Case Number: 2303025/2015

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH**
BEFORE:	**EMPLOYMENT JUDGE ELLIOTT**
MEMBERS:	**MS B LEVERTON**
	MR N SHANKS

BETWEEN:

Mr P Elworthy

Claimant

AND

Your-Move.Co.UK Ltd

Respondent

ON:	**8, 9, 10, 11, 12, 15 and 16 May 2017**
IN CHAMBERS ON:	**17, 18 and 19 May 2017**

Appearances:
For the Claimant: **In person**
For the Respondent: **Mr E Legard, counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claims for sexual harassment and constructive unfair dismissal fail and are dismissed.
2. The claim for direct sex discrimination succeeds and proceeds to a remedy hearing.

REASONS

1. By a claim form presented on 7 November 2015 the claimant Mr Paul Elworthy claims constructive unfair dismissal and sexual harassment. The claimant worked for the respondent from 2 June 2008 until his resignation by letter dated 15 September 2015 as Senior Financial Consultant.

2. The parties agree that the correct name of the respondent is Your-Move.co.uk Ltd and the record is changed accordingly.

The procedural background

3. There were three preliminary hearings in this matter. The first was on 19 January 2016 before Employment Judge Hall-Smith at which there was a preliminary identification of the issues; the second was on 28 April 2016 before Employment Judge Morton who extended time for the claimant to pursue his claim for sex discrimination/harassment; the third was on 6 July 2016 before Employment Judge Balogun at which she ordered the parties to agree a list of factual and legal issues relevant to the claim.

The issues

4. This is a claim for constructive unfair dismissal. Did the respondent fundamentally breach the claimant's contract of employment? The terms of the contract relied upon are the implied term of trust and confidence and the implied term that an employer will reasonably and promptly afford a reasonable opportunity to an employee to obtain redress of any grievance.

5. The respondent denies fundamental breach. It was therefore an issue for the tribunal as to whether there was a fundamental breach of the contract of employment. The claimant also relies on the matters relied upon as sexual harassment as going to the fundamental breach of contract.

6. The claimant relies on two allegations in support of his claim that the respondent fundamentally breached his contract of employment (in addition to the allegation of sexual harassment):

    a. Did the respondent fail to deal effectively with the claimant's grievances;
    b. Did the respondent require the claimant to undertake toilet cleaning duties.

7. Did the claimant resign in response to any proven breach?

8. Did the claimant affirm the breach by delaying his resignation?

9. If not, and the claimant was dismissed, what was the reason for dismissal? Was it for a potentially fair reason under section 98 Employment Rights Act 1996 and was a fair procedure followed?

10. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged?

11. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when? (The Polkey argument).

<u>The claim for direct sex discrimination/harassment</u>

12. The claim for sex discrimination was identified by employment Judge Morton at the hearing on 28 April 2016. The issue was whether during a Christmas lunch in December 2013 a remark was made by the claimant's then manager Ms Sarah Thompson to the effect that if he banked £180,000 of income she would give him a blow job and that amounted to sexual harassment.

13. The claimant also relied upon this as direct sex discrimination and relied upon it as part of his claim for constructive dismissal. For direct discrimination, was the claimant treated less favourably because of his gender than the respondent treated or would treat others?

14. For harassment was the conduct related to the claimant's gender?

15. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

16. If not, did the conduct have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

17. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Applications as to additional documents and an additional witness statement

18. The respondent applied for leave to introduce some supplemental documents amounting to approximately 25 pages. The documents fell into two categories: the first were notes made by grievance officers and the second amounted to emails between June and September 2014 regarding a policy that employees who have live disciplinary sanctions are not invited to rewards ceremonies. The claimant had not been permitted to attend such a ceremony in June 2015.

19. The respondent's counsel could not explain why the documents had been disclosed late. The claimant objected on grounds of the late disclosure. The claimant also said he thought the documents had been deliberately suppressed. The claimant accepted that he had been in receipt of the documents for about a month.

20. We considered that both categories of document were relevant to the issues in the proceedings. We informed the claimant that it remained open to him to cross-examine witnesses on the documents and on the late disclosure of those documents and put his case to them that the documents had been deliberately suppressed. We therefore gave leave for these documents to be introduced.

21. The respondent also sought leave to introduce a further witness statement, of Mr Andrew Trantum who issued the claimant with a first written warning in March 2015. This was introduced in reply to matters raised in the claimant's witness statement. The claimant objected to the late introduction of this witness statement.

22. We refused this application. The matter of a first written warning was not relied upon by the claimant in his constructive dismissal claim, based on the list of issues. It did not therefore appear to us to be relevant to the issues that we had to determine and in any event was covered by other witnesses such as Mr Martyn Alderton and Ms Stephanie Hayes. We therefore refused leave to introduce this additional witness evidence.

Other preliminary matters

23. Day 1 was a reading day at which representatives were asked to attend. The respondent had prepared a chronology and a draft timetable. We asked the claimant on day 1 to consider these documents and let us know if they were agreed or if any amendment was necessary. They were agreed.

24. We spent time with the parties clarifying the issues (based on the respondent's list of issues sent to the tribunal on 28 September 2016 as ordered by Employment Judge Balogun) and dealing with applications in relation to documents and statements and procedural issues. The claimant was represented in these proceedings by his union until 3 October 2016. The list of issues was sent to the claimant's union representative at the end of August 2016 prior to being sent to the tribunal in accordance with Judge Balogun's Order.

25. The respondent provided us with a cast list.

26. We also asked the claimant to paragraph number and paginate his witness statement to assist with the smooth running of his evidence.

27. We also gave the claimant an explanation of the process we would follow.

Witnesses and documents

28. We heard from (i) the claimant and from his former colleague (ii) Mr John Wheatland. We also heard from the claimant's former colleague (iii) Mr Giles Barrett who appeared pursuant to a witness order issued on day 5 of the hearing. Mr Barrett is still employed by the respondent. Mr Wheatland is not. The claimant also had a statement from his former colleague Mr Ben Quennell. The claimant decided not to call Mr Quennell.

29. The claimant contended that pressure had been applied to Mr Barrett by the respondent to discourage him from attending the hearing to give his evidence. We were satisfied after hearing from Mr Barrett that his

reluctance to attend was personal and no pressure had been placed on him by the respondent.

30. For the respondent we heard from eight witnesses: (i) Mr Simon Cox, national financial services director (ii) Ms Sarah Thompson, his former line manager, (iii) Mr Paul Jardine, who heard the claimant's first grievance (iv) Mr Martyn Alderton, who heard the claimant's appeal against a first written warning, (v) Mr John Hargreaves who heard the claimant's second disciplinary, (vi) Mr Steven Little who heard the claimant's second grievance (vii) Ms Sarah Westman, HR Operations Support Adviser, who investigated the claimant's second disciplinary and (viii) Ms Stephanie Hayes, Head of HR for Financial Services.

31. The cast list appears at appendix 1 of this decision.

32. There were 2 lever arch folders of documents running to about 750 pages plus the supplemental bundle from the respondent of 25 pages which we gave leave to introduce into the main bundle.

33. A statement had been prepared and exchanged for Mr Andy Preacher, Head of HR. On the morning of Day 1 the respondent said that a decision had been made not to call Mr Preacher as he dealt with matters post-termination of employment.

34. We had an agreed chronology, a cast list and an agreed timetable.

35. We had written submissions from both parties to which they spoke. They are note replicated here. The submissions and any authorities referred to have been fully considered, even if not expressly referred to below.

Findings of fact

36. The respondent is a national estate agency. It employs approximately 2,000 people. Within the wider group it employs about 5,000 employs. The respondent is part of the LSL Property Services Group. The claimant was based in Eltham and Bromley. The respondent has an HR team of about four employees based in Newcastle.

37. The claimant had two periods of service with the respondent. The first period was from 2000 to 2007. He then had about a year off and was re-employed on 2 June 2008 as a senior financial consultant. The claimant accepts that his period of continuous service for the purposes of these proceedings, commenced on 2 June 2008. His role was to give mortgage advice to the respondent's clients. In January 2015 Ms Sarah Thompson became his line manager. She reported to Mr Simon Cox, the national financial services director.

38. The claimant was a high performer and wrote a great deal of business for the respondent. The respondent accepts that in person and face to face, the claimant is a pleasant, articulate and intelligent man.

39. The claimant relies on events in 2015 as leading to his resignation which he complains of as constructive dismissal. He also relies on a comment which he said was made by his line manager Ms Sarah Thompson on 20 December 2013 which he relies on as an act of sex discrimination or harassment.

The 20 December 2013 lunch

40. On 20 December 2013 the claimant attended a senior consultant's reward lunch. He asserts that at that meeting Ms Thompson said that she would give him a blow job if he banked £180,000. The claimant says it was said in front of a number of people.

41. One of those present at the lunch was the claimant's witness Mr Giles Barrett, whose evidence was that he heard Ms Thompson say to the claimant that if he achieved a target of £180,000 banked income she would give him a blow job.

42. Ms Thompson categorically denied making this comment. She and the claimant used to be friends and she said he never raised with her, his sense of upset at this alleged comment.

43. The claimant's case was that the comment was made after the lunch, when people were standing around mingling and after they had all had a few drinks. His case was that they were standing in a group of about four of five people, himself, Ms Thompson, Mr Barrett and two others whom he could not remember. There was talk of sales targets as it was coming up year end and Mr Barrett had been doing a "phenomenal" amount of sales. Everyone was focused on achieving their targets at year end and the likely effect on bonuses.

44. The claimant and Ms Thompson did not agree on the venue of this lunch. Ms Thompson said it was at Skylon at the Festival Hall, Southbank, overlooking the river and the claimant thought it was at Smollenskys in Charing Cross.

45. The claimant's evidence was that the comment left him feeling "not great" and he thought it was not an appropriate comment for a senior manager to make.

46. The claimant did not complain about this issue until his second disciplinary hearing in front of Mr John Hargreaves on 16 September 2015, after his resignation letter had been handed over. His case is that he did not complain at or near to the time because he feared for his job. No mention was made of this matter in the resignation letter (set out below under the heading "Disciplinary hearing 2 and the claimant's resignation").

47. The notes of the hearing before Mr Hargreaves record the claimant as saying *"he finds it incredibly inappropriate that a senior manager (Sarah*

Thompson) had stated that if he booked £150 grand's worth of business she would give him a blow job" (page 720). The amount of money mentioned at the hearing differed from £180,000 to £150,000.

48. Mr Hargreaves took the allegation seriously and asked HR to investigate, even though the claimant's employment had terminated.

49. The first Ms Thompson heard of this allegation was during an investigatory telephone call with Ms Laura Todd of HR on 22 September 2015, nearly two years after the alleged incident. There was a note of the investigatory telephone conversation between Ms Todd and Ms Thompson at page 732. In that conversation Ms Thompson told Ms Todd that she and the claimant used to be very good friends and they used to have a laugh together. Ms Thompson also said in this interview, when asked if she had made the comment, "*absolutely not, do you really think I would ever say that? He might have wanted me too."*

50. We heard from the claimant's former colleague Mr Giles Barrett who remains in the respondent's employment. He was present at the lunch on 20 December 2013. His evidence was that he heard Ms Thompson make the comment.

51. Mr Barrett's evidence was that alcohol was flowing freely at the event. He recalls the remark being made by Ms Thompson after the meal and there were about four people standing around, they were all men with the exception of Ms Thompson. He clearly recalled the comments being made and the reference to £180,000. When he heard Ms Thompson make the comment he said "*Does that count for everyone?"* and she replied "*No, you're married*". This was followed by laughter.

52. Mr Barrett was asked about the claimant's reaction. Mr Barrett could not recall the reaction from the claimant, the conversation carried on as normal without a break in the flow. He took it as a joke but agreed that he cannot not speak for others. Even in evidence before us, Mr Barrett laughed about it and did not regard it as serious. He said that the comment hardly raised an eyebrow at the time. He said that he went home that evening and mentioned it to his wife. Mr Barrett and the claimant are good friends and the claimant did not complain to Mr Barrett about it until he asked him to prepare a statement in connection with these proceedings.

53. We had no evidence from the claimant that he had complained to anyone at the time, either at work or outside the workplace with friends or family.

54. We find that Ms Thompson made the comment. We find this based on Mr Barrett's corroborative evidence which we found convincing.

55. The claimant was asked in cross-examination whether he saw it as a joke. He replied that he saw it as inappropriate and he ignored it. He thought that someone in Ms Thompson's position should not make such a

comment. Ms Thompson did not become the claimant's direct line manager until January 2015. She was not his direct line manager on 20 December 2013.

56. The claimant was asked in cross-examination whether he saw it as sexualised banter and he replied "*I didn't see it that way*". The claimant's evidence was that the comment left him "*not feeling great*". He accepts that it was a one-off comment. He also said that it left him feeling "*a bit uncomfortable*". The claimant said that he did not raise it because he did not want to lose his job.

57. We find that the claimant did not find this comment humiliating, offensive, hostile or intimidating. We set out in our findings below, that the claimant is a persistent challenger of issues at work. He accepts this (his submissions paragraph 16). He is not afraid to raise grievances and complaints in a robust manner. We do not accept the claimant's evidence that he did not raise it at the time because he was afraid for his job. When challenged about the number of complaints that he raised, the claimant said that he raised them because they were justified and he was right to do so. We find that he had no hesitation in raising a complaint if he thought it was justified We find that this comment from Ms Thompson did not feature in his thinking until his resignation when, as we set out below, he had fully in mind his claim for constructive unfair dismissal.

58. It was the claimant who in October 2014 approached Ms Thompson directly about arranging the rewards lunch for the following year (email page 155B).

59. Our finding is that the claimant was not upset by the comment. His own evidence was that he thought it was inappropriate and he ignored it. We find that the claimant ignored it because at the time he did not find it upsetting, offensive, hostile, degrading, humiliating or intimidating.

60. We accept the claimant's evidence and find that the comment left him feeling no more than "a bit uncomfortable" and it left him feeling "not great".

<u>The cleaning issue</u>

61. In 2008 following the financial crash, to save money the respondent took away the cleaners from the office and the staff were told that they had to clean the offices including the toilets. The claimant was very offended by this as he took the view that he had not taken exams to become a financial consultant in order to do cleaning.

62. An email was sent by Ms Carmel Luff, the area manager for the three offices in the Bromley area, on a date in 2008 (which could not be more precisely identified) to those offices (page 155) saying:

"guys due to the fact we get charged £18k a month for cleaning in our

division and generally the job is done badly we are going to clean our own offices from now on
window cleaning will still be done
please make sure you draw up a Rota to get the toilets/kitchen dusting and hoovering done – time to roll up our sleeves guys and do what has to be done !!
I am relying on you all to roll out to your teams in a positive way – better to clean ourselves and save someone's job etc….anyone saying its not "their" job can easily be replaced by a member of staff who has lost their job due to office closures elsewhere in the company!!
c
ps I did point out that I hardly ever clean my own house but that was no defense heehee"

63. The claimant's evidence (statement paragraph 15.2) is that to date the respondent still expects its staff to do this. No additional payment is made for this. The claimant said he made a formal complaint about it but there was no record of it and no copy of it before this tribunal.

64. The request to carry out cleaning duties was not made to the claimant alone and it was not personal to him. It applied to all the staff at the relevant offices.

65. The claimant was indignant because he had taken professional exams to become a financial consultant and he said he had not done this in order to clean toilets. We agree with this. He considered Ms Luff's email to be a "threat of sacking" if he or colleagues did not perform the cleaning duties.

66. The claimant's own evidence was that he never performed any cleaning duties at the office. He said that the respondent "forced" him to do cleaning yet he accepts that he never did it. He has never been disciplined or reprimanded for failing to carry out cleaning duties in the seven-year period from 2008 to 2015.

<u>The stationery "ban"</u>

67. In October 2014 all staff at management level were told that there were no funds to purchase office stationery in the final quarter of the year (Q4). Funds would not be made available until the first quarter of the following year, in January. The claimant and his colleagues firstly had to look at whether they could share stationery resources between offices and if not, to purchase it themselves and claim it back on expenses in January. This applied to all staff at management level not just the claimant. The claimant's witness Mr John Wheatland and Mr Ben Quennell's witness statement confirmed this.

68. The claimant said in evidence that this could not be right for people who were earning £10,000-£12,000 per annum especially in the expensive pre-Christmas period. The claimant's salary was a lot more than this at around £55,000 per annum including commission (ET1, bundle page 8).

He said he believed he spent about £30-£50 on stationery in Q4 in 2014 and this was reimbursed in the following January (2015). The claimant could not produce any receipts for stationery purchases and we accept and find that this is because he submitted the receipts to accounts for reimbursement.

69. The purpose of the stationery policy was to save money and the respondent's thinking was that offices tended to stockpile stationery and they preferred that old stocks were used up before new stock was ordered.

70. The claimant had a conversation with Ms Thompson about this in late 2014. She offered to drive some white paper over to him from her office, but due to diary commitments it would be a day or two before she could do this. The claimant declined this offer.

71. Ms Thompson suggested that the claimant contact the Eltham, Beckenham and Blackheath offices to see if they had any they could spare. The claimant was indignant that he should be expected to incur the cost of driving to another office to collect stationery. There was no ban on reclaiming mileage cost and we find that the travel expense would not be delayed until January of the following year. The Eltham office is two miles away and the mileage rate is 15p per mile. The return trip to Eltham would have incurred a mileage cost of 60p.

72. We find that the Q4 stationery embargo was inconvenient for the claimant but no more than that. We take his point that if those on low salaries of £10,000 to £12,000 had been made to wait until after Christmas to be reimbursed, this would have had a noticeable impact financially but the claimant was earning around five times more than this.

Client tracking

73. In November 2014 the claimant was upset because he considered that one of his colleagues, another financial consultant named Lee Oddy, had signed up one of his clients.

74. On 12 November 2014 the claimant informed Ms Thompson of this at a meeting. He followed this up with an email on Sunday, 16 November 2014 (page 165).

75. The claimant's main concern was that there was no written policy to tell him when it was acceptable to "take" or begin working with, another consultant's client. The claimant had a very good relationship with his previous line manager Mr James Macauley who had given him to understand that if a consultant had not worked with a client for three months, it was acceptable to take on that client. The claimant wanted to know what the rules were.

76. The reason this happened in Mr Oddy's case was because the

respondent's Preview system, on which they record client transactions, had been changed. It no longer immediately showed all the past transactions with a customer; only those within the last 28 days. The claimant's last contact with the customer, with whom he had been in contact on and off since about April 2013, was on 16 September 2014. Mr Oddy made contact with the client on 3 November 2014, outside the 28-day period. For a financial consultant to see earlier transactions it was necessary to tick a box on the Preview system to reveal earlier transactions. Mr Oddy had not ticked this box.

77. The claimant was on sick leave for three from 17 October to 6 November 2014. The incident with Mr Oddy took place on Monday 3 November 2014, a date when the claimant was off sick.

78. The respondent's policy, unsurprisingly, is that the interest of the customer comes first. A customer should not be told that they must wait until their financial consultant returns from a period of absence, before their mortgage application can be progressed.

79. As the claimant had not received a response he chased this up with Ms Thompson on 2 December 2014 and she replied that she was discussing it with Mr Oddy's line manager that day. The claimant said that he wanted clarification from Mr Simon Cox the National Sales Director as to whether he could go for other people's business straightaway (page 164).

80. Mr Oddy apologised to the claimant by email (page 159) dated 11 December 2014 saying: "*Paul, I was unaware you were still tracking these clients as your appointment was back in April and there were no notes showing on the case as it only shows a month unless you specify otherwise. I apologise if you are actively tracking them, it certainly wasn't intentional*."

81. On 15 December 2014 in an email titled "Company Policy" the claimant said he would like confirmation as to whether there was a policy regarding the points he had raised. The claimant copied his union representative in to this email. Ms Thompson replied on 16 December saying: "*To clarify there is no company policy on tracking, out of professional courtesy however if I was an FC I would have discussed the case with you. I agree with you about the customer's needs being the main priority and we were due to phone the clients to understand why they choose to use another FC to make further decisions however the clients have pulled out of the sale"* (page 162).

82. The claimant was not content to leave it there. He sent an email to Ms Thompson copied to his union representative and others saying (page 162): "*to clarify as you have now confirmed there is no company policy in place please can you now confirm that I am now authorised to sign up other consultants business on the first day that the other consultant has seen that client? Please note this is the third time I have asked you this question and if you are unable to answer please confirm who I would need*

to escalate this to for an answer…..". He asked for a response within five working days.

83. On 23 December 2014 17:52 hours the claimant sent an email to Mr Cox, the National escalating this matter to him (page 161). It was copied to others including his union representative and Ms Stephanie Hayes, the Head of HR for Financial Services. He said: "*Further to my email dated 16/11/14 to Sarah Thompson and further emails which you have been copied in on I am still awaiting a response to all the points raised… I am struggling to see why we are having such difficulties answering simple questions…….. I have made you aware that Lee Oddy has a reputation for this type of practice and that this is not an isolated incident. I am unclear why we appear to turn a blind eye to this……. Please can you respond within five working days".*

84. Mr Cox did not like the tone of this email. He found the comments that the claimant was "struggling to see why [the respondent was] having difficulties answering simple questions", to be patronising. He also did not appreciate the comment about turning a blind eye to things. He thought that being asked for a response within five working days at about 6pm the evening before Christmas Eve was inappropriate and disrespectful and he considered the way in which the claimant had addressed Ms Thompson demonstrated a lack of respect for senior management.

85. After the Christmas break Mr Cox consulted Ms Stephanie Hayes, Head of HR Financial Services on next steps. He did so because Ms Thompson had also previously stated that she felt the claimant was seeking to bully and undermine her by routinely questioning policies, systems and processes. Mr Cox and Ms Hayes agreed that they would invite the claimant to a meeting with Mr Cox (his next line manager above Ms Thompson) to address these concerns about his approach to his job and his colleagues.

<u>The 9 January 2015 meeting</u>

86. The invitation to the meeting was sent by Mr Cox by letter to the claimant dated 6 January 2015 (page 169). It said that the meeting had been arranged "*for the following reasons: concerns regarding your approach to your role and your colleagues [and] examples of insubordination*". Mr Cox said in the letter "*I advise that this meeting is currently an investigation and an opportunity for you to bring to my attention any factors which you feel may not have been considered which are relevant to this situation*". This letter therefore identified the meeting as an investigation meeting.

87. In the final paragraph of the letter Mr Cox said "*I must also advise however that based on this meeting; I may consider it appropriate to progress to disciplinary action."*

88. Mr Cox said in evidence that the purpose of the meeting from his point of view was to "draw a line in the sand" around the claimant's attitude and

manner towards his colleagues. We find it unsurprising upon receipt of the letter that the claimant considered it a disciplinary investigation because that is what the letter said.

89. In preparation for the meeting Mr Cox asked Ms Thompson for examples of the claimant's behaviour that had led to her concerns. We saw examples of these concerns (which were sent to Mr Cox) in at the following emails:

> *"Hi Sarah, I have today had confirmation that my knee surgery will take place on…… I would appreciate no pressure from you or the company to return to work sooner than my full recovery will allow.* (Claimant's email 21 March 2014 page 234)
>
> Ms Thompson's response of 21 March 2014 was: *"Paul, I take this email as offensive, inappropriate and wholly unjustified please give me evidence of when I have ever expected someone to return to work when they are ill or recovering from an operation without being fit. In fact I think you will find it to be the complete opposite. Sarah"*
>
> [Commenting on clients who did not give a good rating on the service, the claimant said to Ms Thompson in August 2014] "*Considering it is the vendors that pays our fees and we have acted in their best interests then I find it strange that we audit the buyer……. We can't have it both ways. Either the company wants the business but has to accept that the buyer is not going to be over the moon about having to use us or we just let the business walk out the door and not put up a fight when someone puts up resistance about using us"* (page 238).
>
> [In October 2014 the claimant said to Ms Thompson] "*Please can you clarify how I am able to achieve 12 mortgages per calendar month with our current systems in place." (page 157).*

90. The perception from the respondent was that the claimant tended to make regular challenges to processes and procedures and that in doing so his style of communication was insubordinate. We saw a comment in an email from Area Compliance Manager Mr Simon Perry (20 October 2014) saying *"Paul is adamant that he knows how to do everything despite observations to the contrary and is resistant to any suggestions of change……. This puts him in direct conflict with the sales process……. Instead he seems to seize every opportunity to challenge what is asked of him*" (page 156).

91. Mr Dean Bailey from HR Operations Support said (page 173) "*As per our earlier conversation Fridays meeting is not a disciplinary meeting and no outcome will be given. Fridays meeting is a one to one with a member of senior management and is a chance for Simon to discuss any concerns with you and for you to raise any items you feel necessary*". In a further email on the same date (page 171), sent at 12:43 Mr Bailey said "*Hi Paul, I can confirm this is a one to one meeting so only you and Simon will be in attendance*."

<u>The arrangements for the 9 January meeting</u>

92. The claimant complained about the arrangements for travelling to the 9 January meeting. The meeting was arranged to take place at the

respondent's Canterbury office, which is where Mr Cox is based and because it fitted with his diary commitments on that date. The claimant lives in Sidcup and worked in Eltham. The claimant underwent a second knee operation in October 2014, the first having taken place in May 2014. He was not signed off sick from work in January 2015 when the meeting was due to take place. Mr Cox was unaware of the second knee operation in October 2014.

93. In an email to Mr Bailey dated 7 January 2015 at 11:32 (page 173) the claimant said: "*You have confirmed that Mr Cox has insisted that I still attend this meeting. For audit purposes please confirm that I have made you aware of the risk that this may have on my health. I confirm that I will attend the meeting".* He went on to ask who would be attending and whether Mr Cox would allow him to record the meeting.

94. In reply (page 172) Mr Bailey said that if the claimant found the distance too far to drive the respondent would pay for him to take public transport to the meeting. Alternatively he could drive and take a break as needed. The claimant's view was that both of these options would still impact upon his health.

95. We find that in early January 2015, the claimant was not off sick and he had been driving to work and to work-related meetings. There was no medical evidence produced to the respondent at the time. Mr Bailey made sensible suggestions as to alternative means of transport and Mr Cox was unaware the second knee surgery in October 2014. In those circumstances we find that the respondent's insistence that the meeting take place in Canterbury was not calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

96. Despite two written confirmations from Mr Bailey that the meeting was a one to one meeting, the claimant had received an invite letter to a disciplinary style investigatory meeting. At the outset of the meeting on 9 January 2015 Mr Cox revisited the invite letter and drew the claimant's attention to the fact that it was an investigation meeting and that it could escalate to a disciplinary meeting (page 180). We find in those circumstances it is not surprising that the claimant was confused about the nature and the purpose of the meeting.

97. The claimant wanted Mr Cox to issue a company policy on what he called "stealing clients". Mr Cox did not think this was appropriate. He said that if the claimant or the branch were out of pocket due to Mr Oddy's actions, this would be addressed. Mr Cox asked the claimant if he really meant what he said in his email to Ms Thompson when he had asked if he was now authorised to sign up other consultants' business on the first day the consultant had seen this client. The claimant thought this was a perfectly reasonable request.

98. In the meeting Mr Cox said that if the claimant could provide examples of

"stealing clients" – examples he already had, rather than examples that he went on to discover and if these examples supported the need to issue guidance, he would look at it and reconsider. Mr Cox effectively asked the claimant not to "go fishing" for the examples.

99. We find that the policy was as Ms Thompson had stated, that it was a matter of professional courtesy and common sense in the individual circumstances. The practice differed from region to region. The policy was not in writing. Employers are not obliged to create written policies on each and every matter that might arise and they are entitled to have unwritten policies and regional differences, with the risk that this may give rise to uncertainty and possible complaints.

100. Mr Cox took the claimant through the emails (set out above) where he thought the claimant showed a poor attitude and/or insubordination towards colleagues.

101. The meeting concluded with Mr Cox giving the claimant three options. They were: (i) for the claimant to acknowledge that he had behaved inappropriately in his communication and attitude over a sustained period and that he would not constantly waste management time and be perceived as a negative force. They would then move on and no formal action would be recommended; (ii) that if the claimant did not consider that his behaviour needed modifying, Mr Cox would have to consider formal action which could involve an invitation to a disciplinary and dismissal could be a potential outcome and (iii) that if the company's ethos, policies and culture were not acceptable to the claimant and he was fundamentally unhappy in his role he should consider seeking alternative employment. The claimant said he would take the weekend to consider the best way forward.

102. In a two-page email sent by the claimant to Mr Cox, Ms Hayes and the claimant's union representative Ms Thoburn at 22:10 hours on 9 January (page 179), he apologised saying "*My attention was not be rude but to highlight procedural problems. If I have offended anyone by the tone of my emails then I apologise".* We find that this was a qualified apology because it followed a long list of complaints, justifications and criticisms of the respondent and said "*<u>if</u>"* I have offended anyone, without accepting that he had been rude or that he regretted it. Mr Cox did not regard it as a genuine apology and felt the claimant did not show any remorse.

103. The claimant accepted in evidence that his tone could sometimes be blunt but in his view he was never rude. The claimant continued to put forward his complaints regarding a lack of policy on client tracking. He said that his old area had a 3-month rule and he was aware of another area with a 1 month rule. He still wanted to know why he could not take clients from day one. He complained about a past grievance concerning his bonus and complained about Ms Thompson whom he thought was less hands-on than his previous line manager and he thought she managed by email.

Following the 9 January meeting

104. On 12 January Mr Cox emailed the claimant. He wanted to know how the claimant wished to go forward. In a second email sent on 14 January at 4:22pm Mr Cox said (page 189) "*in light of the perceived reluctance from you to address the issues raised, I feel it is now appropriate to look to move to a full investigation of the issues with the possibility this may result in disciplinary action*". The claimant had stated to Mr Cox in a telephone call that he intended to instruct a solicitor regarding "*other issues"* which he did not specify.

105. Mr Cox took the view that despite the claimant's qualified apology the claimant ignored the instruction not to actively seek out examples of "stealing clients". Ms Thompson also made Mr Cox aware (email 9 January 2015 at 15:56hrs page 453) of inappropriate comments made by the claimant to his trainee Vera Praca that he was "coming after" Ms Thompson and Mr Simon Perry, a compliance manager. These two incidents and the email of 9 January (178-179) formed the basis of Mr Cox's decision to move to a disciplinary investigation.

106. The claimant replied on 14 January saying that he had apologised that some of his emails had not been "*in the correct tone*" (page 189). Mr Cox had sent the claimant the notes of the meeting and the claimant said he did not agree that the notes reflected the meeting they had and that he could "prove" this. He wanted considered at a hearing a case of "*workplace bullying and health and safety issues*" although he did not say what those issues were. He said "*I confirm that depending on how the hearing is conducted I will start legal proceedings against the company and individuals. Please can you confirm that all communication is copied into my union rep."* We find that the claimant was confrontational with this comment about legal proceedings, depending upon how things went. We find that the claimant firmly had legal proceedings in mind by at least 14 January 2015.

107. We find that it was reasonable for Mr Cox to move to a disciplinary investigation for the reasons he gave, because it indicated to Mr Cox that the claimant was not genuinely apologetic and by his actions it seemed that he intended to continue as before. Mr Cox took the view that the claimant had not learnt anything from their meeting on 9 January.

The 28 January 2015 investigation meeting and Grievance 1

108. An investigation meeting was arranged for Wednesday 28 January 2015. The night before that meeting at 22:34 hours on 27 January 2015 the claimant sent an email to Stephanie Hayes copied to his union representative Ms Thoburn.

109. In that email (pages 210-211) he queried the nature of the meeting on 9 January as he had been told by HR that it was a one-to-one meeting yet

he had a letter saying it was an investigation meeting. He also complained that at the 9 January meeting Mr Cox responded to his questions about the nature of the meeting by saying: *"if I can cut to the chase this is the problem we have with you that you argue the toss on many issues*".

110. The claimant complained that he found Mr Cox aggressive in that meeting and complained that Mr Cox told him to "*put up or shut up".* He complained that when discussing the lack of a policy on client tracking, Mr Cox made a comment that they did not have a policy on pushing someone through the window and this made him feel intimidated. He complained about the travel arrangements for the meeting in Canterbury and said that Mr Cox had said he had received "*feedback from HR …. that they expected me to kick up a fuss and they were right*". He said he thought HR were supposed to be impartial and he found this disturbing and inappropriate.

111. It was HR, rightly on our finding, who decided to treat the claimant's 27 January 2015 email as a grievance. We refer to this below as Grievance 1.

112. The investigation meeting took place on 28 January 2015 between the claimant, Ms Thompson and Ms Sarah Batson from HR. The notes of that meeting were pages 213-225. The heading of the meeting notes states "*Meeting notes non-verbatim*".

113. Ms Batson was 2 hours late for the meeting. She had travel delays as she had to fly down from Newcastle, pick up a rental car at the airport and drive to Kent. The claimant asserted that this meant he did not have enough time to present his case at the meeting. It lasted just under 2.5 hours. Towards the end of the meeting the claimant was asked if there was anything else he wanted to discuss, he said yes the meeting with Mr Cox. This was then discussed. The end of the note states that there was nothing further from any of the attendees. We find that the claimant was not disadvantaged by Ms Batson's late arrival, he had the meeting time he needed and he has sought to make more of this after the event.

114. Due to Ms Batson's late arrival for the meeting, Ms Thompson offered to buy the claimant lunch. She suggested that they go to the pub, which they did. The claimant contended that it was "highly inappropriate" to take to the pub, an employee who was under investigation as there were "multiple coffee and sandwich bars" in the vicinity. We find that the claimant did not complain to Ms Thompson at the time about this choice of venue. He did not suggest in evidence that he did complain or that he suggested an alternative. It would have been easy for him to say, "I would rather go to a coffee shop", but he did not. We find that the claimant is seeking to make something out of this choice of venue after the event, when he was content to agree to it at the time.

115. Ms Batson was the notetaker at the meeting; she was also in attendance in her capacity as an HR manager. The claimant complains that as

notetaker she should not have participated in the meeting. We find that she asked pertinent questions in the meeting for clarity and was acting within the scope of her role as an HR manager.

116. The claimant considered that there was overlap between the questions and issues at the 9 January meeting with the 28 January meeting. We find that if the claimant was right, that there were procedural defects with the 9 January meeting, then the respondent corrected this by holding the 28 January meeting. It was not in dispute that the 28 January was an investigatory meeting under the disciplinary procedure.

117. The main issue raised by Ms Thompson at the meeting was the claimant's lack of respect for senior management and his constant objections and challenges to process and procedure. She put to him a series of emails that he sent in 2014, in which he made challenges to policies and procedures. Ms Thompson said she felt that the claimant was challenging all the time and on everything, she was at the end of her tether. She also felt personally insulted by his email of 21 March 2014 (referred to above) in which he implied that Ms Thompson might put pressure on him to return to work before his sick leave had expired.

118. It was not best practice for Ms Thompson to conduct the investigation meeting on 28 January 2015 because she was involved in the subject matter and she was not able to be completely impartial. This was counterbalanced by the presence of Ms Batson from HR and the fact that Ms Thompson was not a decision-maker. This was a matter for the subsequent hearing before Mr Andrew Trantum and we find it was not a breach of the claimant's contract for his line manager to conduct that meeting.

119. The claimant said he would take away that he should use a lighter tone and pick up the phone to Ms Thompson. We find that there were tensions in the working relationship as Ms Thompson replied that she might "*threaten him to put it in an email*". This led the claimant to feel that there was an agenda against him. The claimant took the position that he had already answered many of the questions in the meeting with Mr Cox on 9 January and he continued to put his challenges on policies and procedures. Ms Thompson also asked the claimant whether he still wanted to work for the respondent (page 225) which he thought was an unfair question. Ms Batson rightly told the claimant that he should raise his concerns via the grievance procedure.

120. After the meeting Ms Thompson passed the matter to the Financial Services Director Mr Trantum to consider the action to take going forward. Ms Thompson did not make a recommendation. It was Mr Trantum's decision that the matter should go to a disciplinary hearing.

<u>The hearing of Grievance 1</u>

121. The claimant's email of 27 January 2015 was treated as a grievance. In

that email he complained about Mr Cox's treatment of him in the meeting of 9 January 2015. He said that Mr Cox had told him that the problem the respondent had with him was that he would *"argue the toss on many issues*" and that when the claimant raised his issues about policy, Mr Cox told him that they "*didn't have a policy on pushing someone out of the window*". The claimant said Mr Cox had told him that HR said that they he would "*kick up a fuss*" about the travel to Canterbury and that Mr Cox told him to "*put up or shut up*". The claimant complained about the description of the meeting as a one to one or investigatory. He said Mr Cox also questioned whether he wanted to remain in the respondent's employment.

122. The grievance hearing took place on 4 March 2015 before Mr Paul Jardine, who is an Acquisitions Director for one of the group companies and is based in Newcastle. The venue was the Premier Inn in Victoria. The claimant was accompanied by his union representative Ms Alison Thoburn. The notes of the grievance hearing were at pages 257-262, the note-taker was Mr Ian Roberts, an associate director. The invitation to the grievance hearing was at page 246; a copy of the grievance procedure was enclosed with the letter.

123. The claimant put to Mr Jardine that he should not have gone ahead with the grievance hearing because he did not have all the relevant evidence before him. The claimant thought that Mr Jardine should have had the notes of the meeting of 28 January 2015 which were not yet available and thought Mr Jardine should have interviewed more members of staff.

124. Mr Jardine checked with the claimant and his union representative on more than one occasion as to whether the claimant was happy to proceed in the circumstances (page 257). We find, based on the notes and Mr Jardine's evidence, that the claimant was happy to proceed and there was therefore no error in process when the claimant's agreement was in place, with the benefit of union representation.

125. At the end of the grievance hearing Mr Jardine confirmed with the claimant and his union representative that the main issues for consideration were (1) there being an inconsistency of process as to the nature of the meeting on 9 January, (2) lack of clarity on the respondent's policy on client tracking, (3) bullying and/or intimidation by Mr Cox and (4) Mr Cox's conduct and the disciplinary process. The claimant and his union representative agreed that these were the issues for determination (notes page 261).

126. At the end of the grievance hearing the claimant asked for other points to be considered by Mr Jardine. They are set out in the notes at page 262 and in email exchanges between the claimant and Mr Jardine at pages 264A-264F. The claimant agreed the revised meeting notes at page 265A of the bundle.

127. The claimant said in evidence that Mr Jardine "conducted himself well" in the meeting.

128. As a result of the matters raised by the claimant, Mr Jardine followed up with further enquiries of Mr Cox and Mr Perry. This was in relation to the claimant's assertion that there was an agenda and a conspiracy against him and of bullying by Mr Cox. On 19 March Mr Jardine spoke with both Mr Perry and Mr Cox. The notes of those conversations were included in the bundle at pages 262A-262D. These notes were only disclosed to the claimant one month prior to this tribunal hearing. They were disclosed prior to exchange of witness statements so that the claimant had the opportunity to deal with them in evidence.

129. None of the respondent's witnesses could explain the reason for the late disclosure which we found most unsatisfactory given the claimant's level of concern on the issue and that the point had been raised with the tribunal on day one.

130. Mr Jardine heard from the claimant and followed up, at the claimant's instigation, with further enquiry of Mr Cox and Mr Perry. We find that the grievance hearing took place reasonably promptly as it was heard five weeks after having been raised.

131. Mr Jardine's grievance outcome letter dated 23 March 2015 was at page 298-299. He dealt with each of the four points that had been agreed with the claimant and his representative. The grievance in relation to the inconsistency on the purpose of 9 January meeting was upheld. Mr Jardine found that there were inconsistencies in the communication and he therefore understood the claimant's confusion. He also upheld the claimant's complaint about the delay in being provided with the notes of the meeting of 28 January 2015. He said this delay was acknowledged and that HR apologised but that this did not justify the delay. He said that feedback had been provided to those involved so that the process could be improved. Therefore on point 1 the grievance was upheld.

132. The remaining points of the grievance were not upheld. On client tracking Mr Jardine confirmed that there was no formal policy in place and that the business had considered this unnecessary. He said there was an accepted practice driven by the requirement to provide the best customer outcome. He said he would however provide feedback to the financial services business and request their consideration of the inclusion of a policy to cover such situations.

133. The bullying allegation (point 3) was not upheld. Under this heading Mr Jardine again acknowledged the confusion surrounding the nature of the meeting of 9 January. He could not find evidence to support the claimant's contention of an agenda against him.

134. On point 4 the outcome was that it was acknowledged that the claimant had apologised but on the basis that he had been advised on several occasions about his style of communication, the decision was taken to manage it via a formal process. Mr Jardine said he had investigated and

confirmed that an independent manager made the decision to move to a disciplinary process. This manager was Mr Trantum and Mr Cox was not involved.

135. The claimant was given a right of appeal against this grievance outcome.

The appeal on Grievance 1

136. The claimant appealed the outcome of the grievance by email of 26 March 2015 to Mr Dean Bailey of HR (page 304). Despite being upheld on grievance point 1, the claimant nevertheless appealed the outcome of all four points.

137. On point one the claimant continued to seek an explanation of the nature of 9 January meeting. On point two, the claimant had been given the answer that there was no formal policy on client tracking, but he could not accept the position. He wanted guidance and said he had provided examples of other consultants taking each other's business and that Mr Jardine had failed to explain why there were different rules in different areas. On point three he maintained his case that he had been bullied by Mr Cox and he wanted to know who in HR had said he would "kick up a fuss" about travel arrangements. On point four he wanted evidence that his style of communication was inappropriate.

The overpayment

138. At the end of February 2015 the claimant was overpaid gross commission of £1,112. The net amount was £645.36. The claimant received his payslip, which was sent by second class post, on about Wednesday 25 February 2015 about two days before his pay was received into his bank account. His pay went into his bank account on Friday 27 February 2015.

139. The claimant said that it was often difficult to tell exactly how much commission he was due to receive because the respondent did not break it down. He had a good idea how much commission he had earned, but at that time he was also responsible for mentoring two new employees and he did not know how much they had banked which could affect his commission. As soon as the claimant received his pay slip, he spent his monthly salary.

140. Ms Thompson raised the overpayment with the claimant on Monday 2 March 2015, the first working day after pay day (email page 252). Ms Thompson consulted with Ms Sara Winter a management accountant and with the Head of HR Ms Hayes. Ms Winter had erroneously offered the claimant a repayment plan, when she did not have authority to do so. The respondent's policy is that when the overpayment is picked up quickly, they recover it under section 14 of the Employment Rights Act in the following month. Ms Hayes and Ms Thompson stuck to this policy.

141. The claimant did his legal research on the issue of overpayments. The outcome of that legal research was in the bundle at page 297. The claimant highlighted in that document the following sentence "The employer who fails to acknowledge a mistake and simply proceeds to rely on section 14 to recover without giving notice to the employee could be in breach of the implied term of trust and confidence (entitling the employee to resign and claim constructive dismissal)." We find that the claimant was preparing his claim for constructive dismissal at this stage, it having been in his mind since at least 14 January 2015.

142. We saw a chain of email correspondence between the claimant, the Head of HR Ms Hayes in March 2015 in relation to this overpayment. On 9 March 2015 (page 295) Ms Hayes raised with the claimant the fact that it was year-end and the overpayment could affect his P60 and his tax for the year. The claimant replied that he had other matters to resolve and he was not in a position to deal with it.

143. Ms Hayes set out a breakdown of the figures on 10 March and chased this up with the claimant on 16 March. The claimant replied that as he was due to attend disciplinary hearing the next day (17 March) he said: "*Depending if I receive any form of disciplinary measures including verbal or written warnings then I would need to move to constructive dismissal".* He said he did not have the money to repay it. Ms Hayes said they would be processing the correction in the March pay run.

144. The claimant gave Ms Hayes a stock legal answer when seeking to resist an immediate claw back of the overpayment. He claimed that he had spent the money, it was the respondent's mistake, he had relied on it to his detriment and should not now be penalised by the respondent. The claimant's evidence to the tribunal was that he had to borrow in order to cover the respondent clawing back the amount from the following month's salary. Ms Hayes asked the claimant to contact her so that she could see if any alternative handling of the matter was possible (page 290). The claimant said he preferred to keep all communication by email "due to previous errors from your department". Ms Hayes said it needed to be dealt with urgently and she would set up a call.

145. The claimant replied at 10:22 on 17 March (page 287) saying: "*We appear to be going round in circles. Would you like to speak to my solicitor who can advise you on the correct legal procedure. They are very good but very expensive so you would have to pay for their time".* We find this to be a facetious and unnecessary comment which was not going to help the employment relationship.

146. The claimant said that he borrowed from a family member and he did not pay any interest. Understandably therefore there was no documentary evidence to support the borrowing. The claimant accepts that the money was not his and he was obliged to repay it. Despite saying that he suffered financial detriment, we find that he did not.

147. We find that the respondent did not act unlawfully or in breach of contract in effecting the recovery of the overpayment in the following month's pay run. The overpayment had been picked up almost immediately and raised with the claimant on the next working day after pay day. It was an unusual situation that the claimant had purportedly spent his entire month's salary straight away. The legal research the claimant carried out and told him that the employer who proceeds with the recovery without giving notice "could", not "would", be in breach of the implied term of trust and confidence. We find that on these facts the respondent acted lawfully and not in breach of contract by deducting the overpayment in the following month's pay run in accordance with their statutory right to do so under section 14 Employment Rights Act 1996.

The first disciplinary meeting on 17 March 2015

148. We saw the invitation to the disciplinary hearing, by letter of 4 March 2015, at page 263. The letter informed the claimant that the purpose of the hearing was to consider whether disciplinary action should be taken against him in relation to concerns regarding his approach to his role and his colleagues and examples of insubordination. Ms Todd, HR Operations Support Adviser, enclosed with that letter the documentation to be used at the hearing. She informed the claimant that the respondent did not intend to call any witnesses but that if he wished to do so he should let her have their names as soon as possible. He was informed of his right to be accompanied.

149. The tribunal did not hear from Mr Andrew Trantum who conducted the disciplinary hearing on 17 March 2015. This was for three reasons, firstly the claimant objected to the late introduction of his witness statement, secondly the list of issues (dealt with whilst the claimant was represented) did not include reliance on the disciplinary procedures and thirdly because other witnesses dealt with the matter of the disciplinary hearing.

150. The notes of the hearing were at pages 266-272. It lasted one hour and forty minutes. The claimant was represented by Ms Thoburn. Mr Trantum confirmed to the claimant that the meeting was not about the challenges raised, but the tone of his challenges and his failure to accept answers and clarifications given by management. Mr Trantum reiterated that the purpose of his hearing was not in relation to the claimant's concerns about any agenda on the part of Mr Cox. This was part of the grievance process.

151. The claimant focused on the reasons why he had made his various challenges and Mr Trantum reminded him that it was not about the challenges themselves but about the tone and manner. When Mr Trantum informed the claimant that he would be discussing a number of the points with HR the claimant replied "*I don't want to be rude Andy but HR has not got a clue*" (page 271). This rather underlined the claimant's lack of respect for colleagues and management.

The outcome of disciplinary 1

152. The hearing concluded without an outcome, which Mr Trantum was to consider. The outcome was given by letter. Mr Trantum found the disciplinary charges proven and issued the claimant with a first written warning dated 20 March 2015 (page 280-281). The duration of the warning was 12 months.

153. In addition the claimant was demoted from executive financial consultant to senior financial consultant because it was considered inappropriate for him to act as a mentor to junior employees. Mr Trantum and confirmed that the claimant's communication style was not acceptable and he said his line manager would address with him in further detail the expectations of how to conduct himself in his communications. The claimant was required to review his approach to working within company policies and procedures and to consider when and how it was productive to address his queries. He was informed that when he did make his challenges, it should be done in a professional and courteous manner.

154. Although the claimant contended that Mr Trantum had made a recommendation of training, we find that this is absent from the disciplinary outcome letter. What Mr Trantum said was that the claimant's line manager would address with him the expectations of how he should conduct himself in his communications. There was no recommendation by Mr Trantum of any formal training.

155. Ms Thompson followed this up in a discussion with Mr Cox and Ms Hayes and they decided that this should take the format of she and the claimant reviewing his emails and any feedback she had received and talking through what were good examples and where there was room for improvement. We find that following the disciplinary outcome, there was at least one example of such a discussion between the claimant and Ms Thompson (page 528).

156. The claimant appealed against the first written warning in an email to his union representative copied to Mr Trantum and HR (email dated 23 March 2015 page 310).

The appeal against the outcome of Grievance 1

157. The claimant's grievance appeal took place on 29 April 2015 before Finance Director Ms Lisa Hurley, who no longer works for the respondent. We did not hear from Ms Hurley. It took place about a month after the appeal was presented. The notes of the appeal hearing were at pages 390-396. The claimant was accompanied by his union representative Ms Thoburn and a note taker was present, Ms Taylor.

158. On point one, the claimant again raised the issue of the inconsistency around the description of the meeting on 9 January. Ms Hurley reminded the claimant that his grievance had been upheld on this point. The

claimant said he thought it was linked to the bullying allegation. On point two the claimant continued to raise his concern about the lack of a policy on client tracking.

159. On point three the claimant confirmed that there was no bullying by Mr Cox prior to the meeting on 9 January, prior to that date he had simply considered Mr Cox to be unapproachable. The bullying allegations centred around the 9 January meeting. This was the only face-to-face interaction between the claimant and Mr Cox. The claimant said he thought that he had injured Mr Cox's ego and as a result Mr Cox had a vendetta against him (pages 392 and 394). On point four the claimant said he understood that Mr Cox had canvassed an negative opinion from Mr Perry about himself.

160. In the meeting the claimant acknowledged with Ms Hurley that his emails could be blunt but that he was never rude. He said that if they were blunt he had apologised. He also considered that the options given to him by Mr Cox in the 9 January meeting showed there was an agenda. He also considered that the disciplinary outcome from Mr Trantum was further evidence of that agenda. He told Ms Hurley that he thought Ms Thompson was also scared to challenge Mr Cox.

161. At that meeting the claimant's union representative raised with Ms Hurley the lack of any written notes of Mr Jardine's follow-up conversations with Mr Cox and Mr Perry. As we have set out above these notes were not disclosed until a month before this tribunal hearing and we have received no satisfactory explanation for this from the respondent.

162. Ms Hurley concluded the meeting by telling the claimant that she would make some further investigations and she would aim to send him an outcome by 11 May 2015. She asked if the claimant was comfortable with that timescale and he said he did not want it to be rushed and he was not concerned about the time required (page 396).

163. Following Mr Jardine's grievance outcome, the claimant made a subject access request under the Data Protection Act 1998. On 9 May 2015 (page 439) he informed Ms Hurley that he had received information as a result of his subject access request and he said he had further evidence of Ms Hayes helping Mr Cox carry out an agenda against him. He asked for a follow-up meeting at to allow him to present the evidence.

164. Ms Hurley replied on 13 May 2015 (page 238) saying that she was unable to meet with the claimant again, but he should send what he had and she would review it and get back to him. The claimant sent further documents to Ms Hurley by email on 16 May 2015 (page 438).

165. We find that the sending of additional information to Ms Hurley on 16 May 2015 contributed to the delay in Ms Hurley providing the claimant with an appeal outcome.

166. On 18 June 2015 Ms Hurley sent to the claimant a six-page grievance appeal outcome (pages 561-566). Ms Hurley adopted the four points from the original grievance hearing (and Mr Jardine's outcome letter) and added to this an additional point raised by the claimant in the hearing (point 5) and five further points raised by the claimant after the appeal hearing.

167. The claimant had already been upheld on grievance point 1. Nevertheless he raised with Ms Hurley further issues in relation to 9 January meeting and she partially upheld his complaint. On grievance point 2, the claimant had been unsuccessful before Mr Jardine but was partially upheld by Ms Hurley on client tracking. Ms Hurley understood the claimant's need to seek understanding of the time after which other consultants' clients could be approached and understood his reasoning for pursuing this point. Ms Hurley said that she felt it necessary to highlight that the claimant's approach and tone of communication was not in a manner she considered business appropriate and she understood how it could have been considered argumentative, resulting in the query not being handled constructively.

168. Ms Hurley went into some detail on point 3 in relation to the claimant's complaints about Mr Cox's conduct at the meeting on 9 January. Ms Hurley partially upheld some of the claimant's complaints in relation to Mr Cox's conduct. She found that Mr Cox did say that the claimant should put up or shut up and that he argued the toss about everything. She considered that put up or shut up was meant as an example rather than a direct command and that a more appropriate example could have been given; in relation to arguing the toss, she found that Mr Cox said this due to the number of previous grievances the claimant had raised and she acknowledged that this comment could have been given in a more constructive manner.

169. On the bullying allegation, Ms Hurley considered the claimant's complaint and acknowledged that some of the conversation and statements made by Mr Cox were not conducive to addressing his concerns in a productive manner and in some cases the terminology used by Mr Cox was not appropriate. She said she would be sharing her feedback about this and advising of the learning required. She did not uphold his complaint in relation to the travel to 9 January meeting as she found that the claimant had been offered options to allow him to manage his travel safely in relation to his knee condition. Ms Hurley spoke with Ms Thompson who said that she had never complained to the claimant that Mr Cox was a bully.

170. On point four the claimant had asked for evidence of his own alleged inappropriate communications. Ms Hurley had investigated this matter in a conversation with Ms Thompson and accepted Ms Thompson's evidence that the claimant had been advised of those concerns verbally.

171. The following additional points were addressed by Ms Hurley. On the

claimant's complaint of an allegation that HR had said he would "kick up a fuss" about travel to 9 January meeting, Ms Hurley investigated this and the HR representatives had no recollection of the comments being made. She accepted that the words "as we would expect" could have been better expressed by Ms Hayes and she acknowledged how this could have been perceived by the claimant as he felt it showed lack of impartiality by Ms Hayes.

172. Ms Hurley did not uphold the claimant's complaint about junior employees being questioned as part of the investigation into the claimant because it is necessary to speak to other staff members in the context of an investigation. She did not uphold the claimant's complaint regarding Ms Thompson carrying out investigation into the claimant. His complaint was that she had investigated with people who had not dealt with him for a considerable time and Ms Hurley's outcome was that this outdated information was removed before being placed in front of the disciplinary officer.

173. Ms Hurley did not uphold the claimant's contention that there that there was a link between the meeting with Mr Cox and subsequent disciplinary outcomes. The claimant raised concerns about the disciplinary outcomes and Ms Hurley rightly informed him that it was not her role to deal with the disciplinary process. Her role related to the grievance process.

174. By way of an overall conclusion she recognised that some of the points the claimant raised highlighted processes which resulted in confusion or had not been handled in line with best practice and she would feed this back as part of her outcome. She did not uphold the claimant on his allegations of bullying or inappropriate behaviour. She informed him that he had no further right of appeal.

175. The claimant sent Ms Hurley a long email (page 567, dated 22 June 2015) taking issue with her findings. At the start of that email he said "*To date this is probably the fairest investigation so far …..*" and he confirmed this in evidence. He accepted that she was independent and said that she was probably the most comprehensive although he thought there were "things missing".

176. We find that Ms Hurley was under no obligation to deal with the claimant's lengthy email in response as she had concluded the grievance process.

<u>The disciplinary appeal against the first written warning</u>

177. As stated above, the claimant appealed against the first written warning in an email dated 23 March 2015. The claimant's grounds of appeal were that Mr Trantum was aggressive in the meeting, that he failed to answer the claimant's numerous questions and that he had not been supplied with "*all the required information from previous meetings".* The claimant was unspecific in the email as to exactly what was missing and what questions

remained unanswered. The claimant said "*It was unclear from the meeting if this was a deliberate ploy from HR or poor planning from Mr Trantum. Either way it was totally unprofessional*".

178. The claimant's appeal against his first written warning was heard on 20 April 2015 by Mr Martyn Alderton. Mr Alderton is the managing director of one of the group companies and is based in Exeter. The notes of the appeal hearing were at pages 317-321.

179. At the appeal hearing, the claimant continued to raise his past concerns on issues such as client tracking and Mr Cox's behaviour at the meeting on 9 January 2015. Mr Alderton thought that the claimant had either misunderstood the purpose of the hearing or was using it as an opportunity to raise wider issues that were not relevant to the disciplinary appeal. We find it was the latter, that the claimant was using it as an opportunity to raise his wider issues that were not relevant to this appeal.

180. The claimant wanted to go over the 9 and 28 January meetings as well as the disciplinary hearing. He wanted to discuss his allegation that Mr Cox had an agenda against him. It was a repetition of the same issues that he raised within his grievance process. He wanted to raise other extraneous issues such as a deduction of £100 from his salary the previous year. He continued to complain about Ms Batson's lateness for the 28 January meeting.

181. The hearing concluded with Mr Alderton confirming that he would review the evidence before giving an outcome. The claimant sent more information to Mr Alderton on 23 April. Mr Alderton sent the claimant the notes of the meeting for review.

182. The claimant made a great deal of the fact that he had to seek amendment to the notes of the appeal hearing before Mr Alderton. We find that the amendments the claimant sought were not substantial. Mr Alderton fully accepted that the first draft of the meeting notes was not 100% accurate.

183. The whole purpose of sending a draft to the other attendee is to seek his comments, input and amendments. It is very difficult for anyone to take a completely accurate and verbatim note of everything that is said at a lengthy meeting. Mr Alderton had no difficulty in accepting amendments put forward by the claimant and after three drafts, a final version of the notes was produced. We find that this is not because the notes were "wrong" as the claimant suggested, but because they were in draft and respondent was open to receiving the claimant's input until they arrived at a final version.

184. It was put to Mr Alderton that he should have considered a verbal warning on appeal instead of upholding the first written warning. The claimant had no prior warnings and his view was that if a sanction was to be imposed it should have started with a verbal warning. It is a common

feature of disciplinary proceedings that the first penalty can start anywhere within the range, of verbal, first or final warning or dismissal depending upon the seriousness of the particular proven disciplinary charge. It was not suggested by the claimant or his representative during the appeal hearing that they would have been content with the substitution of a verbal warning.

185. Mr Alderton's role was to review the decision made by and the process followed by Mr Trantum and not to deal with the claimant's other grievances and complaints.

186. Following the meeting with the claimant on 20 April 2015 Mr Alderton made further enquiry, by way of conference call, with Mr Trantum and Ms Thompson. On 18 May 2015 the claimant sent further documents to Mr Alderton arising from his data protection subject access request. Included within that information was a chain of emails between the claimant and Ms Thompson about time off in lieu (332-328). It was a fairly contentious set of emails from the claimant, who did not receive an answer he was happy with. In his concluding email to Ms Thompson on the subject (page 328) he said "*Thank you for your time you have been a great help to me*". We find this was sarcastic.

187. Mr Alderton reviewed the claimant's additional documents but confined his decision-making to the remit of the appeal against the first written warning.

<u>The appeal outcome on disciplinary 1</u>

188. The disciplinary appeal outcome dated 26 May 2015 was at page 485-487 of the bundle. Mr Alderton considered the claimant's contention that he was not given an opportunity to put forward his case at the disciplinary hearing and that he found Mr Trantum aggressive. Mr Alderton found that Mr Trantum had been stringent in his approach in order to ensure that his hearing stayed on track. Mr Alderton found that the hearing was difficult on both sides. Mr Alderton did not uphold the claimant's contention that the disciplinary hearing had been pre-determined. He upheld the decision to remove the claimant's executive status because of his role in acting as a mentor to junior employees. Mr Alderton took the view that the disciplinary hearing had been handled correctly and that Mr Trantum had reasonable grounds upon which to reach his decision. He upheld the first written warning and the demotion. He told the claimant that the decision was final and there was no further right of appeal.

189. Notwithstanding that this was the conclusion of the appeal process the claimant responded by email on 29 May 2015, page 492. He said "*I find the contents quite unbelievable*!". Mr Alderton found the claimant's tone to be inappropriate and showing a lack of regard for senior management. He contacted Ms Hayes about this, which triggered a further disciplinary investigation into the claimant's attitude and behaviour.

190. The claimant followed this with a further email to Mr Alderton on 30 May 2015, page 499-500, with a 10 point list of what he regarded as missing points from Mr Alderton's investigation and several further concerns. On 1 June 2015 the claimant sent a further email to Mr Alderton with "*one last point for you to address*".

191. We find that the claimant did not respect the conclusion of the process and was determined to carry on. Mr Alderton found the claimant's tone aggressive and inappropriate. In a yet further email on 2 June 2015 the claimant said (517) "*Regardless if your decision is right or wrong you still have a duty to answer all the points raised in the meetings……".* We find that the claimant was wrong about this and Mr Alderton did not have a "duty" to answer everything the claimant raised in meetings. His remit was to consider an appeal against a first written warning. He did this.

The Stars Ball

192. The claimant was told that he could not attend the Stars Ball on 11 June 2015. This was an event to congratulate successful members of staff, the event having been publicised on the intranet. It was a black-tie event taking place at a hotel in Daventry and included a one-night stay at the hotel. The generic invitation to that event was at page 397. The claimant challenged this decision and wanted to know what the policy was.

193. We saw that the policy was originally formulated in 2014 in relation to a sales reward trip to Dubrovnik. The same criteria were adopted for the Stars Ball. The criteria included (page 518B) a rule that any employee with a live disciplinary warning on file, would not be eligible. We saw disciplinary papers dated May 2015 relating to an employee named Tom Coan in which he was told that he would not be able to attend the Stars Ball because he was going through a disciplinary (page 518K). We find that this rule was part of the general criteria for the event and it was not personal to the claimant. He was ineligible to attend because of his disciplinary warning.

194. The attendance criteria were available on the respondent's intranet known as "The Buzz" although the claimant had not seen this. The claimant accepted that he had no express or contractual right to attend the Stars Ball and that the respondent had a discretion as to who they invited. We find there was a policy but the claimant had not seen it. There was no breach of his contract in withdrawing his invitation to the Stars Ball. It was consistent with the policy and was applied to others.

Grievance 2

195. On 22 March 2015 the claimant raised Grievance 2 in an email to Ms Hayes (page 285). The email said: "*As I will be proceeding with Legal action I need to follow the correct procedure first. Please can I raise a formal grievance. Please insure that not money is taken from pay until this has been resolved*". The grievance related to the overpayment made on

27 February 2015.

196. Grievance 2 was heard by Mr Steven Little, Head of Group HR, on 11 May 2015. The grievance was originally due to be heard on 22 April 2015 in the Bexleyheath office but was postponed because the claimant's representative was not available. The letter setting up the grievance hearing for 22 April was at page 312 of the bundle. The respondent's intention was to hold the grievance hearing a month after it was raised which we consider was reasonable. The delay was due to the claimant's request for a postponement.

197. The notes of the grievance hearing of 11 May 2015 were at pages 209-213. The claimant attended with his union representative, the hearing was chaired by Mr Little and there was a note taker, Ms Hall. At the start of the hearing the claimant challenged Ms Hayes' level of experience.

198. The claimant had a full opportunity to set out the facts from his point of view about the overpayment. The claimant continued to raise matters that had been dealt with at the hearings and meetings such as the "kick up a fuss" comment. This was not relevant to the grievance regarding the overpayment. It pertained to the travel arrangements for the 9 January meeting. At the end of the meeting he also raised an issue about car insurance.

199. Following the meeting with the claimant on 11 May 2015, Mr Little carried out investigation meetings with six individuals: Ms Hayes, Ms Winter, Mr Cox, Ms Batson and Ms Alison Stead, Payroll Team Leader, in relation to the clawback of the overpayment. We find that this was a very thorough exploration of the overpayment issue and he did a comprehensive investigation.

200. Mr Little sent the claimant a four-page grievance outcome letter dated 21 May 2015, page 475-478. He apologised for the error in making the overpayment but he did not uphold the decision that the recovery was inappropriate or unfair. This included a consideration of the erroneous offer of a repayment plan. Mr Little went on to deal with several other unrelated issues that had been raised by the claimant such as his company car insurance, his data protection subject access request and an issue concerning union emails. He also reminded the claimant that any other issues should be considered in a separate grievance process, raised within one complaint, to allow that process to be conducted and responded to fairly. We find that Mr Little was extremely thorough and produced a well-considered and well-reasoned response.

201. The claimant did not appeal against the outcome of grievance 2 because he considered that the grievance procedure was corrupt (claimant's statement paragraph 11.6) and he thought he was unlikely to receive a fair hearing.

202. Instead of following an appeal process, he decided to challenge Mr

Little's decision with Mr Little himself (email 22 May 2015, pages 480-482). Even though he was not obliged to do so, as the correct route for the claimant was an appeal, Mr Little responded to the claimant's very detailed 8 point challenge to the grievance outcome.

203. It was only after the hearing, in the 22 May email, that the claimant complained that Mr Little should not have heard this grievance as it related to his own department. It was not right, in his view, that HR was investigating HR as he said in evidence, that it was "like the police investigating the police". The claimant did not complain about Mr Little's involvement at the time, despite having union representation. This complaint only came when he did not agree with Mr Little's outcome. We find that if the claimant, who was represented, had a genuine concern about the grievance being heard by Mr Little, he could and should have raised it before or at the start of the hearing.

The second disciplinary proceedings

204. In late May 2015 Ms Sarah Westman, HR Operations Support Adviser, was asked by her line manager Ms Sarah Batson and by the Head of HR Ms Hayes to carry out an investigation into the appropriateness of the claimant's communication with employees and senior management to see whether there was any evidence of insubordination, vexatious conduct or wasting management time. This investigation was initiated by Ms Hayes and Mr Alderton.

205. Mr Alderton had received the email from the claimant after his disciplinary appeal outcome (page 492) saying: "*I find the contents quite unbelievable!"* which he found inappropriate in tone and lacking in regard for senior management. He had contacted Ms Hayes about it and they decided to move to an investigation. Ms Hayes was also unhappy that the claimant had challenged her level of experience.

206. Within her investigation Ms Westman spoke with Ms Hayes, Mr Trantum, Mr Jardine, Mr Alderton, Ms Hurley, Mr Bailey and Ms Todd. We saw meeting notes of all these investigatory interviews. Ms Westman also reviewed written communications between the claimant and his colleagues.

207. Ms Westman did not hold an investigatory meeting with the claimant personally. She considered that there was sufficient in terms of the written communications from the claimant.

208. On completion of her investigation Ms Westman passed the information to Mr John Hargreaves, National Financial Services Director of a group company, to make the decision upon whether the matter should proceed to a disciplinary hearing. Mr Hargreaves made that decision and asked Ms Westman to set up a hearing. He did not suggest that she should carry out more investigation by holding a meeting with the claimant. Ms Westman was not a decision maker within this process. She acted on the

instructions of those more senior to herself. On 1 July 2015 the claimant was invited to the second disciplinary hearing which was scheduled for 9 July 2015.

209. On 2 July 2015 Ms Hayes sent a long letter to the claimant's union representative (page 618-619) answering 11 questions that had been put by the claimant on various issues he considered outstanding.

210. Ms Westman mistakenly informed the claimant that Ms Hayes had raised a grievance against him. She acknowledged that this was a mistake. We find that Ms Hayes did not raise a grievance against the claimant.

Grievance 3

211. On 11 September 2015 the claimant submitted grievance 3 (page 677) which included a complaint about the disclosure by Ms Thompson to Ms Hayes of an email he regarded as confidential (although it was not marked as such).

Disciplinary 2

212. The claimant was invited to a second disciplinary hearing on 16 September 2015. The meeting was arranged Ms Westman and was to be heard by Mr Hargreaves who is based in Preston, Lancashire.

213. The disciplinary hearing was originally scheduled for Thursday 9 July 2015. This date was not convenient to the claimant as his union representative was unavailable. The claimant had an email exchange with Ms Westman concerning these arrangements. In an email dated 3 July 2015 at 09:18 he told her (page 624) that "*This will go to court so your response will need to be accurate as you may be asked to attend*". The claimant continually flagged his intention to bring legal proceedings and had been doing so since mid-January 2015.

214. The claimant told Ms Westman that his union representative would be available in the week commencing 3 August 2015. Ms Westman scheduled the hearing for Thursday 6 August. The claimant said in reply (page 643) "*I look forward to meeting you on Thursday 6 August*". The claimant told Ms Westman that he had not been well, and she said Mr Hargreaves could reschedule (email 4 August 2015 at 9:15am page 658) and could offer 16, 17 or 18 August.

215. At 12:58 on 4 August 2015 the claimant emailed Ms Westman to say that he was due to have a knee operation on 8 August and he thought the earliest he would be able to return to work was 1 September. He was offered 16 or 18 September and was told that these were final options for dates. Ms Westman wrote to the claimant on 6 August (page 660) confirming the date of 16 September 2015 in Bexleyheath. The claimant was told by email on 9 September that if he did not attend, it would go ahead in his absence.

216. The claimant replied on 9 September at 16:51 (page 681) saying that due to his knee operation he would not be returning to work until Monday 21 September. Ms Westman replied a few minutes later saying that she understood that he would not be attending. The claimant replied on 10 September saying that after discussions with his solicitor he would be attending (680). He wanted confirmation that the respondent had accident liability insurance.

217. In a further email of 9 September 2015 (page 682) Ms Westman offered the claimant a modified procedure if he was not planning to attend. She referred to this as a modified remote process. This modified procedure could be paper-based or by telephone.

218. Ms Westman replied on 11 September saying "*Dear Paul, thank you for confirmation of your decision to attend the hearing next week, though should you not feel well enough to attend on the day, we strongly recommend that you do not do so. At the hearing, we will ensure that you are given the opportunity to take regular breaks, or to adjourn the meeting if needs be. Additionally, please ensure to submit a claim for your travel expenses, particularly should you need to take a taxi or public transport to attend, and you will be reimbursed*." (page 680).

219. The claimant was concerned about the fact that he was on crutches and there were stairs that he might have to climb. Arrangements were made for the meeting to take place in a ground floor room so that he did not have to deal with any stairs. He said he was grateful for this.

220. The claimant complained that he had been "forced" to attend the disciplinary hearing on 16 September 2015. We find that he was not forced to attend this hearing. The email of 11 September 2015 strongly recommends that he should not attend if he was not well enough to do so. He was offered a modified procedure. He said he would be attending. Adjustments were be made to accommodate his needs.

<u>Disciplinary hearing 2 and the claimant's resignation</u>

221. The claimant prepared his resignation letter on 15 September 2015. He took it with him to the hearing so that he could make his decision on the day.

222. The claimant told Mr Hargreaves that he thought the decision had already been made. Mr Hargreaves found that offensive. As a professional senior manager within the business he said he would make his own decision and he was not influenced by anyone.

223. The claimant told Mr Hargreaves that the outcome of his disciplinary before Mr Trantum, was a recommendation that he should receive some training. Our finding, above, is that there was no recommendation of formal training. Mr Trantum told the claimant that his manager would address

expectations with him regarding communications with management and colleagues and we saw one such example at page 528.

224. Mr Hargreaves said that some things come with training and some things are just a matter of life experience (page 717). Mr Hargreaves, having seen the claimant's email communications, thought that many of them were the product of a considered response when the claimant would have had time to think about what he was saying.

225. The claimant continued to raise his other numerous concerns with Mr Hargreaves, whether these were related to the disciplinary issue or not.

226. Mr Hargreaves indicated that he would have to consider how the matter would go forward. At this point, the claimant and his representative asked for a break. They were given a separate room so that they could discuss matters privately. When the meeting reconvened, Mr Hargreaves asked the claimant and his representative if they had covered everything they wanted to put forward and asked whether the claimant had anything else to add? The claimant then handed in his resignation letter. This took Mr Hargreaves completely by surprise.

227. The letter was addressed to the managing director Mr Jon Cooke and said as follows (page 700-701):

> *Dear Mr Cooke*
> *It is with great sadness that I would like to tender my resignation with immediate effect. After thirteen years with the company my position has been made untenable due to companies continued failure to deal with workplace bullying. I have highlighted to you that Simon Cox continues to bully people in this organisation. I wrote to you specifically to discuss this further but you failed to reply to my second letter.*
> *The previous FSM resigned due to the treatment received by Simon Cox and now unfortunately I am being forced to do the same. I would also imagine that there would be other complaints on file. My question to you is how many other people is this man going to be allowed to bully before the company takes action? My previous FSM was an amazing manager that cares deeply for the business. By allowing successful and hard-working people to leave the company due to bullying is having an adverse effect on the business which ultimately affects shareholders. As PLC Company you have a duty to fully investigate this to avoid further damage to shareholders.*
> *I have tried to follow your own internal process's when trying to report this but unfortunately found them corrupt with the HR department keen to cover up any wrong doing. In summary the HR department ignored written communications from your managers proving that your senior managers lied during the process. I also have evidence that my personal data was disclosed in order for Stephanie Hayes to start a grievance process against me. It has been quite shocking the lengths some of your managers have gone to too cover up the truth. I have also had to incur sexual comments which I have found disgusting, inappropriate and unprofessional from a member of your senior management team.*
> *My only hope now is by highlighting this matter it may prevent Simon Cox from bullying other people in the future.*
> *I have previously highlighted the lack of support to the consultants receive in my area from the line manager Sarah Thompson. Unfortunately this is where my problem began. Sarah Thompson has no system knowledge and managers by email rather than actually getting involved in the problems. Most of her work is passed to Julia Scott to do. She was so scared to challenge Simon Cox or advised him of the problems that we were facing that things either never got done or nothing changed.*

The number of consultants that have left our area recently would indicate that there is a problem. As a senior consultant I found the lack of support is difficult to deal with so I would imagine it was a hundred times more for new starters. In the end I had to protect myself by asking for everything to be put in email as I knew things didn't get done.
Throughout my 13 years with your move I have worked hard for the company and consistently produced results. I feel sad and let down that I have been forced out by the company allowing this type of bullying to continue. As a result I feel I have no option but to proceed to a tribunal. I wish you every success in your future.
Regards
Paul Elworthy

228. At the end of that meeting, after handing in his resignation, the claimant said that he had evidence and found it *"incredibly inappropriate that a senior manager (Sarah Thompson) had said that if he booked 150 grand's worth of business, she would give him a blow job*".

229. The claimant resigned and Mr Hargreaves had not reached the point of making a decision on the disciplinary case.

230. Ms Westman wrote to the claimant on 17 September 2015 informing him that he had three grievance matters outstanding which were yet to be investigated. These were (1) allegations of the data protection breach regarding Ms Hayes (grievance 3 above), (2) carryover of holiday and (3) allegations against Mr Trantum and Mr Alderton not taking actions on points raised during his meetings and their outcomes.

231. At Mr Hargreaves' instigation, arrangements were also made investigate the allegation of the comment by Ms Thompson.

232. On 24 September 2015 Mr Andy Preacher heard grievance 3. As this post-dated the claimant's resignation it was not dealt with in evidence. The grievance was not upheld. The outcome letter was dated 30 September 2015 (page 734-735).

233. On Monday 28 September 2015 Mr Hargreaves wrote to the claimant. He said that as the claimant had resigned during their meeting there would be no outcome on the disciplinary (page 733). He said that the allegation against Ms Thompson had been investigated and was completely refuted by Ms Thompson. He said he could neither confirm nor deny that the comment was said (page 733).

The law

234. The applicable law in relation to constructive dismissal is found in section 95(1)(c) of the Employment Rights Act 1996 which provides that "*for the purpose of this Part an employee is dismissed by his employer if …….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".

235. The leading case on constructive dismissal is ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221***, CA. The employer's conduct must give rise to a repudiatory breach of contract. In that case Lord Denning said "If the employer is guilty of conduct which is a significant breach going to the root of the contract, then the employee is entitled to treat himself as discharged from further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

236. In ***Malik v Bank of Credit and Commerce International SA 1997 IRLR 462*** the House of Lords affirmed the implied term of trust and confidence as follows: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".*

237. In ***Baldwin v Brighton and Hove City Council 2007 IRLR 232*** the EAT had to consider whether for there to be a breach, the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view of the EAT was that the use of the word "and" by Lord Steyn in the passage quoted above, was an error of transcription and that the relevant test is satisfied if either of the requirements is met, so that it should be "calculated or likely".

238. In ***Working Men's Club and Institute Union Ltd v Balls EAT/0119/11*** Underhill P (as he then was) said in relation to a disciplinary process: "*Of course tribunals should be slow to treat the investigation as itself a repudiatory breach; very often an employer may act reasonably in investigating allegations of misconduct which turn out in the end to be groundless."*

239. In ***W A Goold (Pearmak) Ltd v McConnell 1995 IRLR 516*** the EAT said that there was an implied term in a contract of employment "*that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have*".

240. Procedural defects in a disciplinary process can be corrected on appeal. What matters is whether the disciplinary process as a whole was fair - ***Taylor v OCS Group Ltd 2006 IRLR 613 CA***.

241. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

242. Section 26 of the Equality Act 2010 defines harassment under the Act as follows:

> *(1) A person (A) harasses another (B) if—*

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

243. Harassment and direct discrimination are mutually exclusive – section 212(5) Equality Act 2010.

244. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic? The EAT also said (Underhill P) that a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

245. In ***Weeks v Newham College of Further Education EAT/0630/11*** the claimant complained that misogynist comments at work had created an

offensive environment for her and that she had been subject to sexual harassment. The employment tribunal thought that she grossly exaggerated what had happened albeit that there were some such comments spread over time - this did not in context amounts to harassment. This finding was upheld by the EAT who said (Langstaff P at paragraph 17) that it was accepted that a single act may be so significant that its effect is to create the proscribed environment, but the VAT also recognised that it does not follow that in every case a single act is in itself necessarily sufficient. The EAT said that context is all-important.

246. The respondent also relied on the decision of the EAT in ***Heafield v Times Newspaper Ltd EAET/1305/12*** in which it was held that a comment including a swear word in reference to the Pope, was not intended to express hostility to the Pope or Catholicism and did not constitute harassment.

247. In ***Chief Constable of Kent Constabulary v Bowler EAT/0214/16*** (Simler P) the EAT said (paragraph 29) "Determining whether the treatment that B is subjected to amounts to a detriment involves an objective consideration of the complainant's subjective perception that he or she is disadvantaged, so that if a reasonable complainant would or might take the view that the treatment was in all the circumstances to his or her disadvantage, detriment is established….. In other words, an unjustified sense of grievance does not amount to a detriment; the grievance must be objectively reasonable as well as perceived as such by the complainant".

Conclusions

Sexual harassment

248. We have made a finding above that Ms Thompson made the comment that if the claimant banked hundred £180,000 she would give him a blow job. We have also made a finding that the claimant did not find it upsetting, offensive, hostile, degrading, humiliating or intimidating. We find that the comment was not made by Ms Thompson with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The purpose of the comment was to be humorous in a relaxed convivial social context. We are supported in this finding by Mr Barrett's evidence. As the EAT held in ***Weeks*** (above) context is all-important.

249. We have gone on to consider whether the comment had that effect, and we find that it did not. The claimant did not find it upsetting, offensive, hostile, degrading, humiliating or intimidating and as such the comment did not amount to harassment as defined in section 26 of the Equality Act 2010. The claim for sexual harassment fails.

Direct sex discrimination

250. We have considered whether Ms Thompson's comment amounted to direct sex discrimination.

251. We have found above that Ms Thompson's comment left the claimant feeling "a bit uncomfortable" and "not great". It did not meet the bar for harassment but we find that the effect on him was nevertheless a detriment. It was a highly sexualised comment and we have no hesitation in finding that the comment was made because of the claimant's gender. We find that Ms Thompson would not have made an equivalent comment to a woman. We therefore find that the comment was less favourable treatment because of sex and the claim for direct sex discrimination succeeds.

252. We find that the effect of the comment upon the claimant was mild. Had it been more serious, we find that he would have had absolutely no hesitation in complaining about it at the time. The claimant was not reluctant to challenge anything that he considered was "not right" and upon which he considered himself justified.

253. Had this comment had a more significant impact on the claimant we find that he would have complained at the time. For the same reasons we find that it was not in any way causative of his resignation nearly 2 years later. He described it to Mr Hargreaves in 16 September 2015 meeting as no more than inappropriate.

Constructive unfair dismissal

254. The claimant has to show more than a simple breach of his contract of employment. He has to show that there was a fundamental breach, going to the very root of his contract, entitling him to treat himself as dismissed. He also has to show that if there was such a breach, that he did not waive (accept) that breach.

255. We have found above that the respondent issued an instruction to staff in 2008 which survived at least until the claimant's resignation in 2015 that they carry out cleaning duties including cleaning the toilets. We have also found that at no time did the claimant carry out any cleaning duties, he was not forced to do so and he was not reprimanded or disciplined for failing to carry out the cleaning duties.

256. As such, because the claimant was not compelled to carry out these duties, we find that there was no breach of his contract of employment. Had the claimant been compelled to carry out these duties our finding may have been different. However he did not carry out these duties and suffered no penalty as a result. As such we find there was no breach of his contract of employment in this respect.

257. We have also found above that Ms Thompson's comment was not in any way causative of the claimant's resignation nearly two years later.

258. We have considered whether the respondent reasonably and promptly afforded the claimant a reasonable opportunity to obtain redress of his grievances. We find that they did. It was the respondent who chose to treat the claimant's 27 January 2015 email as a grievance in the first place. It was heard by Mr Jardine on 4 March 2015. We found above that the grievance hearing took place reasonably promptly as it was heard five weeks after having been raised. The claimant thought Mr Jardine "conducted himself well" in the meeting.

259. After 4 March hearing, Mr Jardine went on to make further enquiry of Mr Cox and Mr Perry. This resulted in a slight delay to the grievance outcome letter of 23 March 2015. The outcome took about a week longer than that the grievance procedure envisages but we find it was entirely reasonable in those circumstances when Mr Jardine had been asked by the claimant to look in to further points before giving his outcome.

260. Mr Jardine gave a fully considered response to the claimant's grievance. The claimant had an opportunity at the hearing to present his case and he was represented. The claimant appealed the grievance outcome and this was heard by Ms Hurley; again the claimant considered that she gave him a fair hearing. The delay in providing the grievance outcome was satisfactorily explained.

261. Grievance 2 relating to the recoupment of the overpayment, was raised by the claimant on 22 March 2015. It was originally due to take place on 22 April 2015 but was postponed due to the claimant's representative's unavailability. We have found above that the respondent's intention was to hold the grievance hearing a month after it was raised which we considered reasonable. The delay was due to the claimant's request for a postponement.

262. Mr Little heard grievance 2, he carried out six investigatory meetings with different individuals, he held his meeting with the claimant on 11 May 2015 and sent the claimant a detailed and fully considered 4-page grievance outcome letter dated 21 May 2015. That fell within the 10-day timescale set out in the grievance procedure. Mr Little also responded to subsequent correspondence and points raised by the claimant despite the fact that the correct route for the claimant was an appeal and not a direct challenge to Mr Little himself.

263. Grievance three was raised only five days before the claimant resigned and only four days before the claimant wrote his resignation letter. Despite the fact that the claimant's employment had come to an end, Mr Preacher considered the grievance and gave the claimant an outcome.

264. We find that the respondent gave the claimant a reasonable and prompt opportunity to obtain redress of his grievances. The law does not require the respondent to decide the grievances in the claimant's favour.

265. The claimant had been preparing for a claim for constructive dismissal

since mid-January 2015. He made a number of references to the respondent (set out in our findings above) to his intention either to bring legal proceedings or more specifically to bring a claim for constructive unfair dismissal. He told the respondent that he was in receipt of legal advice from solicitors. He had union representation. It was nine months since the first mention of this, until he resigned.

266. The claimant did not have a right to have grievances determined in his favour. He had a right to be afforded a reasonable grievance process. We find that the grievance officers acted reasonably and gave full and proper consideration to the grievance issues, plus many more issues, and that the claimant did not agree with the outcome. He persisted in raising challenges and did not respect the outcome or the process. He did not let matters lie after his appeal on grievance 1 and rather than appealing Mr Little was outcome on grievance 2 he made further challenges to Mr Little himself.

267. We find that the respondent's conclusions on the grievances were reasonable even though the claimant did not agree with the outcomes.

268. The claimant does not dispute that he was a serial challenger of issues at work. The problem was that the claimant was never going to be satisfied unless or until the outcome was 100% in his favour. Even when grievance issues were partially upheld, he returned to them and would not let them lie.

269. The claimant had some acknowledgement in Ms Hurley's grievance appeal outcome that Mr Cox had not behaved exactly as he should in the meeting on 9 January 2015. We agree with her in that respect.

270. However the claimant was not respectful of management in his written communications and to a lesser extent he was difficult in meetings with senior managers. He overstepped the line.

271. We accept the respondent's submission as correct, that there is no such thing as the perfect employer. HR made mistakes along the way and the claimant found this extremely frustrating to the extent that he felt there was an agenda against him. The agenda issue was dealt with and covered in the claimant's grievance hearings.

272. We find that perhaps there should have been a little more emphasis by HR and managers on providing more detailed guidance to the claimant on his communication style. Nevertheless, we find that the claimant is an intelligent man and he knows the difference between being polite and being impolite. He overstepped the line and, although the claimant in the list of issues did not rely expressly on the disciplinary matters, we find that the respondent did not act in breach his of contract by moving to investigations and the disciplinary procedure.

273. We have considered whether the respondent, without reasonable and

proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. We find that the respondent had proper cause for their actions and they did not act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. The respondent had a high regard for the claimant's level of work performance and their objective was to bring him back on track so that he could continue bringing in good business results for the company.

274. The claimant took great issue with the procedural handling of the 9 January 2015 meeting. We found above that even if he was right about that, it was corrected by the 28 January 2015 meeting. The claimant also had an acknowledgement from Ms Hurley that Mr Cox did not act quite as he should have done and she would share this by way of feedback and advise on the learning required.

275. We find that there was no fundamental breach of contract by the respondent. As such, there was no dismissal within section 95(1)(c) of the Employment Rights Act 1996 and the claim for constructive unfair dismissal fails and is dismissed.

276. The respondent confirmed that in person they found the claimant to be a pleasant, articulate and intelligent man. We found the claimant to be so. He conducted himself admirably as an advocate and he worked well with the respondent's counsel – something many litigants in person find difficult.

Listing a provisional remedies hearing

277. At the conclusion of the hearing, the parties having been given an opportunity to check their availability, we listed a provisional remedies hearing for Friday, **1 September 2017.** There will be no further notice of hearing.

278. We ordered that there be an updated schedule of loss from the claimant on or before **4 August 2017** and there shall be disclosure of remedies documents on or before **4 August 2017**.

279. By consent the respondent will prepare the remedies bundle.

280. On or before **11 August 2017** the claimant will serve a remedies witness statement on the respondent.

281. On or before **25 August 2017**, if so advised, the respondent will serve on the claimant a statement in response.

282. Each party is responsible for ensuring that they have sufficient copies of their statements available for the tribunal at the remedies hearing.

283. In the light of our findings above the orders for an updated schedule of

loss, disclosure on remedy, statements and a remedies bundle are vacated. As the claimant has failed on his unfair dismissal claim, this is not a loss of earnings case.

284. What remains for us to consider is the claimant's award for injury to feelings. We have made detailed findings upon the effect of Ms Thompson's comment upon the claimant and we remain open to hearing submissions on the level of the award. We consider that it may be helpful to the parties if we indicate our provisional view, on what is currently before us, that this is a lower band Vento case.

285. We encourage the parties to seek to agree remedy but in the event that they cannot, the date for the remedy hearing remains effective. We limit it to half a day, commencing at 10am on 1 September 2017. If the parties reach agreement on remedy, they shall notify the tribunal as soon as possible so that the hearing date can be vacated.

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Employment Judge Elliott
Date: 19 May 2017

Appendix 1 – Cast list

Name	Position	Role
Claimant	Senior Financial Consultant	
John Wheatland	Sales Manager (Bromley)	
Giles Barrett	Senior Financial Consultant	
Ben Quennell	Financial Consultant	
Sarah Thompson	Financial Services Director	C's line manager
Simon Cox	Financial Services Director (National)	ST's line manager
Andy Trantum	Financial Services Director (LSLi)	Disciplinary (1) officer
Paul Jardine	Regional Managing Director (SW region)	Grievance (1) officer
Stephanie Hayes	Head of HR (Financial Services)	
Martyn Alderton	Managing Director (LSL CCSL)	Disciplinary (1) Appeal officer
Steven Little	Head of Group HR	Grievance (2) officer
Sarah Westman	HR Ops Support Advisor	Disciplinary (2) Investigator
John Hargreaves	Financial Services Director (National – Reeds Rains)	Disciplinary (2) officer
Andy Preacher	Head of HR (LSLi)	Grievance (3) Officer