EMPLOYMENT TRIBUNALS

Claimant: Mr S Mistry

Respondent: City of Bradford Metropolitan District Council

Heard at: Leeds **On: 12 and 13 January 2017**

Before: Employment Judge Eeley

Representation
Claimant: Mr Smith, Counsel
Respondent: Mr Gallagher, Solicitor

JUDGMENT having been sent to the parties on 22 February 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant presents two claims, one for unlawful deductions from wages, the other for constructive unfair dismissal. No claim for notice pay is pursued.

The Issues

2. The issues in the case were clarified at the outset of the hearing. In relation to unfair dismissal claim the issues were:
    a. Was there a fundamental breach of contract by the Respondent?
    b. Did the Claimant resign in response to any such fundamental breach?
    c. Was there a relevant breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures such that an uplift or reduction should be applied to any damages awarded?

    No issue was taken by the Respondent as to waiver or affirmation of the contract. The Respondent also clarified that in the event that a dismissal was established it did not seek to put forward a fair reason for dismissal and it conceded that any such dismissal would be unfair.

3. In relation to the claim of unlawful deductions from wages the issues for determination would be:

   (a) What amount of wages were properly payable?

   (b) Was there a deduction from that amount?

   (c) Was the deduction authorised in one of the ways set out in section 13(1) (a) or (b) of the Employment Rights Act 1996.

4. In the event, during submissions at the conclusion of the case Mr Gallagher fairly conceded that the claim for unlawful deductions was made out on the evidence heard and no formal determination needed to be made by the Tribunal in relation to the unlawful deductions claim.

The Evidence

5. I have before me an agreed bundle running to 134 pages and I read those pages to which I was referred by the parties in the course of their evidence. In terms of witness evidence I heard evidence from the Claimant on his own behalf and from the Respondent's witnesses three of whom presented witness statements: Mrs Simone Dalton (Unit Manager at Norman Lodge Care Home); Mr Philip Gibbs-McDermott (Business Change Manager and Assistant Service Manager for Residential and Day Care Services); and Mr Dean Roberts (Service Manager for Residential and Day Care.) I had written witness statements from those witnesses and I heard oral evidence in cross-examination from each of them. I am also grateful to both representatives for the helpful oral submissions that they made at the conclusion of the hearing.

The Facts

6. The Claimant was employed by the Respondent and had been employed since 14 June 1991. He had been employed since December 2001 at Norman Lodge Care Home as a driver/care assistant. The written contract of employment was at page 55 to 58 of the bundle. It should be explained in relation to Norman Lodge that it comprised two distinct elements. Firstly, it had a residential care home and, secondly, an attached day care centre. The Claimant was working four days a week on a 30 hour contract. For three of those days he was acting as a driver transporting elderly service users to and from the day centre at Norman Lodge and providing care and assistance whilst the service users were present at the centre. On the fourth day he would work as a care assistant generally within the unit i.e. within the residential care home part of the premises. He would be involved in getting people out of bed and providing assistance with personal care, personal hygiene, general care and the like.

7. The Respondent underwent a reorganisation of the services it provided and decided to close another day centre at Whetley Hill in 2014. There was a protracted period of consultation and examination of proposals together with consultation with trade unions. The decision was taken to streamline the service and it was decided that the day centre at Norman Lodge would be closed whilst the care home at the centre would be retained. The day care centre services would thereafter be provided at a different location, that of Beckfield Care Home. So it would be the same service at a different location.

8. The proposals were unresolved and the situation was "up in the air" for some time and understandably there was some staff anxiety about the changes and regarding job security. As at the end of 2015 and beginning of 2016 there was still no final decision and staff at meetings with Mr Gibbs-McDermott were given reassurance that there would be jobs within the new structure but not necessarily where those jobs would be.

9. By way of background in January 2016 a vacancy as a carer at Norman Lodge Care Home arose and the Claimant and his two colleagues were asked if they wanted to take it. The Claimant refused and his colleague Vicky Benson took it up in the absence of any competition for the post.

10. As part of the assimilation process the final decision in relation to the Claimant was that a job was identified for him as a driver/carer at Beckfield. He was to be given no option in relation to that job. However, it was the same job as he had previously been doing at Norman Lodge. The only material difference was the change of location which I understand to have been an additional 0.3 miles further away from his home. The Claimant was not happy with the decision but for the purposes of this case the Claimant is not contending that there was no good reason for the transfer or complaining about the decision or the reorganisation per se. Rather, the complaint is about the way in which the process was handled. So, it was the same job with the same terms and conditions and pay just at a different location. There was even the expectation that the Claimant would be working with the same or substantially the same elderly service users as he had assisted at Norman Lodge.

11. The most material events for the purpose of this case started in April 2016 when the Respondent decided to inform the Claimant of its decision in relation to the organisational structure. Simone Dalton was the manager at Norman Lodge. Her deputy was Louise Ryan. Mrs Dalton reported to Mr Gibbs-McDermott who in turn reported to Mr Rogers. The Claimant asserts that he was bullied and harassed in relation to the changes from 8 April. In the event, there was very little evidence put before the Tribunal in relation to that period of time and I do not find that there was any bullying or harassment from 8 April.

12. The real chronology starts on 15 April when there was a meeting at Norman Lodge. Present were the Claimant, Mrs Dalton and Mr Gibbs- McDermott. Mr Gibbs-McDermott explained the transition. He explained the service proposals to the Claimant. It is to be noted that the Respondent expected that the Claimant would be pleased that he still had a job. He wasn't, in the event, pleased. He was concerned about travel time. He asked what other options were available to him and he was told that there were no other options. The Claimant was unhappy and decided that he wanted to discuss the matter with his wife over the weekend and expressed as much to the Respondent.

13. The Claimant thought at this point that it was being suggested that if he didn't go to Beckfield one of his colleagues would go to work at Beckfield. This seems to have been a misunderstanding on the Claimant's part. It certainly was never the plan as far the Respondent was concerned. The Claimant also thought that there was a care post available at Norman Lodge and indeed there was a 29 hour contract available. The contract involved shift work and the Respondent had no intention of giving that post to the Claimant.

14. In the course of evidence Mrs Dalton conceded that as at 15 April the Claimant and his colleagues may have been under the impression that they were able to transfer to do care work but not necessarily that this would be at Norman Lodge, although there was a vacancy. On 15 April the Claimant was told for the first time that he was moving and that he had no choice about it and Mrs Dalton confirmed in evidence that the Claimant was clearly upset about this decision.

15. In the event he went away and came back after the weekend and there were further meetings on 18 April. The first meeting took place between the Claimant, Mrs Dalton and Ms Ryan. Mrs Dalton hoped that he had decided to accept the transfer. The Claimant informed her that he didn't wish to go. He asked to stay at Norman Lodge and reduce his hours to 16 hours per week. Mrs Dalton said that that was not possible due to the assimilation procedure and there was some concern expressed on her part that that the Claimant in any event would not be fit for a full-time carer role due to his previous problems with sciatica. Mrs Dalton explained that the 29 hour contract would be on the shift pattern and that this contract of 29 hours could not be reduced or split between employees. There was some discussion between the parties. The Claimant wanted to reduce his hours in order to focus on his business interests which were possibly a dog walking business that he had previously set up. Mrs Dalton explained that the only way that he would be able to achieve a 16 hour working week could possibly be if he resigned and started work as a casual worker for the Respondent at the premises. Apparently, there were some longstanding casual workers working on site. The Claimant wanted to think about it further and discuss it with his wife.

16. Mrs Dalton was concerned that the Claimant was not complying with the decision that had been made and so she got Mr Gibbs-McDermott on site for a second meeting later that day on 18 April. Prior to that second meeting she

reported back the contents of the first meeting to Mr Gibbs-McDermott. Present at that second meeting present were the Claimant, Mrs Dalton and Mr Gibbs-McDermott. During the course of that second meeting the Claimant again expressed the view that he was not accepting the transfer to the new role and that he was not happy. He still persisted in wanting to work 16 hours per week as a care assistant at Norman Lodge. Mr Gibbs-McDermott persisted that there were no alternatives and explained the business rationale for the decision. He also pointed out the benefits of the move. The Claimant expressed the view that he wished to discuss it with trade union representation and the meeting ended.

17. The following day (on 19 April) Louise Ryan the deputy manager raised an issue with Mr Gibbs-McDermott regarding a holiday request. The Claimant had submitted a written request on 11 April (page 80 of the bundle). He had requested two weeks holiday from 2 May to 16 May. The second week was the transition week for service users to move to Beckfield. Mr Gibbs-McDermott told Ms Ryan not to approve the second week because of that transition week for the service users.

18. I find that the Respondent was entitled to either authorise or not authorise holidays in accordance with service needs. The Claimant had no right to any particular day off subject to having his leave entitlement for the year as a whole honoured. The Claimant asserted in the course of the case that leave had previously been verbally approved and that effectively Louise Ryan was now de-authorising leave and that this formed part of a programme of bullying and harassment. On reflection, I don't accept that. I accept the Respondent's evidence that leave approval required both a written request and written authorisation and given the Claimant's longstanding employment with the Respondent the Claimant would know that. I accept the Respondent's evidence that usually it would be the deputy manager Louise Ryan who would deal with holidays. Here the Claimant is asserting that Mrs Dalton had verbally approved the holidays. That would not normally be part of her role. He gave relatively vague evidence about how and when this approval took place. I formed the view that at most he had effectively "passed the paper under Mrs Dalton's nose" and she has said something to the effect of "it'll be alright." However, the Claimant would know better than to rely on that and that is not a proper authorisation of holiday leave. So, I find that the holiday was not approved and then disapproved and that the Respondent had good reasons for not approving the second week of the two weeks that had been requested.

19. On 21 April the holiday request was signed off by Louise Ryan with only the first week being approved. Louise Ryan told the Claimant of the decision and he was not happy with it. On the following day (22 April) at 7.10am (or thereabouts) the Claimant rang into work sick and spoke to Amanda Thorpe who was the other assistant manager at Norman Lodge. He said he would not be in that day due to sickness absence and he was unlikely to be in the

next day either. In any event Amanda requested that he ring in the next day to confirm this. The Respondent's procedure for notification of sickness absence is set out at page 31 of the bundle. It sets out the requirements for notification of absence and I find that the Claimant complied with the first day's requirements. Later on 22 April, at about 8.45am, he also left a message to confirm that he would not be in the next day. So the Respondent was clearly informed that he would be absent on both 22 and 23 April. Matters moved on to the following day (23 April) and I note that the policy doesn't require any particular step to be taken on the second day of an absence. The first week is effectively a week of self certification. In any event a doctor's fit note for the Claimant was in fact dropped off signing him off for one week with stress at work and that is at page 81 of the bundle.

20. The next requirement on the policy is on the fourth day of the absence where an employee is required to phone in and confirm both the reason for absence and the expected return to work date. As it was, the Claimant was not in breach of this given that he had a doctor's note and by the fourth day the Respondent would know in substance both why the Claimant was off and for how long. I should say, of course, that was done via the doctor's note rather than a phone call but I don't consider that anything turns on that.

21. At this point (day four of the absence, 26 April) Mrs Dalton jumped the gun. She sent the letter at page 82 of the bundle. I notice it is not on headed note paper but it requests a welfare meeting with the Claimant on 10 May. At this stage the Claimant has only been signed off work for a week and there is nothing to suggest to Mrs Dalton that he won't be back at work by that date. The letter asks the Claimant to call Mrs Dalton and confirm that he has received the letter. There is no evidence on the face of the document that any copy documents or notification policy had been enclosed with the letter. I appreciate the desire that Mrs Dalton had to sort out the problem which had apparently risen and to prepare for the Claimant's transition to a new role. I appreciate the difficulties arising when a service is going through the sort of changes that the Respondent's service was. I also appreciate that stress absences for employees can be difficult to manage especially if they are protracted. However, this wasn't a protracted stress absence, it was only one week. The Respondent's concerns should be balanced against the fact that there is a need to give employees the space to recover. Whilst not contacting an employee for week after week is usually not advisable, being too keen can hamper their recovery, undermine the purpose of sick leave and promote the feeling that the employee is being harassed. Whilst this might not have been Mrs Dalton's intention it certainly turned out to be its effect on the Claimant.

22. On 27 April Mrs Dalton phoned the Claimant and left a message and asked him to contact her at Norman Lodge. The Claimant did not respond. On 28 April (day six of the absence) Mrs Dalton called the Claimant again and left a message. She also later called his wife. I note that this was not necessary, it was not an emergency and at this point the Claimant was still covered by his doctor's note.

23. On 29 April (day seven of the absence) Mrs Dalton called the Claimant again and left a voicemail. I have a transcript of the voicemail which is agreed between the parties and which has been added to the back of the bundle. The contents of the voicemail message from Mrs Dalton are:

> "*Hello Sanjay it's Simone. Can you please ring me? I have been instructed if you do not ring me by lunchtime today to stop your wage so can you please ring me. You are not following procedure. Thank you. Bye*".

I note in this message Mrs Dalton says that she 'will' stop pay, not that she 'may' stop pay. The allegation made is that and the Claimant is not following procedure and that is not correct as far as I can see. So the Respondent was threatening to stop the Claimant's pay without any justification at that stage. Yes, the Claimant had gone relatively quiet but he was legitimately signed off work to recover. In any event, subsequent to this voicemail message the Claimant's colleague handed in a further doctor's note. There is nothing in the Respondent's policy saying that he cannot do that or that he should not use a third party to drop off a doctor's note. In fact, this is only day seven of the absence and a doctor's note is not required by the policy until day eight. For the record, I note that from this point onwards the Claimant is continuously covered by a doctor's sick note until the end of his employment.

24. After receipt of this medical certificate the Claimant called Mrs Dalton back and that conversation was recorded. There is a transcript within the bundle which I won't quote in full. The material points to note from it are set out herein. It is alleged at the beginning of that conversation that the Claimant is not following procedure. As I have said, I think he was following procedure. In the recording the Claimant is criticised for using a third party to bring in the certificate. As I have said, there was nothing in the procedure to prevent him doing that. In the recording there is a threat that the Respondent will stop pay if the Claimant doesn't maintain contact and Mrs Dalton asserts that she needs to arrange a welfare meeting and that the Claimant has to come in for this. The Claimant is required to call her back in relation to that. It is important to note that (prior to this phone conversation) on 26 April the Claimant had lodged a written grievance against Mrs Dalton and Mr Gibbs-McDermott (page 83). He alleged harassment and bullying. Given that context it is clear that he would not want to have a welfare meeting with the manager that he had accused of bullying and harassment.

25. On 3 May the Claimant left a message with Amanda confirming that he was not going to attend the welfare meeting. On 5 May Mrs Dalton left a phone message for the Claimant asking him to contact her regarding the welfare meeting. On 6 May (page 90) the Claimant's grievance was acknowledged by a letter. On 9 May (page 92) a formal notice of assimilation was sent out. On 10 May Mrs Dalton sent a further letter (at page 93) which stated:

"Dear Sanjay

Re: Absence

I am writing because we are concerned about your health. We had arranged a welfare meeting with you on the 10 May 2016 so that we could understand the nature of your illness so that we are in a better position to support you and try to help you return to work soon. I am very concerned that you chose not to attend this meeting. May I take this opportunity to remind you of your responsibility to engage with management throughout any periods of absence, as outlined in Council sickness procedures. Although my primary concern is your well being, I must make you aware that if you do not contact me by 16 May 2016 so that we can arrange a welfare discussion, your sick pay may be stopped. I can be contacted on 01274 691520.

Yours sincerely, Simone Dalton.

26. On 12 May it had been proposed that there should be a grievance meeting which the Claimant had to have rescheduled. It was rescheduled for 20 May. On 14 May the Claimant submitted a second grievance which is found at page 98 of the bundle. In the meantime on 28 April the Respondent made an occupational health referral (page 86) and it is to be noted that the Claimant attended the telephone consultation with occupational health on 23 May (page 99). This generated an occupational health report (page 110) and so in this regard the Claimant had also complied with the procedure. Further, an appointment was made for him on 6 June with Jenny St Romaine (page 111) who is a type of mediator/dispute resolution expert. As I understand it the Claimant attended that appointment on 6 June and notified her that he was taking legal advice. That is recorded at page 99. So, again, the Claimant kept up his side of the bargain in terms of compliance and attending appointments.

27. In any event Mrs Dalton wanted the Claimant to attend a welfare meeting with her on 10 May. The Claimant didn't attend. Mrs Dalton consulted HR and was told that persistent failure to follow procedure could lead to suspension of sick pay. That is what culminated in the letter at page 93 dated 10 May, quoted above. When Mrs Dalton heard nothing in response to her letter she issued an instruction to payroll to stop sickness payments. Mrs Dalton did not inform the Claimant either orally or in writing that this had been actioned and he wasn't told at any stage that he had a right of appeal against that decision. The first the Claimant knew of the fact that the decision had been made to stop his pay was when the money did not reach his bank account. He rang the payroll department. He was told that the decision was a permanent one. Instead of receiving £174 direct into his bank account on a weekly basis he received payments of £36 twice and one payment of £4.00. The first underpayment being on 2 June. This decision to stop sick pay was taken at the same time as the Claimant: -

    a. was off sick on a fully certified basis;

    b. had gone to occupational health appointments;

c. had got an anxiety disorder;

d. had raised a grievance about the person (Mrs Dalton) who wanted the welfare meeting and who actioned the decision to stop pay.

Mrs Dalton knew of the grievance when she decided to stop the Claimant's pay. She was told about it by Mr Roberts on about 13 May and actioned the decision to stop pay on 17 May.

28. I note that Mr Roberts had been notified of the decision to stop pay at least a day before the decision was actually actioned. He had also had reported to him that there had been a breakdown of communication and that the Claimant was not complying with requests to attend a welfare meeting.

29. A grievance meeting had in fact taken place on 20 May with Mr Roberts as grievance officer (notes at page 105). In that meeting Mr Roberts promised to investigate and gave a time frame of approximately three weeks. There is no documentary evidence of any investigations having taken place. No witness statements have apparently been obtained. There was some suggestion to the Tribunal that witness statements had been obtained but nothing was put in evidence before the Tribunal and no explanation was given for the absence of those documents from the bundle. Mrs Dalton and Mr Gibbs-McDermott in their witness statements make no mention of having been interviewed for the purposes of the grievance. The three week time frame elapsed. No evidence in the bundle shows investigations taking place.

30. On 10 June, following the stoppage of his pay and the failure of the Respondent to contact him regarding any outcome or update in relation to his grievance, the Claimant resigned. His resignation letter is at page 114. He cites his previous grievances, he cites the failure to deal with the grievance and give an outcome and he cites the stoppage of sick pay as the final straw. That letter is acknowledged on page 116 and the Claimant is offered a further meeting to discuss his grievance which he did not take up. Following that the Respondent acknowledges the resignation in writing.

Law

31. The unlawful deductions from wages claim having been conceded by the Respondent in closing submissions no details of the law relating to unlawful deductions need to be set out within these reasons.

32. Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal where *"the employee terminates the contract under which he is employed (whether with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct"*. In order to succeed the Claimant must establish a repudiatory breach of contract (*Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*)

33. In relation to the unfair dismissal claim the Claimant relies upon breaches of both an express term of his contract and also upon a breach of the implied term of mutual trust and confidence.

34. The express term relied upon is the contractual right to sick pay for six months at full contractual pay and for a further six months at half contractual pay. During closing submissions Mr Gallagher conceded, based on the oral evidence given by the Respondent's witnesses, that the Respondent was in breach of this express contractual term. It was accepted that the Claimant should have received full sick pay prior to his resignation and that the Respondent did not have the right, pursuant to the contract, to stop the Claimant's pay during his sick leave. I remind myself that the breach of an express term and in particular an unlawful deduction from wages in and of itself need not be a fundamental breach of contract but it may be depending on the circumstances. The obligation on the employer to pay wages is a fundamental part of the contract of employment such that a failure to do so is perhaps likely to constitute a fundamental breach unless in all the circumstances of the case the breach is in fact very minor.

35. The implied term relied upon is the implied term of mutual trust and confidence which is the implied term that *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."* Any breach of the implied term of mutual trust and confidence is to be considered a fundamental or repudiatory breach of contract (*Morrow v Safeway Stores plc 2002 IRLR 9, EAT).* The test of whether there has been a repudiatory breach of contract is an objective one (*Leeds Dental Team Ltd v Rose 2014 ICR 94, EAT*).

36. The actions alleged to be a fundamental breach of contract can be considered separately or cumulatively. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident, even though the last straw by itself does not amount to a breach of contract (*Lewis v Motorworld Garages Ltd 1986 ICR 157, CA)*. The act constituting the last straw does not have to be of the same character as the earlier acts, nor does it have to constitute unreasonable or blameworthy conduct. However, the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer (Omilaju v Waltham Forest London Borough Council 2005 ICR 481).

37. If the Claimant can establish a repudiatory breach of contract he must show that he resigned in response to it. Where there is more than one reason for the resignation the Claimant need not show that the breach of contract was "the" effective cause or the principal reason for the resignation. He need only show that the breach of contract played a part in the resignation. (*Wright v North Ayrshire Council 2014 ICR 77,.)* As noted above, the Respondent in this case does not assert that the Claimant waived the breach or affirmed the contract.

Application to the facts

Express term

38. In relation to the stoppage of pay I conclude that that was a fundamental breach of contract. I take into account the surrounding circumstances, in particular, the fact that the failure to pay the Claimant wasn't a mistake, it was a deliberate decision. It was done without the authorisation of the Respondent's policy and it was done in the context of the Claimant having complied fully in terms of sick notes and occupational health referrals. It was conceded that it would have had an obvious and distressing impact on the Claimant. In addition, he was not properly notified of that decision nor given his rightful right of appeal in relation to it. Instead he was shocked to discover the decision when he enquired with the payroll department and was told that it was a permanent decision. That all happened in the context of the Claimant suffering from an anxiety disorder. It is also relevant to note that it constituted a sizeable reduction in income in a relatively low paid job which could therefore have a significant impact on the Claimant's financial circumstances. In addition, it was also actioned by someone against whom the Claimant had taken out a grievance.

39. I consider the breach of the express term in relation to pay to be a fundamental breach on its own. However, I go on to consider whether the other matters relied upon constitute a breach of the implied term of mutual trust and confidence.

Implied term

40. In submissions Mr Smith set out five broad headings relied upon in relation to the implied term of mutual trust and confidence. I deal with them in turn.

41. Firstly, the issue of the way the transfer was handled. The Claimant alleges that he had a legitimate expectation of staying at Norman Lodge doing care work. I don't accept that. I know he was not happy about the decision but it is a legitimate reorganisation to meet service user needs and the various constraints upon the Respondent. The Claimant hasn't contended that the Respondent wasn't entitled to transfer him, just that the way it was discussed and dealt with was wrong. I don't accept that there was a breach of mutual

trust and confidence. There was no entitlement for the Claimant to carry on work at Norman Lodge, he was never promised it. There was no entitlement to a 16 hour contract and I don't accept that he was asked or told to resign. Rather, I accept that Mrs Dalton explained that this was the only way that he was going to achieve his aim of a 16 hour contract, namely on a casual basis. I accept that the Claimant was upset by this but that in itself was not a fundamental breach of contract or a breach of the implied term.

42. The second issue is the holiday leave. As previously stated I don't accept that it was verbally approved or that the Claimant had any right to rely on verbal approval. The approval had to be in writing and he knew that. I don't consider that to be a breach of the implied term.

43. The third issue was the way that the sickness absence had been handled. I refer to the chronology as set out in detail above. I conclude that there was a heavy handed approach too early in the chronology and that that set the tone for later difficulties. The Respondent was alleging breaches of procedure by the Claimant when in fact there weren't any. There were repeated unwarranted phone calls (including contacting his wife) and threats to stop pay if no contact was made. There was a premature requirement for a welfare meeting at a point when the Respondent was not aware that the sickness would even exceed one week. I also note the content of the recorded message and I note that the Claimant was being asked to meet with someone about whom he had raised a grievance. I conclude that there was no reasonable or proper cause for the manner in which this issue was handled and that this was a breach of the implied term either taken alone or collectively with the other matters referred to.

44. The fourth issue was the issue of sick pay which I have dealt with elsewhere. I find that the way the Respondent dealt with this issue was either a breach of the implied term in its own right or forms part of such a breach when considered collectively with the other matters relied on.

45. Finally, there is the matter of the grievance. The Respondent didn't respond to the Claimant within the anticipated time frame of three weeks. There was also no evidence of meaningful investigation even though the grievance officer sought to draw conclusions in his witness evidence without the benefit of the investigation to back them up. I also consider that it was inappropriate for him to hear this grievance given that he had been involved in the sick pay decision and had been told, probably erroneously, that the Claimant had breached procedure in relation to keeping in touch and welfare meetings. That wasn't a matter that was known to the Claimant and therefore doesn't sound as part of the constructive unfair dismissal claim itself but it may be relevant in relation to the ACAS code. There was a lack of progress with the grievance for which the Respondent can be criticised. There was also a

failure on the Respondent's part to contact the Claimant and update him as to the progress of the grievance. I find that this is a failing on which the Claimant can rely but I don't consider it to be the most serious breach. It wouldn't constitute a fundamental breach on its own but does play part of the overall course of events and taken with the other matters relied upon forms part of the breach of the implied term of mutual trust and confidence which is a fundamental breach of contract.

46. Taking into account the Claimant's witness evidence and the contents of the documents in the bundle I conclude that the Claimant resigned in response to the Respondent's fundamental, repudiatory breach of contract as set out above. It follows from my findings above that I find that there was a constructive dismissal and, in light of the Respondent's concessions, that such dismissal was unfair.

47. I am asked to consider whether there was a relevant breach of the ACAS code and to determine whether an uplift should be applied to any damages to be awarded hereafter. I have decided that no uplift should be applied. Section 207A of the 1992 Act provides a broad discretion. The requirements of the Code itself are relatively minimal and are certainly not detailed. Whilst there were problems with the way the Respondent handled the Claimant's grievance (particularly the lack of progress made within the timeframe) I am not convinced that there are breaches of specific paragraphs of the Code or that any breaches could be said to be major in the circumstances of the case. Therefore, no uplift is to be applied.

Employment Judge Eeley

Date: 15 March 2017

Sent on: 27 March 2017