claimant did not respond until 8 April 2022, saying his emails had gone into his

junk folder.

## Resignation

12 April 2022 – Resignation and Welfare meeting

113. Mr Marshall met with claimant again on 12 April 2022 for a welfare meeting. The notes of this meeting are at page 89-91 and were again prepared by Ms Hamilton. At the outset of the meeting, Mr Marshall explained that he knew the claimant had submitted his formal complaint and asked whether the claimant was ok to continue from a welfare point of view. The claimant responded

*“To be honest, has reflected on the situation and it has not been an acceptable process and it has been treated pretty poorly. Would still like my outcome of the complaint heard. Would like to hand my notice in, a four week notice period from today”. Mr Marshall asks “Response from compliant?” The claimant responded “ Yes, Charlie said she had got it. But career and personal life have taken enough from the treatment I have had over the last year”*

The claimant went on to say –

*“Financially a bit of a mess. Knowing in my own mind coming to work in these conditions is not something I can do. Can't put myself in the position to be treated that badly again and the RM [a reference to Ms Ford] has the 50 shops closest to me. Will see the doctor and tell them of my decision, possibly have to go down the medication route. Most of the things that have happened should have happened straight away. Not a dig at you as you picked up later on. Just feeling that continuing my employment with Morrisons won't do anyone any good. Would mean [Ms Ford] is my RM and she's not fit to do that. Being a leader is a privilege and she is not fit to do this. I put in a serious complaint and since contact saying it will be looked into and heard nothing for three weeks. Deserve a lot better.”*

114. Mr Marshall asked the claimant whether he “*had another job to go to?*” The claimant responded “*no, not even thought about it*”. This claimant accepted in cross examination that this statement was untrue. The claimant accepted he had applied and attended an interview with his current employer before 12 April 2022.
115. During the meeting the Claimant complemented Mr Marshall on the support he had provided but said he felt a Regional Manager should have been used. The note of the meeting records that the claimant told Mr Marshall, “*Brian, you have been really good but feel this should have been an RM [Regional Manager]*”. Brian explained how the respondent had started with Tim [Deering, a Regional Manager] and he had tried to support the claimant from his perspective. The claimant said “*I believe you have supported me already but I feel the business should have used an RM.*” He said that he had been “*Treated poorly, not from your point of view. Was left until after Christmas as the business need priority. One call with Tim and then he dropped out*”. (91) The claimant confirmed that he had agreed to have a conversation with only Mr Marshall following the first call with them both, but said that this was not following the process, the process stated Regional Manager and Regional People Manager.
116. The claimant did not raise any complaint in his witness statement about the Regional Manager, Tim Deering, not being part of his welfare support and/or not being replaced by another Regional Manager.
117. Mr Marshall confirmed to me that he was a Regional Manager himself (but in

People rather than for the stores) so would be responsible for and had undertaken welfare meetings with his direct reports. He confirmed that he would have the same access to return to work opportunities as Mr Deering.

118. The claimant told Mr Marshall he would send his resignation in the same format as his complaint. That evening the claimant sent an email to David Potts and Claire Grainger (who he had also sent his formal complaint to on 23 March 2022 ) (142). The email said:

*“Hi David/Claire,*

*Since submitting my formal complaint three weeks ago, it has given me a lot of time to think over what has gone on over the last calendar year and given me the realisation that the leadership that I have been subject to both whilst in work and off sick has been poor at best dash something I feel I can no longer continue to endure, given how much it has disrupted my career and personal life.*

*Since submitting my complaint I've seen a huge difference in people taking a professional approach to the process is that Morrisons has for its people dash so I'd like to thank you for that. I role model my leadership on those principles and on reflection I've been badly comment badly let down by the people who are in leadership roles to support me at the time I've most needed it. I formally handed my notice in this evening to Brian Marshall on my welfare call at 5:30 PM and felt obliged to update you with that also, so that the 10th of may will be my four week notice. Stop the paragraph I would still like to receive feedback on my formal complaint, in the hope it will help me to personally recover from how I felt this past year”*

*Yours sincerely  
Scott*

119. The claimant did not send any email asking for an update on the investigation of his formal complaint prior to his resignation. The first time he asked for an update on 8 May 2023 (146)

*“ I'm just emailing to ask has there been any progress with my formal complaint? Since submitting on the 23/03, other than a response around Laura being on holiday and that she would be completing the investigation on her return – I haven't heard back since then. Conscious that my last day contracted with the business is 10/5 and would of hoped it be concluded by then.”*

120. The claimant accepted in cross-examination that three weeks did not give the respondent adequate time to deal with his complaint. But the claimant said that in three weeks case handling could have come to him to talk through his complaint. He said he was expecting a case manager to reach out to him in the first three weeks and speak to him in the first week.

121. The claimant said that the last straw in this case was that since submitting his complaint nothing had happened in 3 weeks and nothing had changed. Mr Liberadzki put to the claimant that what he said in his email of 12 April 2022 was in direct contradiction to his claim that nothing had changed since submitting his formal complaint. The claimant denied that he had said nothing had changed and listed things that had changed including that there had been a change in the way people treated him and correct processes were being followed.

10 May 2022

122. The claimant posted a facebook message on 10 May 2022 regarding the end of his employment with the respondent (93) “ *Today marks the end of my six years at Morrisons!! I feel satisfied to be leaving after six successful years. I've had the pleasure of working with some really really great people, colleagues and managers that have truly led the way for some real personal highlights of my working career..... From my first day in retail as a manager, I was always told- treat people how you'd like to be treated and I can say for certain on my last day that I've stayed true to that. Over and out Morrisons....*

In the post the claimant also refers to his shrinkage audit record.

12 May 2022

123. This was the claimant's last day of employment with the respondent, following the end of his notice period. The claimant remained on sick leave throughout his notice period.

13 May 2022

124. The claimant commenced his new role at his current employer.

### ***New employment commenced on 13 May 2022***

125. The claimant's last day of employment with the respondent was 12 May 2022. The claimant said he started a new role with another supermarket, the following day on 13 May 2022. The claimant had not disclosed documents concerning his application for the role – he said he did not have in his possession or control a copy of his application (which he had made online) and did not have a copy of any acknowledgement of his application. He said that the timeframe for his application was “*probably sometime in February or in early March [2022]*” and he had probably started looking for alternative roles in February or March 2022.
126. The claimant did not disclose any documents from his current employer confirming the date of his interview or the arrangements for it. He said the email had gone into his junk folder.
127. The claimant said he did not receive any letter thanking him for attending the interview and confirming that the company would be in touch. He said that he had been told verbally.
128. The claimant had disclosed, after being reminded by me of his obligations of disclosure in relation to the order for specific disclosure, texts concerning his attendance at the interview. These indicated he had attended an interview with his current employer on 25 March 2022. The claimant confirmed that he had attended the interview for his current role on 25 March 2022.
129. The claimant said that he was offered his current role on 13 April 2022 and provided an email dated 13 April 2022 from Sarah Darkins of his new employer. He also provided a copy of his formal offer letter and contract which stated that the date of issue was 13 April 2022 and the start date for the role was 12 May 2022. The claimant denied that he asked or knew the start date for his new role (which was a fixed term role) before his offer letter. Mr Liberadzki said this was not credible. I noted that the claimant was evasive when being questioned about his knowledge of the start date of the new role and whether he had been asked about his notice period.

130. The email from Sarah Darkins was sent at 11.57am on 13 April 2022 and said:
- “Congratulations on your offer for the Buyer team with Jenna. I have processed the details this morning so you should have the offer details with you shortly”*

The claimant confirmed that Jenna was the hiring manager but did not accept that this referred to a separate offer from Jenna. The claimant’s formal offer letter and contract were issued on 13 April 2022.

131. I find that it can be inferred from the evidence that when the claimant resigned he had been offered his current role or had the expectation of a likely offer.
132. I am now in a position to record my findings about the reasons why the claimant resigned. I find that the claimant did not resign because he had not heard about his formal complaint in three weeks and/or because nothing had changed since submitting his complaint. When the claimant submitted his formal complaint on 23 March 2022, he had not been in work since 4 November 2021. He had indicated to Mr Marshall on a number of occasions from 18 January 2022 that he planned to submit his formal complaint imminently but did not submit it until 23 March 2022. The claimant’s formal complaint had been acknowledged and he had been told that the manager dealing with his complaint was on holiday and would deal with it upon his return. The claimant did not ask for an update on the progress of his complaint before resigning and accepted in evidence that it was not reasonable to expect his formal complaint to be dealt with within a three week period. In his welfare meeting with Mr Marshall he had said that he would want it heard within 28 days due to financial reasons. In his resignation email, the claimant does not complain, or even raise, that he had not heard anything about his formal complaint in three weeks. He also commented in this email that *“Since submitting my complaint I’ve seen a huge difference”*. It was not the case that things hadn’t changed. I find that the claimant did not resign in response to the alleged breach of the implied term of trust and confidence but because he had been offered a new job or had the expectation of a likely offer with his current employer. He knew he had 4 weeks’ notice and the role started was due to start on 12 May 2022 (according to the issued contract).

## **Submissions**

133. At the end of the oral evidence each party made a submission summarising their case.

### *Claimant’s submissions*

134. The central case of the claimant was that the following amounted to a fundamental breach of contract which entitled the claimant to resign when triggered into doing so by the last straw in April 2021:
- 1) the conduct of Ms Ford and Ms Ashley following the meeting of 13 May 2021 and 4 November 2021 when he went onto sick leave; and
  - and 2) the way his welfare meetings were dealt with in January to April 2022, with no support being apparent.

In relation to the last straw, he said that his formal complaint had not been dealt with in a timely manner, there had been zero contact with him and no one had reached out to meet him. Also, nothing had changed since submitting his formal complaint despite several attempts by him.

The claimant said he genuinely believed people were trying to catch him out in doing something wrong so they could raise the issue with him. He said there were



so many more incidents of inappropriate behaviour which Ms Lord was aware of but he could not prove. In relation to the welfare meetings, he said Mr Marshall was not at the right leadership level, he couldn't explore all the options and despite providing full disclosure of his issues, Mr Marshall chose not to do anything with it. The claimant invited me to conclude that the statements of Ms Poole and Mr Gale should not be believed. He submitted that Ms Ford said in evidence that she did not believe them and so didn't withhold his sick pay. Ms Liberadzki disputed that this was what Ms Ford had said, he read out his note to me - that as the claimant was absent with anxiety she didn't want to add to this. I told the parties that I would check my own notes of Ms Ford's cross examination.

135. Some of the matters the claimant referred to in his submissions were not relevant issues in the case or could not be relied upon as a ground for terminating the contract as they post dated his resignation or he was unaware of it at the time of his resignation and accordingly it would provide no basis for an unfair dismissal claim. The claimant submitted that he had told nothing but the truth during his evidence and that he had provided all materials in his position.

### **Respondent's Submissions**

136. Mr Liberadzki began by referring me to the case of **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**. He also submitted that when looking at whether the claimant resigned in response to the breach, the reason relied on by the claimant need not be the sole reason but effective. Mr Liberadzki invited me to conclude that the claimant's case had not been made out, there was little that could be criticised in terms of Ms Lord and Ms Ashley's behaviour and the welfare support provided and any criticisms that could be made came nowhere near the high threshold required before a repudiatory breach of contract could exist. Mr Liberadzki referred me to the statements of Ms Pool and Mr Gale at page 76 and 81 and 78-79 and invited me to conclude that the claimant going on sick leave at least in part a planned response to the shrinkage report not Ms Ford's management style or any allegations against her.
137. He reminded me that the decision not to extend the claimant's sick pay was not part of the claimant's case of fundamental breach and that matters which followed his resignation were not relevant. In relation to the last straw he referred me to pg 142 and the claimant's statement that since submitting his complaint he had seen "a huge difference" which was directly at odds at way claim was now pleaded. In the event that I found a breach of trust and confidence, Mr Liberadzki invited me to conclude that the reason for the claimant's resignation was because he had found a new job and invited me to draw an inference that when the claimant resigned he had an offer or was in expectation of a likely offer from his current employer.

### **Relevant law**

138. Section 95 of the Employment Rights Act 1996 ("ERA") relevantly provides:
- 95 Circumstances in which an employee is dismissed
- (1) For the purposes of this Part an employee is dismissed by his employer if (and... only if)—
- ... (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. ...
139. In "Harvey on Industrial Relations and Employment Law" at paragraph DI [403]:  
*"In order for the employee to be able to claim constructive dismissal, four conditions must be met:*

(1) *There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.*

(2) *That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.*

(3) *He must leave in response to the breach and not for some other, unconnected reason.*

(4) *He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract."*

140. If the employee leaves in circumstances where these conditions are not met, he will be held to have resigned and there will be no dismissal within the meaning of the legislation at all.

141. The Tribunal's starting point was the test set out by the Court of Appeal in **Western Excavating (ECC) Ltd v. Sharp [1978] IRLR 27**. An employee seeking to establish that he has been constructively dismissed must prove:

- a. that the employer fundamentally breached the contract of employment; and
- b. that he terminated the contract by resigning?
- c. that he resigned in response to the breach.

142. The term of the contract upon which the claimant relies in this case was the implied term of trust and confidence. It is an implied term of any contract of employment that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: **Malik v Bank of Credit and Commerce International SA [1997] ICR 606**, as clarified in **Baldwin v Brighton & Hove City Council [2007] IRLR 232**.

143. The test of whether there has been a breach of the implied term of trust and confidence is an objective one in which the subjective perception of the employee can be relevant but is not determinative. As Lord Nicholls said at page 611A of **Malik** in relation to the conduct relied on as constituting the breach:-

*"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. This requires one to look at all the circumstances."*

144. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

145. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT (Langstaff J) in **Frenkel Topping Limited v King UKEAT/0106/15/LA** (in paragraphs 12-15):

"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of **BG plc v O'Brien [2001] IRLR 496** at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is

“seriously”. This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:

“... apt to cover the great diversity of situations in which a balance has to be struck between an employer’s interest in managing his business as he sees fit and the employee’s interest in not being unfairly and improperly exploited.”

13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.
14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was “conduct with which an employee could not be expected to put up”. In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.
15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach.”
146. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per **Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, 350***
147. In some cases, the breach of trust and confidence may be established by a succession of events culminating in the “last straw” which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal affirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**.
148. The last straw doctrine is relevant only to cases where the repudiation relied on by the employee takes the form of a cumulative breach.
149. The law relating to the reason for a resignation after a repudiatory breach was reviewed by the EAT (Langstaff P presiding) in **Wright v North Ayrshire Council [2014] IRLR 4**. If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause. That is particularly clear from the decision of the Court of Appeal in **Nottingham County Council v Meikle [2005] ICR 1**. At paragraph 20 of **Wright** Langstaff P summarised it by saying

“Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause.”

If, however, there is an underlying or ulterior reason for the employer’s conduct, then there has not been a constructive dismissal.

150. An employee may lose the right to treat himself as constructively dismissed if he affirms the contract before resigning.
151. An employee is entitled to a reasonable period of time in which to resign before being taken to have affirmed the contract: **Air Canada v. Lee [1978] ICR 1202, EAT**. The length of that period is not fixed. Relevant factors include the consequences to the employee of losing their job and their prospects of finding alternative work: **Chindove v. William Morrison Supermarkets EAT/0201/13**.
152. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract. All depends on the circumstances of the particular case: **W E Cox Toner (International) Ltd v Crook [1981] IRLR 443**,

## **Conclusions**

153. The definition of a dismissal for these purposes is found in section 95(1)(c) of the Employment Rights Act 1996 which is where an employee terminates the contract in circumstances where he is entitled to terminate it because of a fundamental breach of contract by the employer.
154. I have had to decide is whether the claimant's resignation should be construed as a dismissal. In order for the employee to be able to claim constructive dismissal there must first be a fundamental breach of contract by the respondent. This is a case where the claimant alleged that a series of actions on the part of the respondent cumulatively amounted to a breach of the implied term of trust and confidence.
155. I had the benefit of a significant amount of factual evidence, both written and oral. Not all of it proved to be relevant. I took account of all relevant points made in submissions, even if not expressly addressed below.
156. Applying the test derived from **Malik** I had to determine whether the respondent without reasonable or proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. There were two strands to that test:
- (1) Was there reasonable and proper cause for the employer's actions?
  - (2) If not, were those actions serious enough to be likely, when viewed objectively, to destroy or seriously damage the relationship?
157. I reminded myself that the courts have emphasised that this is a test which is not to be applied too lightly. It is a stringent test for a claimant to meet as emphasised in **Frenkel Topping Limited v King UKEAT/0106/15/LA** ( paragraphs 12-15) It was said in the **Tullett Prebon** case that the employer must have demonstrated objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. Those are words which indicate the strength of the implied term.
158. As for the last straw, it is possible for a last straw to constitute a repudiatory breach even if in itself it does not breach trust and confidence, and even if in isolation none of what has gone before has breached trust and confidence.
159. The Court of Appeal in **Kaur** (referred to above) offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed: -

- 138.1 what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? I concluded the answer to this was the way the claimant's formal complaint was dealt with after its submission, i.e. that the claimant had received no response to his formal complaint in three weeks and nothing had changed.
- 138.2 Has he or she affirmed the contract since that act? I concluded the answer to this was no. The claimant resigned on 12 April 2022.
- 138.3 If not, was that act (or omission) by itself a repudiatory breach of contract? I concluded that it was not.
- 138.4 If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence. I concluded that it was not.
160. The claimant's case was set out in the agreed List of Issues. The List of Issues concentrated on two broad themes plus the last straw which appeared in paragraph 8.1.1.3.
161. The first broad theme was an allegation that the claimant was bullied and gaslighted into believing his performance could and should be better during the period following the meeting of 13 May 2021 and 4 November 2021. The second was an allegation that the welfare support provided to the claimant between 4 November 2021 and 12 April 2022 was "appalling" and he was provided with no support and I considered the events between 23 March 2022 and 12 April 2022 for the last straw.

*The Last Straw*

162. The claimant submitted his formal complaint (which he sometimes referred to as a grievance) on 23 March 2022. He resigned on 12 April 2022 and said that his resignation had been triggered by the way his formal complaint was dealt with after its submission, i.e. that he had received no response to his formal complaint in three weeks and nothing had changed. In my judgment the conduct of the respondent between the 23 March 2022 and 12 April 2022 would not have been serious enough when viewed objectively to be calculated or likely to destroy or seriously damage trust and confidence. It was not something which showed any intention to abandon and altogether not to perform the contract of employment; it was not something with which an employee could not be expected to put up.
163. The claimant's formal complaint had been acknowledged by the respondent, he had been informed who would be investigating it and that there would be a delay due to the investigating manager being on holiday. The formal complaint was not ignored or rejected. The claimant did not contact the respondent to check on its progress before resigning and accepted in cross examination that three weeks was not a reasonable time for his formal complaint to be dealt with. In his resignation email (142) the claimant does not refer to any delay in dealing with his formal complaint. In evidence he said that a case manager should have contacted him during these first three weeks to discuss his complaint, whilst I accept there was some delay, given it had previously been explained that the manager responsible was currently on holiday, so there would be a delay, I did not consider this omission to be serious enough to destroy trust and confidence.
164. The second part of the last straw was that since the claimant had submitted his complaint nothing had changed. In submissions I was reminded by Mr Liberadzki

of what the claimant had said to the respondent's CEO and Director of People in his resignation email (142). The claimant said "*Since submitting my complaint I've seen a huge difference in people taking a professional approach to the process is that Morrisons has for its people dash so I'd like to thank you for that.*" The claimant had also referred in evidence to some of the changes that had occurred during the period 23 March 2022 and 12 April 2022. Objectively, I rejected the claimant's claim that nothing had changed since he had submitted his complaint and in the circumstances the respondent's actions did not meet the Malik test. In isolation, I concluded that last straw relied upon by the claimant was not a breach of trust and confidence. It did not breach the **Malik** test.

165. Having concluded that the last straw was not a repudiatory breach in itself I next considered whether the cumulative series of acts relied upon by the claimant taken together amounted to a breach of the applied term. Whilst the last straw was in itself insufficient to justify the claimant treating his resignation as a constructive dismissal, I had to consider whether when viewed against a background of such incidents it was sufficient to warrant him treating his resignation as a constructive dismissal.
166. I concluded that the last straw was not part of a course of conduct comprising several acts and emissions which, viewed cumulatively, amounted to a breach of trust and confidence. The last straw relied upon did not constitute a breach of the implied term of trust and confidence when added to what had gone before.

*Bullying and gaslighting*

167. Looking at all the circumstances, I was satisfied that there was no bullying or gaslighting by Ms Ford or Ms Ashley during the period following the meeting of 13 May 2021 and 4 November 2021. I concluded that the claimant had a distorted perception of his treatment and this his perception was tainted by his unsuccessful request for a pay increase when he took over the Swinton store. Whilst he did not rely on the meeting of 13 May 2021, viewed objectively, this meeting was amicable and demonstrated a reasonable management approach. Ms Ford and Ms Ashley's conduct was not calculated or likely to destroy or seriously damage trust and confidence. Whilst Ms Ford did raise issues with the claimant it was not unreasonable for her to do so and there is evidence that she also informed the claimant that she was happy with how he was performing and running the store. He received a positive appraisal in September 2021 and a performance rating which matched his own view of his performance. The claimant accepted that the points raised by Ms Ford in her store inspections were minor, not exceptional to his store and it was reasonable for her to raise them. The claimant had claimed that Ms Ashley had also bullied and gaslighted him but I was struck by the lack of actual examples of alleged inappropriate conduct regarding Ms Ashley and the claimant's lack of respect for her. I could identify only one specific example of alleged inappropriate behaviour during the period – her calling the claimant on holiday and asking why he did not feel supported by herself and Ms Ford.
168. The claimant's perception was that people were trying to catch him out in doing something wrong so they could raise the issue with him was not borne out. I noted that when Ms Ford did have evidence of the claimant doing "something wrong" (such as sending the email dated 27 October 2021 and other emails of a similar tone and approach) she did not discipline him but took a more informal reasonable management approach.
169. Whilst I found there were some occasions when Ms Ford was direct in how she communicated her concerns or issues, I agree with Mr Liberadzki that any criticisms of Ms Ford and Ms Ashley would not come near to the high threshold of

the Malik test. There was reasonable cause for Ms Ford and Ms Ashley to act as they did during this period. In isolation or when added to what went afterwards, the conduct was not serious enough when viewed objectively to be calculated or likely to destroy or seriously damage trust and confidence. It was not something which showed any intention to abandon and altogether not to perform the contract of employment; it was not something with which an employee could not be expected to put up.

*Welfare support*

170. The claimant characterised the welfare support he received as “appalling” and that ultimately he had not received any support. Having had the benefit of oral and written evidence of the claimant, Mr Marshall and Ms Ford, I rejected this characterisation.
171. As set out in my findings of fact, Mr Marshall had made clear to the claimant what his role was in the welfare process and, importantly, he had been clear as to what was not part of his role and the welfare process. An example of one such occasion was the welfare meeting on 1 March 2022 *“Know you have some concerns but this is me dealing with your welfare, you have mentioned a complaint but this needs to be separate as this is about your welfare.”* (172-178). In the claimant submissions, he stated that he was familiar with the welfare process, having conducted welfare meetings with his staff in the past and that Mr Marshall had “implored” him to submit his formal complaint. The claimant had assured Mr Marshall, from the early stages of his welfare support, that he was going to finalise and submit his formal complaint very soon. Given the claimant knowledge of the welfare process, his repeated statements that he was going to submit his formal complaint, Mr Marshall’s clarity as to his responsibilities and that the formal complaint was separate from his welfare support, it was not an omission or unreasonable for Mr Marshall not to have escalated the claimant’s verbal concerns.
172. A key aspect of Mr Marshall’s role was to support the claimant’s welfare such as by listening to him, offering support such as access to the respondent’s resources such as Vita Health and occupational health. As referred to in my finding of fact the claimant was complimentary about Mr Marshall’s support in welfare meetings with him – such as at the welfare meeting on 1 March 2022 *“I feel that you have supported as listened to me so felt supported”*. Mr Marshall also offered to refer the claimant to occupational health on two occasions, but the claimant did not feel it would be beneficial and discussed Vita Health with him. He asked how the claimant how he could help him, he arranged a face to face meeting (which involved some travel for both him and the claimant) as he thought it would be beneficial for the claimant. The claimant makes a reference to Mr Marshall not being a Regional Manager of stores, but the claimant agreed that he would speak with Mr Marshall alone and I was not satisfied that the support the claimant would have received would have been any different had a Regional Manager been involved or that it was unreasonable for Mr Marshall to conduct the welfare meeting as an experienced and senior people manager. Mr Marshall attempted to discuss plans for a return to work but the claimant was adamant he could not be managed by Ms Ford or re-locate from the region she managed. I concluded that Mr Marshall provided the claimant with reasonable and empathetic welfare support.
173. The claimant refers in his meetings to the earlier stages of the welfare support he received after initially going on sick. On the basis of my findings of facts regarding the support he received during this time, I again do not feel that the respondent’s acted in an unreasonable or unfair manner. When contacted by Ms Ford and Ms Ashley to check in on his welfare, the claimant had said that he was not ready to

talk and said he would send weekly updates of his health by email until he was ready to talk. At this stage, the respondent was following the lead of the claimant before inviting him to a welfare meeting at the end of December 2021, when he had been off for some weeks. When the claimant asked for independent people to deal with his welfare this request was accepted and actioned without delay.

174. Viewed objectively the claimant's concerns about the welfare process were unfounded. On the basis of my finding of facts, I was satisfied that the claimant had been supported during the welfare process and the actions of respondent including Ms Ford, Ms Ashley and Mr Marshall did not meet the Malik test. There was reasonable cause for them to act as they did.
175. In isolation or when added to what went before, the conduct was not serious enough when viewed objectively to be calculated or likely to destroy or seriously damage trust and confidence. It was not something which showed any intention to abandon and altogether not to perform the contract of employment; it was not something with which an employee could not be expected to put up. The last straw was not part of a course of conduct comprising several acts and emissions which, viewed cumulatively, amounted to a breach of trust and confidence.
176. In conclusion, there was no fundamental breach of contract by the respondent, and therefore no dismissal under section 95(1)(c). The questions of affirmation or waiver did not arise, and nor did any question of remedy.
177. The claimants claim of unfair dismissal is dismissed.

Employment Judge McCarthy  
Date: 17 March 2023

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON 17 MARCH 2023

FOR THE TRIBUNAL OFFICE

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