

THE INDUSTRIAL TRIBUNALS

CASE REF: 4276/17

CLAIMANT: Marcus Whyte

RESPONDENT: John McDowell and Karen McDowell, trading as Farm View Meats

DECISION

The decision of the tribunal is that the claimant was not constructively dismissed by the respondent. The claimant is entitled to an award of £150.00 in respect of holiday pay.

Constitution of Tribunal:

Employment Judge: Employment Judge Wimpress

Members: Mr I Carroll
Mr I Foster

Appearances:

The claimant was represented by Mr Kevin McCabe, of NIPSA.

The respondent was represented by Mr Keith Smith, of KIS HR Solutions.

SOURCES OF EVIDENCE

1. The tribunal heard oral evidence from the claimant, Mr Kevin McCabe, Mr Christopher Smith, Mr John McDowell and Mrs Karen McDowell. The tribunal was also provided with an agreed bundle of material and received some additional material during the course of the hearing. The tribunal also viewed CCTV footage of the incident which lies at the heart of these proceedings.

THE CLAIM AND THE RESPONSE

2. The claimant alleged that he had been constructively dismissed on the basis of a gross breach of trust and confidence by the respondent in failing to protect him in the work place. The claim form also included a claim in respect of holiday pay. The respondent denied that the claimant was constructively dismissed and

contended that he resigned of his own volition. The respondent did not seek to dispute the holiday pay claim.

THE ISSUES

3. (1) Whether the claimant was constructively dismissed?
- (2) What compensation was the claimant is entitled to, if any?

THE FACTS

4. As stated in the claimant's contract he commenced employment with the respondent on 3 November 2014 as an apprentice butcher. The claimant's date of birth is 29 August 1996 and he was twenty one years of age when his employment terminated and had two complete years of employment. At the time of his resignation the claimant's pay was paid £312.75 gross and £250.00 net pay. The respondent's holiday year runs from 1 April to 31 March and the claimant was contractually entitled to 28 days holiday per year including public holidays. Leave could not be carried over from one year to the next.
5. On 20 January 2017 at around 12.00 there was an incident in the respondent's workplace involving the claimant and Mr Christopher Smith. The incident took place in the back room of the butchers where meat was being prepared. In his evidence to the tribunal the claimant described the incident as commencing with an exchange of words with Mr Smith about the use of work equipment in the course of which the claimant said that Mr Smith was used to touting and had told on Gareth Johnston who had used a scrubber on the floor. The claimant then mimicked Mr Smith by saying in a childlike voice – "Jonny, Gareth is using a scrubber on the floor". Mr Smith then walked from one side of the room with a boning knife in his left hand towards his lower back to the other side of the room where the claimant was standing and punched him with his right hand on the chin. The claimant saw that Mr Smith had a knife in his other hand as he approached and also saw it after the punch was delivered. The claimant described himself as being in total shock when he saw the knife although it was never used at any stage. Mr Smith then said in a threatening voice, "You will not speak to me like that again". The claimant then told Mr Smith to put the knife down and come out the back for a fight. They both went out and the claimant was furious and called Mr Smith everything under the sun. However, Gary Nesbitt intervened and split them up before a fight could take place. The owner, Mr McDowell, had also heard the commotion and had come out to see what was going on. The claimant was still "giving verbals" to Mr Smith at this stage after they were split up. Mr McDowell told the claimant that his language was inappropriate and atrocious and the claimant responded – "I do not care I have just been assaulted." The claimant then told Mr McDowell briefly what had happened and asked him to send Mr Smith home. Mr McDowell replied that he could not do anything until he had checked the CCTV footage. Mrs McDowell then suggested to the claimant that he should go on his lunch and then come back and the claimant said no, that was impossible. The claimant was still furious and told Mr McDowell that he would be going home until Mr Smith was dealt with. The claimant then walked straight home and phoned the Citizens Advice Bureau who advised him to hand in a sick line and phone the police. The claimant didn't want to phone the police because he didn't want to make matters

worse as it would be difficult to work with someone whom he was pressing charges against. The claimant would have been happy with a disciplinary outcome. He didn't want Mr Smith to be dismissed. He just wanted some action taken against him. The claimant thought that Mr McDowell would have dealt with the matter in a few hours and spoken to Mr Smith but nothing happened. The claimant would have been happy if Mr Smith had been sent home.

6. At 1.00 pm the claimant's mother, Mrs Whyte, rang Lisburn PSNI and made a complaint of assault on behalf of her son. At 2.30 pm police visited the claimant at home and the claimant made an oral statement about the incident. Notes were taken of his account and the police stated that they were going to McDowell's and would view the CCTV footage.
7. At 4.00 pm police visited respondent's premises, interviewed witnesses and took possession of CCTV footage of the incident. Constable Ritchie subsequently informed the claimant that Mr McDowell had said that they were waiting for something like this to happen as the claimant was becoming a problem.
8. In his police witness statement Constable Ritchie recorded the claimant as stating that he had a verbal altercation with Mr Smith and was then assaulted by Mr Smith who approached him with a knife in one hand and a raised fist. Mr Smith then allegedly made contact with his fist on the claimant's chin and pushed aggressively. No injuries were noted. Constable Ritchie also reviewed the CCTV footage of the incident and described what he saw in the following terms:

".... Mr Smith working at the back of the shop with a knife, and Mr Whyte at another table working, turning around and looking his way and it looked like he was talking. After about 30 seconds Mr Smith approaches Mr Whyte with the knife in his right hand, but seems to realise he has the knife and moves it to his left hand and holds it behind him as if to keep it clear of Mr Whyte. I believe that the knife was not a factor in this and was not anywhere near Mr Whyte during the altercation. Mr Smith then raises his right fist towards Mr Whyte's face and looks like he makes some sort of contact, but not a full blown punch, but contact is made. Mr Whyte moves out of the way very quickly and was not held, and Mr Smith then moves away from Mr Whyte straightaway."

Constable Ritchie's statement also records Mr Smith being spoken to and giving an account similar to what the CCTV footage showed and that he assisted the police readily and being honest about what happened. Mr Smith also stated that the claimant had been aggravating and provoking him all week.

9. On 21 January 2017 Mrs Whyte phoned the respondent and spoke to Mr McDowell. She asked him a number of questions about the incident and advised that the claimant would be sending in a sick line until the matter was dealt with. Mr McDowell declined to engage with most of the questions and said that the CCTV footage was there for anyone to see and that the matter was in the hands of the police. The claimant asked other work colleagues whether Mr Smith had been sent home or whether any precautions were in place and was informed that he was still working.

10. On 24 January 2017 the claimant submitted his first sick line in which the reason for absence was given as "Recent alleged attack at work, does not feel safe. Situation of work safety needs addressed." The doctor signed the claimant off sick for two weeks.
11. On 24 January 2017 the police contacted the claimant and advised him of attempts to issue a Community Resolution Notice on Mr Smith.
12. On 1 February 2017 a Community Resolution Notice was issued by Constable Ritchie to Mr Smith. The Notice records that Mr Smith had admitted committing the offence of common assault and contains a signed declaration by the recipient admitting his guilt of the offence with the resolution being that he was to apologise to the police by 1 February 2017. The recipient instructions also state that the issuing officer had reason to believe that the recipient had committed the offence and that it is suitable to be dealt with by community resolution and that if this is not done the police will consider another outcome and this may include the matter being referred for prosecution through the courts. The instructions explain that community resolution is a way of dealing with comparatively minor or low impact offence/s without requiring a court hearing. It is not a criminal conviction and does not form part of a criminal record but it is kept on police computer systems as showing the recipient being responsible for the offence and if the recipient goes on to commit another offence this record is reviewed to help decide how to deal with the matter. It is however disclosable if deemed relevant as part of an enhanced Criminal Records Bureau.
13. On 4 February 2017 Constable Ritchie informed the claimant that a Community Resolution Notice was in force and that Mr Smith was very sorry. Constable Ritchie asked the claimant whether he wanted to press charges and that if he did not wish to the police could do so themselves.
14. On 7 February 2017 the claimant submitted his second sick line. The reason for absence was given as work related stress and again he was signed off work for two weeks.
15. On 7 February 2017 Constable Ritchie made a statement in which he described the incident as a low level Common Assault which was dealt with by a Community Resolution Notice as Mr Smith had admitted what had happened and signed appropriate paperwork. We will return to the detail contained in the statement later in our decision.
16. On 10 February 2017 Mrs McDowell wrote to claimant requesting a statement from him by 18 February 2017 and advising that all staff had already submitted personal statements.
17. On the same date Mrs McDowell sent a second letter to the claimant requesting permission to approach his doctor for a full medical report. The letter contained a warning as to the consequences if he did not consent.
18. On 17 February 2017 Mr McCabe, who was now assisting the claimant, sent a letter to Mrs McDowell in which he provided a factual account of the sequence of events to date and went on to set out his concerns as to how this matter had been handled by the respondent as follows:

“Inter alia you have allowed the following to occur:

(a) Ignored an extremely serious assault in the workplace and failed to carry out an investigation contrary to your own procedures;

(b) Regardless of the Police involvement/investigation into a possible criminal offence, you have failed in your “Duty of Care” to this employee by not investigation (sic) the matter that would most certainly constitute “Gross Misconduct” under your own disciplinary procedures;

(c) You have failed to provide a neutral working environment;

(d) The perpetrator of this assault (Mr Smith), a more senior colleague to Mr Whyte has remained in the workplace since the incident took place an (sic) you have:

- Failed to suspend him;*
- Continued to pay him with no loss of earnings;*
- Through your actions appear to have no issue with the conduct of Mr Smith in the workplace;*
- Failed to acknowledge that previously the same employee locked another colleague in a freezer for a period of time without again being disciplined.*

(e) From Mr Whyte’s perspective he believes the following is the case:-

- You totally ignored this serious assault by failing to carry out any investigation.*
- He fears for his safety as you have failed to provide a neutral working environment.*
- You have taken no action whatsoever even though a month has elapsed since the assault.*
- Mr Whyte’s health has been seriously affected by this assault.*
- Mr Whyte has suffered financial loss as he is now on Statutory Sick Pay.*
- Mr Whyte believes that you have ignored the fact that the Police have served a community warning on your employee, yet you continue to employ him without any reference to his conduct or behaviour at work to other junior staff.*

- *Mr Whyte will continue to submit sick lines and consider your request for a medical report.*
- *Mr Whyte will consider his contractual position in light of your failure to address such serious matters.”*

19. On 20 February 2017 Mrs McDowell wrote to Mr McCabe chasing up the claimant’s statement. She advised that she had all of the other statements as well as a report by the PSNI investigating officer.
20. On 10 March 2017 Mr McCabe provided the claimant’s statement to the respondent and requested immediate investigation, suspension of both parties, immediate reinstatement of the claimant on full pay and to be advised of the outcome as soon as possible. In his statement the claimant says that he was subjected to a vicious workplace attack by Mr Smith who pinned him to the sink for a period of time and held him violently by the throat with one hand whilst wielding a boning knife in his other hand in an extremely threatening and menacing manner.
21. On 16 March 2017 Mrs McDowell replied to Mr McCabe and advised that she would treat the material provided as the claimant’s statement and would apprise him of the outcome of the disciplinary investigation in due course.
22. The respondent’s Code of Discipline at paragraph 10.4 makes provision for misconduct and divides it into three categories – minor misconduct, major misconduct and gross misconduct. Assault was stated to constitute gross misconduct and according to the Code, if proved, would result in summary dismissal. Major misconduct according to the Code of Conduct would result in a Final Written Warning. At paragraph 10.2 under the heading of General Principles it is stated:

“Prior to any form of disciplinary action there will be a thorough investigation into any allegation of misconduct or poor performance, which may take into account any mitigating circumstances.”

23. On 17 March Mr McDowell invited Mr Smith to a Disciplinary Meeting on 18 March 2017. The letter set out the allegation in the following terms:

“On Friday 20 January 2017, you may have become involved in an altercation with your work colleague and may have acted inappropriately in these circumstances. You are aware that the PSNI have been involved in this matter and following their professional assessment of this incident, we believe that you may now have a case to answer in respect of your behaviour during this incident.”

Mr McDowell went on to state that the meeting may result in a formal disciplinary outcome and that the incident was being treated as “potential serious misconduct” and that the purpose of the meeting was to allow Mr Smith to present his own mitigation in respect of the allegation. At no point did the letter warn Mr Smith that he was at risk of dismissal. As appears from paragraph 10.4 of the respondent’s Code of Conduct “serious misconduct” is not a recognised category. According to Mrs McDowell it equated to major misconduct.

24. On 18 March 2017 the Disciplinary Meeting took place. It was conducted by Mr McDowell with Mrs McDowell as note taker. No witnesses were requested to be present. Nor was the claimant invited to attend. A number of statements were available including one by Constable Ritchie. Mr McDowell had previously viewed the CCTV footage.
25. Mr Smith's statement was mainly in the form of a report of his conversation with the claimant on the day of the incident. Mr Smith describes the claimant butting in when he was joking about with Jonny (McKetterick) about his cereal bowl and milk being stolen. According to Mr Smith the claimant called him a tout and said that he had squealed about Gareth (Johnston) using a scrubber on the floor. Mr Smith explained that he was just laughing about it and responded when someone asked him what he was laughing at. The claimant repeated that he was a wee tout and Mr Smith responded that he was not here to put up with the claimant's moods and told him to get on with his work. The exchange as described by Mr Smith became increasingly heated. The claimant accused Mr Smith of bullying Gareth Johnston and said that Mr Smith would not bully him like he did Gareth. Mr Smith told the claimant to shut up and the claimant responded - "You bully Gareth, I'm not scared of ya, I'll hit you back, come on. Well I'm not scared of ya, ya fruit". Mr Smith then indicates that he went over to the claimant at that stage and that this was recorded on the CCTV. According to Mr Smith the claimant said - "Come on well me and you outside now fair dig. Put the knife down". The claimant and Mr Smith then went to the outside yard. The claimant continued in a similar vein - "Fair dig now me and you, come on well ya baldy bastard" Mr Nisbit tried to calm the claimant down but the claimant would not be mollified and went on - "I'll fucking kill you ya baldy bastard, what age are you ya cunt. 38? I'll get my brother on to you I'll get you sorted out ya fucking prick!" Mr McDowell came out during the rant at some point and told the claimant to calm down. The claimant responded - "Fuck up no I won't". Mr McDowell told the claimant that he couldn't speak to him like that and the claimant responded - "Fuck off yes I can I don't give a fuck". Mr Smith then started to walk inside. The claimant continued - "I'll get my brother on to you, I'll get you sorted, we'll see, we'll see ya baldy prick". According to Mr Smith when he was back inside the claimant opened the door a couple of times and shouted things in and was banging the window.
26. The disciplinary meeting appears to have been short and to have proceeded on the basis that the main issue was one of mitigation as indicated in the invite letter. Mr McDowell asked Mr Smith to respond to the allegation raised in the invite letter and Mr Smith gave a short account, the material portion of which reads as follows:-

"I went over to him and put my finger at his face and told him to shut up. As I walked towards him I put my knife into my left hand and held it down by my side. I don't think I touched him on the face."

Mr Smith's account appears to have been accepted at face value and was not challenged by putting the claimant's account to him, Mr Nisbit's statement or the contents of Constable Ritchie's statement. Mr McDowell confined himself to asking whether he felt that he had handled the situation the right way and Mr Smith replied -

“I shouldn’t have lowered myself. I have been raised better and should have risen above it. If he returns to work, I would shake his hand and say that it was forgot about”.

27. Mr Smith also gave evidence to the tribunal. In the course of his evidence he alleged that the claimant had been antagonising him for several weeks and had been hostile towards him and other staff members. When asked to give examples he cited a conversation that he had with a co-worker about how his son was getting on with army training. Before he could answer the claimant stated – “All the security forces and army in Northern Ireland should be shot dead”. Mr Smith didn’t complain about this as it wasn’t aimed at him and his co-worker told him to forget about it as it is not worth it. According to Mr Smith there were several similar incidents and the claimant also used industrial language towards him and Mr McDowell.
28. Mr Smith did not accept that he threw a punch at the claimant but rather he approached the claimant, pointed his finger at him and told him to shut up. Mr Smith maintained that his evidence on this was correct when inconsistencies with Constable Ritchie’s statement and the CCTV footage were drawn to his attention. In particular Mr Smith was adamant that there was no contact notwithstanding Constable Ritchie’s statement to the contrary. It was also put to Mr Smith that his evidence on this aspect did not tally with Mr Nisbit’s whose statement recorded that Mr Smith pushed his fist into the claimant’s face. Mr Smith responded that both the claimant and Mr Nisbit were lying. Mr Smith’s account then continued and was that he then turned to the block to sharpen his knife and at this point the claimant reacted and threw a stacker (a plastic container for meat) across the room at another member of staff and demanded that Mr Smith put the knife down and come outside for a fight. When it was drawn to Mr Smith’s attention that his evidence about the stacker was not in his statement or on the CCTV footage he explained that that the stacker was thrown at Eddie Bowden. Mr Smith maintained that the account that he gave to the police was the same as his evidence to the tribunal. Mr Smith also appeared to criticise Constable Ritchie’s role on the basis of the explanation that he gave Mr Smith as to what constituted common assault.
29. Although Mr Smith gave evidence that he was concerned about losing his job as a result of this incident it is clear from the invite letter and the disciplinary outcome that this was never in prospect. Mr Smith also gave evidence that he was not aware of anyone being disciplined during his eighteen years in the business. We accept however that Mr Smith genuinely harboured fears for his job.
30. The tribunal viewed the CCTV footage of the incident on 20 January 2017 and found that it was largely consistent with the version contained in Constable Ritchie’s statement. Unfortunately the alleged point of contact was obscured by the claimant’s head and shoulders. We are satisfied that Mr Smith was trying to minimise or downplay his actions when he gave evidence.
31. On 21 March 2017 Mrs McDowell issued the disciplinary outcome letter in which Mr Smith was given a Final Written Warning and asked to apologise to the claimant.

32. On 22 March 2017 Inspector McPhillips of the PSNI wrote to the claimant and provided him with a brief report on the matter and advised him of the issue of a Community Resolution Notice on Mr Smith.
33. On 5 April 2017 Mrs McDowell wrote to Mr McCabe advising that investigation had concluded and requesting to meet with the claimant on his return to work and to provide any reassurance that he may require. Mrs McDowell also advised that the claimant's role remained available to him and that he should have absolutely no concerns about returning to work when he is medically fit to do so. Mrs McDowell declined to discuss the investigation or the outcome on data protection grounds.
34. On 26 April 2017 the claimant responded stating that he was "not fit to return to work following the serious assault in which I was injured by Chris Smith, the manner in which you have handled this matter and your failure to respond to the issues raised in the grievance letter dated 17 February 2017....". The claimant also requested to be advised of the outcome of the investigation and pointed out that Mr Smith had admitted assaulting him and this would amount to gross misconduct. He also sought details of disciplinary action taken against Mr Smith and whether he remained in employment. The claimant went on to state that in the absence of a response he was not reassured that he should have no concerns about returning to work when he remained in fear for his safety. The claimant also indicated that he was not well enough to meet Mrs McDowell but that if she wished to discuss this any further to contact Mr McCabe.
35. On 30 April 2017 Mrs McDowell replied to claimant's letter of 26 April 2017. In his evidence to the tribunal the claimant was unsure as to whether or when he received this letter. Having heard evidence from Mr McCabe on this issue we are satisfied that the claimant did receive Mrs McDowell's letter some days later after the Easter holidays and then passed it to Mr McCabe. The letter addressed all of the matters raised in the letter of 26 April 2017. At points 4 and 6 Mrs McDowell declined to advise the claimant as to the outcome of disciplinary action taken against Mr Smith on the basis that this would be a breach of personal data beyond saying that the investigation had been closed and appropriate action taken. At point 7 Mrs McDowell stated – "We would like to make it very clear to you, that there is absolutely no risk if your (sic) return to work and for the avoidance of any doubt you are not being prevented from returning to work by anyone from within our business."
36. On 9 May 2017 the claimant submitted a letter of resignation to Mrs McDowell which reads as follows:

"I refer to previous correspondence on this matter and specifically the letter I sent to you on 26th April 2017.

It is with deep regret and disappointment that you have not:

- *Responded to the very valid points I made and the information requested;*
- *Replied within the timeframe given;*

- *Contacted Mr McCabe as suggested even though his secretary rang the main office and your extension last Thursday (4 May) but was unable to get hold of you.*

In the circumstances you have left me with no alternative but to resign from my position as an apprentice butcher with immediate effect.

I feel very unhappy that I was not able to complete my apprenticeship with only one and a half year's practice left.

I feel very let down by the manner in which you handled my circumstances.

I feel that you have not taken the issues I have raised seriously even though I was the subject of a very frightening assault.

It is the view of both my Representative, Mr McCabe and Myself that as an Employer you have:

- *Been guilty of a fundamental breach of trust and confidence in my contract of employment;*
- *Failed in your duty of care to protect my work environment;*
- *Ignored a serious assault at work;*
- *Offered me no reassurances whatsoever as to my future safety;*
- *Were in complete breach of your own conduct and disciplinary procedures;*
- *Your responses were unreasonable in all the circumstances.*

I have suffered a "detriment" physically, mentally and financially as a result of this treatment and I will consider what options are available to me in these circumstances.

I feel very sad you have forced me in to this position."

37. There was some discussion as to whether this letter was intended to embrace Mrs McDowell's response of 26 April 2017. As indicated above it was received by the claimant prior to the issue of the letter of resignation but was not passed immediately to Mr McCabe. It was not referred to in the resignation letter notwithstanding that Mr McCabe was aware of its existence at the time of composing the resignation letter. According to Mr McCabe it did not influence the contents of the resignation letter.
38. In his evidence to the tribunal the claimant stated that the time taken to respond to his detailed request for information was the last straw.

39. The claimant received statutory sick pay from the respondent at £89.35 per week for thirteen weeks and took up new employment on 10 July 2017 with Corey's Butchers where he will be able to complete his apprenticeship.
40. The claimant applied for Jobseekers Allowance following the termination of his employment.

THE LAW

41. Article 126 of the Employment Rights (Northern Ireland) Order 1996 sets out the right not to be unfairly dismissed and Article 127 in so far as relevant provides as follows:-

"127(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to paragraph (2), only if) –

...

- (c) *the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

42. In order for an employee to establish that he/she has been constructively dismissed, an employee must show that his employer had committed a serious and repudiatory breach of contract, that the employee had left because of that breach and that he had not accepted and had not waived that breach. A relevant serious breach of contract can include not just the breach of a specific or written contractual term but a serious breach of the implied term of trust and confidence. Such a breach of the implied term would occur if an employer had acted in a manner which was calculated or was likely to destroy or seriously damage the relationship of trust and confidence.
43. The authors of ***Harvey at D1 [403]*** describe four conditions that an employee must meet if he/she is to claim constructive dismissal.
 - (1) There must be a breach of contract by the employer. This may either be an actual breach or an anticipatory breach.
 - (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last of a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting repudiation in law.
 - (3) He must leave in response to the breach and not for some other, unconnected reason.
 - (4) He must not delay too long in terminating the contract in response to the employers breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

44. The leading case in relation to constructive dismissal is **Western Excavating (ECC) Ltd v Sharp (CA) [1978] ICR 221** in which it was held that an employee's entitlement to terminate his contract of employment by reason of his employer's conduct was to be determined in accordance with the law of contract and not by applying a test of unreasonableness to the employer's conduct. However, the courts mitigated the impact of this approach by recognising that there is an implied contractual term to the effect that the employer should not behave in a manner that would undermine the relationship of trust and confidence between employer and employee.
45. As to the nature of the duty of trust and confidence, it was described by Lord Steyn in **Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, [1997] IRLR 462** in the following terms:-

'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.'

The precise terms of this formulation have been the subject of comment and refinement. In **Baldwin v Brighton and Hove City Council [2007] ICR 680, [2007] IRLR 232** the Employment Appeal Tribunal had to consider the issue as to whether in order 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 taken by the Employment Appeal Tribunal was that the use of the word 'and' by Lord Steyn in this passage was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met. In **BG plc v Mr P O'Brien [2001] IRLR 496**, Mr Recorder Langstaff QC in giving a decision of the Employment Appeal Tribunal in a constructive dismissal case formulated a test as follows:-

"The question is whether, objectively speaking, the employer has conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee."

46. The courts have also considered situations where a series of incidents has occurred and the employee resigns in response to the last actions of the series which constitute the so-called "last straw". In **Lewis v Motorworld Garages Ltd [1986] ICR 157**, Glidewell LJ stated at page 169 F:-

"The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulated series of acts taken together amount to a breach of the implied term?... This is the 'last straw' situation."

47. The Employment Appeal Tribunal considered the so called last straw doctrine in **Thornton Print Ltd v Morton [2008] UKEAT/0090/08/JOJ**. In that case Judge

Serota QC endorsed the judgment of the Court of Appeal in **Omilaju v London Borough of Waltham Forest [2005] 1 All ER 75** and stated that:-

"The principle, if it be one, means no more than that the final matter that leads to the acceptance of a repudiatory breach of contract when taken together and cumulatively with earlier conduct entitles a party to accept a repudiatory breach of contract, whether that last matter is in itself a breach of contract or not."

48. In **Brown v Merchant Ferries Ltd [1998] IRLR 682**, the Northern Ireland Court of Appeal said that although the correct approach in constructive dismissal cases was to ask whether the employer had been in breach of contract and not to ask whether the employer had simply acted unreasonably; if the employer's conduct is seriously unreasonable, that may provide sufficient evidence that there has been a breach of contract. For a claim of constructive dismissal to succeed it must also be unfair.
49. The Working Time Regulations (Northern Ireland) 2016 provide under Regulations 15 and 16 for a worker to have minimum leave in a year of 5.6 weeks. Under Regulation 17 of the 2016 Regulations where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3) therein which sets out a formula to be used in the absence of provision in a relevant agreement.

SUBMISSIONS

50. The tribunal had the benefit of written submissions on behalf of both parties. These submissions are appended to this decision. The tribunal also heard oral submissions. Both representatives made extensive submissions as to the credibility of the witnesses who gave evidence to the tribunal and on what actually occurred on 20 January 2017.
51. In relation to the key legal issues Mr McCabe submitted on behalf of the claimant that:
 - (i) There were fundamental breaches by the respondent of their duty of trust and confidence to the claimant by not sacking Mr Smith for gross misconduct and by failing to reply to correspondence; failing to verify the claimant's safety; ignoring a serious assault at work; failing in their duty of care to protect the claimant's work environment and offering no reassurance as to his future safety.
 - (ii) These breaches were sufficiently important to justify the claimant resigning.
 - (iii) The claimant left for no other reason. Evidence of this is the claimant's continuation to submit sick lines; the claimant's unhappiness at being unable to complete his apprenticeship and that he was not looking for other employment.
 - (iv) The claimant did not delay too long in resigning. Mr McCabe placed reliance on the claimant's letter to the respondent of 26 April 2017 in which

he asked them to deal with a number of issues and requiring a response by 2 May 2017. This deadline was not complied with by the respondent although a letter was received after this date.

52. Although the claimant in his evidence stated that the time taken to respond to his request for information was the last straw Mr McCabe did not seek to argue that this was a last straw case.
53. In relation to contributory conduct Mr McCabe submitted that the tribunal should not make any reduction in compensation on this account.
54. On behalf of the respondent Mr Smith submitted as follows:
 - (i) There was no fundamental or indeed any breach of their duty of trust and confidence to the claimant. The respondent carried out a fair, reasonable and transparent disciplinary process. The respondent considered that that the incident fell into the category of major misconduct and acknowledged their error in referring to serious misconduct in the charge letter. There was no need to invite the claimant to the disciplinary hearing and he was not well enough to meet in any event. It is not for an employee to advise the employer what the outcome of a disciplinary investigation should be. The respondent did not believe that suspension was necessary given the claimant's absence from work.
 - (ii) Mr Smith also pointed out that the respondent had not encountered an incident of this nature in 33 years of business and it was therefore unlikely to recur. The respondent had also provided the claimant with written assurances on 5 and 30 April 2017 that it was safe for the claimant to return to the workplace.
 - (iii) Mr Smith submitted that the respondent believed that the claimant did not leave because of the incident with Mr Smith alone but no ulterior reason for leaving was suggested.
 - (iv) Mr Smith drew attention to Mr McCabe's letters of 17 February 2017 and 10 March 2017 in which he stated that the claimant was considering his contractual position but did not resign until almost three months later and that therefore the incident was not regarded by the claimant as sufficiently important at that time.

CONCLUSIONS

55. Was there a breach of contract by the respondent?

The breaches of contract relied upon by the claimant in his letter of resignation were as follows:

- Been guilty of a fundamental breach of trust and confidence in my contract of employment;
- Failed in your duty of care to protect my work environment;

- Ignored a serious assault at work;
- Offered me no reassurances whatsoever as to my future safety;
- Were in complete breach of your own conduct and disciplinary procedures;
- Your responses were unreasonable in all the circumstances.

These were put slightly differently by Mr McCabe in his submissions in which he placed reliance on –

- (a) The failure to dismiss Mr Smith for gross misconduct;
- (b) The failure to verify the claimant's safety to return to the respondent's business and future safety;
- (c) Ignoring a serious assault at work;
- (d) Failure of the respondent in their duty of care to protect the claimant's work environment;
- (e) Failure to offer the claimant reassurance as to his future safety;
- (f) Breach of the respondent's conduct and disciplinary procedures.

There is some overlap between these matters and we have therefore sought to list the key matters as we understand them and address each in turn.

The failure to dismiss Mr Smith for gross misconduct and breach of the respondent's conduct and disciplinary procedures.

Mr Smith was not charged with gross misconduct but instead was charged with serious misconduct which was not a separate category in the respondent's disciplinary rules. The respondent's case was that serious misconduct equated with major misconduct. Taking this at face value it is clear that the types of misbehaviour falling within major misconduct do not cover assault. Mr Smith sought to contend that the alleged misbehaviour involved constituted dangerous physical horseplay but we cannot accept this as either a correct or a plausible explanation as to why it was not deemed gross misconduct which clearly encompasses physically violent behaviour. It may have been low level violence in this instance but common assault as admitted by Mr Smith and described by Constable Ritchie was nevertheless physically violent behaviour. The respondent may have been concerned that if Mr Smith was charged with gross misconduct they would have had no choice but to dismiss him summarily as provided for in paragraph 10.8 but this would involve ignoring any mitigating circumstances as provided for in paragraph 10.2. In our view Mr Smith should have been charged with gross misconduct on the basis of the respondent's disciplinary rules. It certainly could constitute a breach of Mr Smith's contract if, for example, he had been charged under a higher category than warranted but the question for us is whether the decision to charge Mr Smith with serious misconduct rather than gross misconduct was a breach of the claimant's contract

or the employer's implied duty of trust and confidence. We do not regard this as a breach of the claimant's written contract as it only sounds on Mr Smith's contractual rights. It would be capable of constituting a breach of the duty of trust and confidence but we are not satisfied that the claimant was in fact aware of the nature of the charge faced by Mr Smith or the outcome of the disciplinary proceedings at the time of his resignation. It is also of note that the claimant at an early stage stated that he did not want Mr Smith to be dismissed.

Ignoring a serious assault at work

We are not satisfied that the respondent ignored the assault on the claimant. The matter was initially handled by the police and once the outcome of the police investigation was known the respondent proceeded with disciplinary action against Mr Smith. While the respondent may be legitimately criticised for not categorizing the assault as gross misconduct it did nonetheless discipline Mr Smith and imposed a significant sanction namely a final written warning. The respondent also accepted the outcome of the police investigation as a factual finding against Mr Smith and thus only concerned itself with mitigation issues. We accept that there was no need to suspend Mr Smith given that the claimant had gone off work on sick leave with no immediate prospect of returning.

Failure of the duty of care to protect the claimant's work environment and to offer him reassurance as to his future safety;

The respondent sought to encourage the claimant to return to work from an early stage. Although the respondent did not suspend Mr Smith, there is no reason to believe that he would have been likely to have assaulted the claimant again particularly as he had been the subject of a police investigation in the immediate aftermath of the incident and was later issued with a Community Resolution Notice. In addition, the claimant was to a large extent the author of his own misfortune by deliberately taunting and provoking Mr Smith. If the claimant behaved himself he would not be at risk. Mrs McDowell also sought to reassure the claimant in correspondence in particular in her letter of 5 April 2017.

56. We are not therefore satisfied that there was a breach of the claimant's contract that was sufficiently important to justify the claimant in resigning. A potential 'last straw' argument was not developed in either the claimant's evidence or Mr McCabe's submissions.
57. For completeness our conclusions in relation to the remaining two components of constructive dismissal are as follows:
 - (1) There is no evidence that the claimant left for an unconnected reason. It is clear that the claimant wanted to complete his apprenticeship which had one and a half years yet to run and was not looking for other employment.
 - (2) Had we found in the claimant's favour in respect of the alleged breach of contract we would not have found against the claimant on the basis that he delayed too long in terminating the contract. The incident with Mr Smith took place on 20 January 2017. The police investigation was speedy and ended with a Community Resolution Notice being

issued to Mr Smith on 1 February 2017 although the claimant was not informed of this until 22 March 2017. The disciplinary process was delayed by the police investigation and did not conclude until 21 March 2017. The claimant was informed that the disciplinary proceedings had concluded on 5 April 2017. We do not consider that the claimant delayed too long in resigning on 9 May 2017.

58. We are therefore satisfied that the claimant was not constructively dismissed. Had we found in the claimant's favour on this issue we would we would have made a significant reduction in compensation on the basis of his conduct as it is clear that he was substantially responsible for the loss of his job due to his own bad behaviour. As the respondent's representative puts it there would have been no case had it not been for the claimant's goading and taunting of Mr Smith. Mr McCabe and the claimant accept that industrial language was used. This does not in our view do justice to what occurred and seeks to downplay the claimant's role.

Holiday Pay

59. The claimant is entitled to a payment in lieu of leave in accordance with Regulation 17 of the 2016 Regulations as follows: $(28 \times 39/366) = 3$ days x £50.00 net = £150.00.

AWARD

60. The claimant is therefore awarded £150.00.
61. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 10-11 January 2018 and 6 February 2018, Belfast

Date decision recorded in register and issued to parties:

WRITTEN SUBMISSIONS ON BEHALF OF THE CLAIMANT

Case Ref No: 4276/17 IT

Marcus Whyte (Claimant –v- John McDowell and Karen McDowell t/a Farmview Meats Respondent)

At the commencement of the hearing an opening statement was presented to the Tribunal advising that the Claimant, Marcus Whyte, was claiming unfair dismissal on the grounds that he had to resign his position as Apprentice Butcher with Farmview Meats and as consequence was claiming constructive dismissal.

Constructive Dismissal – Legal Position:

Article 127 (1) (c) of the Employment Rights (NI Order 1996) states:-

"1. For the purposes of this part and employee is dismissed by his employer if (and, subject to Paragraph 2 (2...only if

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employers conduct".

This is usually referred to as constructive dismissal. In any claim for destructive dismissal there are 4 essential elements for a tribunal to consider. Harvey's at Division D1 paragraph 403 sets out those conditions as follows:-

- a. There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.
- b. That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents, which justify his leaving.
- c. He must leave in response to the breach and not for some other, unconnected reason.
- d. He must not delay in terminating the contract in response to the employers breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

The Tribunal sat for 3 days 10th and 11th of January and 6th February 2018, the Claimant gave evidence to the Tribunal on 10th and 11th of January 2018. If I could turn now to applying the facts of the case to the legal test.-

A. There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

It is my position that the Claimant was honest, credible and consistent in the evidence and testimony that he gave to the Tribunal. His oral evidence supported and complimented the earlier submission he had made by way of the ET1. This was

further supported by independent witness statements and the documents that he relied on at the Tribunal. It is the Claimant's case that on 20th January 2017 he was punched, held and restrained briefly by a work colleague. There is a clear case that he was threatened and punched by a colleague Christopher Smith who was wielding a knife in his left hand at the time the assault took place. This version is supported by others and by other facts.

It is supported by the CCTV which was viewed by all the parties. The panel may form their own opinion but in my view it shows quite graphically Christopher Smyth moving towards Marcus Whyte extending his fist and contact is made to the extent that Mr Whyte's head disappears out of view from the footage.

I also believe that his version is supported by the statement from Gary Nesbitt page 75 of the bundle, whereby he states "Chris then walked over towards Marcus, they were arguing at the sink. Chris pushed his fist into Marcus' face. I went over to split them up, they went out the back and the John came over."

I further believe Mr Whyte's version is supported by the statement by Constable Ritchie page 77 of the bundle where he states "after about 30 seconds Mr Smyth approaches Mr Whyte with the knife in his right hand, but seems to realise he has the knife and moves it to his left hand and holds it behind him as if to keep it clear from Mr Whyte". He further states, "Mr Smith then raises his right fist towards Mr Whyte's face and looks like he makes some sort of contact not, a full blown punch, but contact is made." He subsequently concludes that there was a low level common assault had occurred due to the contact made.

I believe the Claimants version is further supported by way of a letter sent by Inspector McPhillips of the PSNI dated 22 March 2017, pages 25 and 26 of the bundle. Whereby, inter alia, he confirms that Mr Whyte did not wish to make a formal complaint. He concludes his letter by stating that "Police contacted Mr Whyte in relation to the issue of a Community Resolution Notice on the other party. On 30th January 2017, Police contacted Mr Whyte that attempts had been made to issue the Community Resolution Notice on the other party. Subsequently on 1st February 2017 at 14.52 hours, Police issued the Community Resolution Notice on the other party. Police took no further actions regarding this matter."

In light of this weight of evidence it is the Claimant's case that the Respondent needs to acknowledge the fact that a '**common assault**' under criminal law did occur in the Respondents workplace. It is a fact that the PSNI carried out an independent investigation and criminal facts were established. This resulted in the issuing of a Community Resolution Notice, ultimately it will be for the Tribunal to determine how they view this document but on behalf of the Claimant I would submit that on the document that was provided under Declaration of Recipient it clearly states "**I admit I am guilty of this offence**". Under the heading Recipient Instructions Important For The Immediate Attention of The Person in Receipt of This Notice it states "You have been handed this notice because the issuing Officer has reason to believe that you have "**committed the offence**" described overleaf and that this is suitable to be dealt with by Community Resolution".

Turning to the letter sent by Kevin McCabe to Farmview Meats dated 17th February 2017 setting out a summary of events (pages 21-24 of the bundle) it is important to note that the employer did not challenge the veracity or the majority of the points recorded in this letter other than their assertions regarding the level of contact that was made in the course of the assault that took place on 20th January 2017.

Specifically John McDowell says "he did not see and/or think there was a punch". He further stated "the knife was at belt level and behind his back".

Again it will be for the Panel to determine what they believe happened on 20th January 2017 but Mr Whyte in his evidence fully acknowledged that there had been industrial language used, that there was banter in the workplace and that he was goading Mr Smith in relation to a colleague's cereal bowl. However, such conduct does not merit an attack of this nature. Mr Whyte was equally prepared to accept that when challenged that when he did give his initial statement he was in shock and thought the knife was much closer to him and held for a period of 15 seconds. However, he subsequently accepted that that version may not have been correct but it did not alter the fact that Christopher Smyth travelled across the room with a knife in one hand subsequently punched and threatened him using his right arm and when Mr Whyte saw the knife he freaked out. However, whatever version you choose to believe it does not alter the fact that an assault took place. It was subsequently investigated by the Police and there was an outcome by way of a Community Resolution Notice.

So in conclusion in terms of a breach of contract, the Claimant's case is as follows:-

The McDowell's went against their own procedures and work contract. Christopher Smyth should have been sacked for gross misconduct. The McDowell's did not reply and had a number of chances to do so with numerous date extensions. With no response or any verification of my safety it was impossible for Mr Whyte to return to Farmview Meats. They had ignored a serious assault at work. They had failed in their duty of care to protect my work environment. They offered Mr Whyte no reassurances whatsoever as to his future safety. They were in complete breach of their own conduct and disciplinary procedures and their responses were not reasonable in all of the circumstances. There was a fundamental breach of trust and confidence on their part.

B. That breach must be sufficiently important to justify the employer resigning or else it must be the last in a series of incidents, which justify his leaving.

It is the Claimant's case that in light of the breaches identified above we would submit that this was sufficiently important reason to justify the employee resigning in these circumstances.

C. He must leave in response to the breach and not for some other, unconnected reason.

It is the Claimant's case that he left for the reasons already identified and for no other reason

Whilst he was off on sick leave the Claimant continued to submit sick lines. He complied with the organisation's requirements. In his letter of resignation he makes it clear that the employer had left him with no alternative but to resign his position as an Apprentice Butcher with immediate effect. He felt very unhappy he was not able to complete his apprenticeship with only 1 ½ years practice left. He felt very let down by the manner in which his employer handled these circumstances. He was not looking for other employment so there was no other unconnected reason for him resigning from his post.

D. He must not delay too long on terminating the contract in response to the employers breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

It is the Claimant's case that from his perspective the Respondents response was totally inadequate for reasons already outlined and the fact that they had failed to deal with Christopher Smyth, even though he had admitted assault to the Police, by not suspending him and keeping him in employment.

They did not address any of the concerns set out by Mr Whyte and his union representative and following consultation he was left with no alternative but to resign his position and claim constructive dismissal as this was a gross breach of trust and confidence by his employer in failing to protect him in the workplace.

Critically, I would draw the Panel's attention to page 37 of the bundle which was a letter Marcus Whyte sent to his employer on 26th April 2017 setting out his concerns and asking them to deal with a number of issues and to clarify their position. He then offered them a date in which to respond by Tuesday 2nd May 2017. It is clear from the evidence that we heard at the Tribunal that this deadline was not complied with and a letter arrived some time after this date but its content did not materially change the position of the Claimant other than that he was left with no other option other than to resign his post as Apprentice Butcher.

CONCLUDING ARGUMENTS

For consideration by the Tribunal, a timeline of key events is as follows:-

- 2017 - 20 January - Assault takes place in the workplace involving CS and MW.
- 23 January - KMcD takes statements from CS and other work colleagues but not MW.
- 1 February - Community Resolution Notice served on CS by PSNI.
- 10 February - KMcD seeks statement from MW.
- 10 February - KMcD seeks access to medical report from MW; Will only meet if medical report made available.
- 10 March - Statement from MW provided.
- 16 March - KMcD advises MW statement treated as evidence.
- 17 March - Letter of invite to Disciplinary Hearing sent to CS.
- 18 March - Disciplinary hearing held involving JMcD, KMcD and CS
- 21 March - Outcome of Disciplinary Hearing sent to CS.
- 5 April - KMcD advises MW that investigation completed and wants to meet.
- 26 April - MW writes to FVM setting out concerns, requesting information and to respond to KMcC on or by 2 May.
- 30 April - Letter from FVM sent by KS on behalf of KMcD – date received unclear.
- 9 May - MW resigns his position.

would wish to make the following submissions on behalf of the Claimant.

- The Employer/Respondent initially sat on their hands and did not carry out a fair, independent and robust investigation of the facts of what had occurred on 20 January 2017.
- If they had done so, on the balance of probabilities, they would have concluded that an assault had taken place on Mr Whyte.
- When they eventually realised that such action was required they conducted a process that was fundamentally flawed and prejudicial.
- They ignored their own disciplinary procedure by relegating a very serious offence to a sanction that was not even covered in their procedure.
- They have been disingenuous to say the least that the conduct by Christopher Smith was considered "*physical horseplay*" this is fundamentally challenged by the claimant and the PSNI would not have been contacted if it were merely that.
- The Employer/Respondent appears to be in denial and disturbingly failed to acknowledge the fact that a common assault under criminal law occurred in their workplace.
- This was an independent investigation.
- Criminal facts were established.
- They have sought to minimise the actions of Christopher Smith when the onus was on them to address the outcome of the police report under 10.8 and 10.10 of their own disciplinary procedure – if not they are sending out a message of tolerating violence in work – which is completely unacceptable and astonishing that they would fail in their duty of care to all other employees.
- It was evident that they took no steps whatsoever to either acknowledge or recognise or indeed take action to address:
 - avoidance of a repeat of this type of incident;
 - no risk assessment, risk reduction or address foreseeability of a future violence at work incident;
 - the fact that they have no dignity at work policy and/or a violence at work policy;
 - the fact they sought no advice from the Labour Relations Agency, Health and Safety Executive and the Equality Commission to address potential similar occurrences in the future.

- The Claimant made the case that he was more dispensable than Mr Smith, who was 37, much older than him and someone FVM valued over him. I believe this was borne out by the treatment afforded to Mr Smith but not Mr Whyte.
- This was evidenced by the fact that the Respondent through JMcD sought to portray MW in a negative light, to the PSNI at the commencement of their investigation by telling outright misleading comments and weighing in more favourably about CS to the police before the Employer had carried out any investigation or enquiries of their own.
- The Claimant believes this and other failings and subsequent actions by the Employer amount to a fundamental breach of trust and confidence on their part and is a breach of the contract of employment which forced him to resign in these circumstances.
- All of the witnesses on the Respondent's side believe the Claimant is wrong; Gary Nesbitt is wrong and critically the PSNI is wrong. It is incredulous that they still believe that CS simply pointed his finger.
- The Respondents were quite prepared to introduce evidence in their direct testimony that did not form part of their original pleadings as set out in their ET3.
- The Respondents sought to introduce "sectarian comments" attributable to the Claimant when there was no evidence whatsoever to support this and formed no part of any previous submissions or statements.
- Such actions raise credibility about their evidence and reliability.
- The Respondents were at times contradictory depicting the Claimant negatively yet also commenting that there were no issues, he was content in his job and had been recently reviewed.
- Finally, the Respondents withheld papers by not disclosing through Further and Better Particulars etc and such an abuse of tribunal process raises again their credibility on all of these matters.

FOR ALL OF THESE REASONS AND ARGUMENTS I WOULD SUBMIT THAT THE CLAIMANT WAS UNFAIRLY DISMISSED AND YOU FIND ACCORDINGLY.

**K McCABE
CLAIMANT'S REPRESENTATIVE**

Based on the above information Mr Whyte's evidence is not credible and is completely at odds with the account of the events he has outlined in his ETI submission to the tribunal.

Mr Whyte also claimed in his to the tribunal that he was injured in the incident. All of the witnesses and the PSNI have confirmed there was no injury. Again this calls into question the credibility of Mr Whyte's evidence.

Mr Whyte's representative made several statements in respect of the 'balance of probabilities' – Mr McCabe asserted that based on the independent witness statements provided to the respondent on Monday 23 January 2017 that there was sufficient evidence to suggest Mr Whyte's account was accurate, however, six statements were available from within the business. Chris Smith, Marcus Whyte, David Mitchell, Edward Bowden, Gary Nisbet and Jonathan McKitterick – only two of the statements have stated that Mr Whyte was punched; four statements have said that they had not witnessed an incident as Mr Whyte described it – on that basis the balance of probability is with Mr Smith.

It should also be stated that Constable Ritchie from the PSNI confirmed that after he had viewed the CCTV that there was discrepancies between Mr Whyte's account and the accounts of Mr Smith, CCTV and other staff members – this suggests that the PSNI officer was questioning Mr Whyte's credibility as well. Constable Ritchie also said in his statement that the incident amounted to a very low-level common assault, which is significantly different from the description provided throughout this case by Mr Whyte and his representative when they described the incident as a serious assault. No evidence produced throughout this case has corroborated the claims made by the claimant that there was a serious assault.

In the correspondence from Inspector McPhillips he states that 'Mr Whyte further reported that the knife had been held close to his face for around 15 seconds...' The tribunal having viewed the CCTV footage will have observed that no knife was used at any stage of the incident.

Mr Smith was issued with a Community Resolution Notice for the incident, however, it must be understood by the tribunal that such a notice is only issued in the following circumstances:

- The most appropriate offences for community resolution are likely to be low-level criminal damage, low value theft, minor assaults (without injury) and anti-social behavior.

Based on the above a community resolution notice in this case was a warning not a criminal conviction, therefore, Mr Smith does not have a criminal conviction as alluded to by the claimant's representative.

For the avoidance of any doubt all of the evidence to the tribunal with the exception of Mr Whyte's clearly demonstrates that no knife was used at any stage by Mr Smith. It would appear that Mr Whyte has exaggerated the facts and fortunately for the respondent the entire event is captured on CCTV which supports clearly the respondents position.

Following confirmation from the PSNI that their involvement with this incident had now concluded, Farmview meats proceeded to conclude their own investigation and to hold their disciplinary meeting with Mr Smith.

It should be acknowledged by the tribunal that it is not the role of the panel to re hear the disciplinary case but to assess if a fair procedure was followed. The respondents have acknowledged to the tribunal that they have little or no experience of conducting disciplinary hearings. Consequently, they were not familiar with the terminology used in producing a charge letter and indeed the format of a disciplinary hearing. Despite their lack of experience, they conducted a fair, reasonable and transparent process, one that adheres to best practice HR in that the employee was invited to a hearing, advised of his right to be accompanied and afforded the right to appeal the outcome.

Having reviewed the witness statements provided by the employees present on the day of the event including the information provided by Mr Whyte through his representative on 17 February 2017, the CCTV footage and the information provided by both Constable Ritchie and Inspector McPhillips they were content that the incident fell into the category of major misconduct. The respondent acknowledges that the charge letter states serious misconduct, however, despite a discrepancy they are content that the outcome they reached based on all of the evidence available was reasonable in all of the circumstances. Mr McCabe suggested during cross-examination that Mr Whyte should have been invited to attend the disciplinary hearing. Mr Whyte's evidence to the tribunal was that on 26 April (Page 37) he was still not well enough to meet. The disciplinary hearing took place on Saturday 18 March 2017 so Mr Whyte was not available at that time.

Based on the information above there was no breach of policy or procedure. Mr Whyte was written to after the disciplinary hearing and advised he was welcome to return to work and that there was no risk within the work place. The letter dated 30 April 2017 was the response to the questions posed by Mr McCabe on behalf of his client.

It is not for any employee to advise their employer what the outcome of any investigation should be. Mr Whyte said Mr Smith should have been suspended and sacked. The respondents did not believe a suspension was necessary as Mr Whyte's absence from work and his unavailability still at 26 April 2017 confirms that there was no requirement to create a neutral act to allow an unhindered investigation to take place.

There was clearly no fundamental or indeed any breach of trust in confidence in these circumstances. The respondent would submit that the timing of Mr Whyte's resignation is a matter for the tribunal to consider. On 17 February 2017 page 24 of the bundle, Mr McCabe advised the respondent that Mr Whyte was 'considering his contractual position' and on 10 March 2017 (Page 32 of the bundle) he again stated that he was considering his contractual position, however, he did not resign his position until 9 May 2017 almost 3 months later. The respondent believes this demonstrates that the incident referred to was clearly not sufficiently important at that time. The respondent also believes that the claimant did not leave because of that incident alone.

Mr Whyte has clearly delayed his decision and despite advising his employer on 17 February 2017 & 10 March 2017 that he was considering his contractual position, he did receive a response to his requests for additional information, which he eventually acknowledged during cross-examination that he was in receipt of before he decided to resign. The response clearly stated that he was welcome back to work, that the business acknowledged that he remained unwell and that his place of work was a safe working environment.

For consideration by the Tribunal, a timeline of key events is as follows: -

- | | | | | |
|-------------|---|--------------------|---|--|
| 2017 | - | 20 January | - | Date of incident |
| | | 23 January | - | Date of request for statements from employees while information was still fresh in the memory. Statements provide in employee's own words and handwriting |
| | | 10 February | - | Date letter sent to Mr Whyte requesting his witness statement as evidence for internal investigation. |
| | | 17 February | - | Letter from Mr McCabe advising that Mr Whyte was considering his contractual position. |
| | | 10 March | - | Statement from Mr Whyte provided via Mr McCabe, information was broadly similar to the letter dated 17 February. Mr Whyte has again affirmed that he was considering his contractual position on this date also. |
| | | 17 March | - | Letter of invite to Disciplinary Hearing sent to Mr Smith. |
| | | 18 March | - | Disciplinary hearing held with Mr Smith |
| | | 21 March | - | Outcome of Disciplinary Hearing sent to Mr Smith |
| | | 5 April | - | Respondent advises Mr Whyte that investigation completed and requests to meet with him and advises there is no risk within the workplace and that his job remains available to him. |
| | | 26 April | | Mr Whyte advises his employer he remains unfit for work. |
| | | 30 April | | respondent wrote to Mr Whyte again reiterating that the investigation was complete, his return to work would be welcomed and that there was no risk to him in the workplace. |

I would wish to make the following submissions on behalf of the respondent:

- The Respondent sought witness statements from all of its employees who were present on the date in question. Mr Whyte was also asked for his statement to ensure all of the available evidence was available after the PSNI had concluded their investigation.
- The majority of the witness statements and the evidence provided by the PSNI supported Mr Smith's position that no knife was used during the incident in question.
- From the time the incident occurred, the respondent was aware that an internal investigation was required and that it may result in a disciplinary outcome if there was a case to answer.
- The respondent had in place a disciplinary procedure and followed it, a three-step process was used and in all of the circumstances the process was fair, reasonable and equitable. Mr Whyte was not available to attend the disciplinary hearing even if he had been invited, the respondent's advice from their HR adviser was that witnesses are not required to attend a disciplinary hearing.
- The respondent in their charge letter described the incident as serious misconduct, the respondent is content that serious and major mis-conduct amount to the same charge.
- The respondent acknowledges that after prolonged provocation that Mr Smith reacted to inappropriate remarks made by Mr Whyte, this is not disputed. The respondent also agrees with the classification of the incident made by the PSNI – it was a very low level common assault and consequently did not warrant a criminal conviction.
- The investigation undertaken by the respondent was robust and considered all of the available evidence – this included witness statements, the PSNI assessments and CCTV footage. Based on all of the above the outcome is reasonable in all of the circumstances.
- The respondent believed from a very early stage that the claimant decided on the day of the incident that he was not returning to his employment at Farmview Meats.
- The protagonist in this incident was Mr Whyte. During his absence from work there was not one single incident of name calling or horseplay. In the previous 32 years in business the respondent had not experienced anything like the incident between Smith & Whyte on that basis alone it was reasonable to believe there would be no repeat offence or incident of this magnitude.

A risk assessment was not possible in the circumstances referred to by Mr Whyte and his representative. There is no mechanism for assessing how or what an employee might do in the work place on any given day. The respondent is aware of the purpose of a risk assessment and has them in place for the tools and equipment within their business. A risk assessment would not have changed the work environment and would not have facilitated Mr Whyte's return to work. The employer did provide a written assurances on both the 5th April and 30th April that there was no risk to him within the workplace and this was not enough.

The availability of a dignity at work policy or a violence at work policy would have provided no more protection than the existing disciplinary policy.

- The respondent does not have a hierarchy in terms of the value of its employees. Mr Whyte was treated fairly, reasonably and equitably throughout his employment with the respondent. Despite his well-documented bad behavior, he was never disciplined and at no stage in any of the correspondence issued to Mr Whyte or his representative was it suggested that he may be the subject of any disciplinary action, even though his conduct falls under the category of Major Misconduct in his contract of employment. The respondent is a very tolerable, lenient employer which Mr Whyte benefited from throughout his employment.
- The claimant was prompted during his cross examination by his representative, this action alone calls into question the credibility of the witness. This is a clear breach of the protocols within the tribunal and upon reexamination Mr Whyte corrected or changed his evidence as directed.
- Finally, the claimant's representative failed to adhere to the timetable set out by the vice chair of the tribunal in his CMD. These actions resulted in a significantly longer process where no witness statements were available and consequently this allowed the case to become more fragmented and to digress into areas that had little or no relevance to the case in hand.

For all of the reasons and arguments I would submit that the respondent acted appropriately in all of the circumstances and the claimants case should fall.