EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr J Knight	**v**	Russell Hume Ltd

Heard at: Watford **On: 15-16 May 2017**

Before: Employment Judge Henry

Appearances
For the Claimant: Mr A MacPhail (Counsel)
For the Respondent: Mr R Dennis (Counsel)

JUDGMENT

1. The claimant has not been constructively dismissed

2. The claimant has not been wrongfully dismissed

3. The claimant was entitled to 5 days accrued annual leave that had not been taken at the time of termination of employment.

4. The tribunal awards the claimant £682.22 in respect of such holiday.

5. The tribunal accordingly dismisses the claimant's claims for constructive unfair dismissal and wrongful dismissal, and awards the claimant £682.22 in respect of holiday pay.

REASONS

1. The claimant by a claim form presented to the tribunal on 4 May 2016, presents complaints for constructive unfair dismissal, breach of contract on receiving no notice on termination, and a claim for outstanding annual leave on termination of employment.

2. The claimant commenced employment with the respondent on 31 October 2009. The effective date of termination was 25 January 2016; the claimant then having been employed for six complete years.

Issues

3. The issues for the tribunal's determination were agreed between the parties and presented to the tribunal as follows:

"Unfair dismissal

1 The claimant resigned without notice on 25 January 2016. Was the claimant constructively dismissed? In particular:

(a) On 25 January 2016 at 8am, did Patrick Herlihy (Managing Director) inform the claimant that:

"I would "only be allowed to continue in employment" with the respondent if I agreed to their proposed condition of working a minimum 60 hours per week with this including work on every Saturday."

(b) If so:

i Did this constitute an actual or anticipatory breach of the claimant's contract of employment by way of an imposition of a unilateral change to the claimant's terms and conditions?

ii Further, and alternatively, did the manner of this communication constitute threatening behaviour so as to fundamentally breach the implied term of trust and confidence?

(c) If so, was this breach repudiatory?

(d) Alternatively, did this constitute the last straw in a series of acts which, when taken cumulatively, resulted in a breach of the implied term of mutual trust and confidence? The claimant relies on the earlier alleged incidents between May 2013 and November 2014, set out in paragraph 24 of his Particulars of Claim and pleaded as follows:

i In May 2013, the claimant informed the respondent that the night shift was having a detrimental effect on his health. The respondent took no action. The claimant claims this is a breach of the respondent's implied contractual obligation to take reasonable care of the health and safety of their employees.

ii In August 2013, the claimant informed the respondent that the night shift was having a detrimental effect on his health. The respondent took no action. The claimant claims this as a breach of the respondent's

implied contractual obligation to take reasonable care of the health and safety of their employees.

iii Having informed the respondent in November 2013, that for health reasons he would no longer be able to work the night shift, the claimant was sent to the Gillingham Branch thereafter and was still expected to work the night shift. The claimant claims this was a breach of his implied contractual terms and conditions, in so far as the respondent failed to take reasonable care of his health, and failed to reasonably and promptly provide redress to what was clearly a grievance of the claimant.

iv In June 2014, the claimant's car allowance was removed without consultation or explanation, and despite the fact that the respondent at this time was requiring the claimant to drive in excess of 1000 miles per week. The claimant claims that the removal of his car allowance constituted a unilateral change to the express terms and conditions of his contract of employment and that the respondent at this time breached the said contract.

v The claimant further avers that in removing his car allowance the respondent, without reasonable and proper cause, conducted itself in a manner that was calculated and which seriously damaged the implied contractual relationship of trust and confidence, and

vi Between December 2013 and October/November 2014, the respondent prevented the claimant from booking annual leave. The claimant avers that this was an express breach of his contract of employment which entitled him to paid periods of annual leave.

(e) If the respondent did commit an actual or anticipatory breach of the claimant's contract of employment, did the claimant waive the breach and/or affirm his contract of employment?

(f) If not, did the claimant resign in response to that breach, or for some other reason?

2 If the claimant was constructively dismissed, was his dismissal unfair, In particular:

(a) Was there a potentially fair reason for the conduct of the respondent that led to the claimant's constructive dismissal?

(b) If so, was that conduct reasonable or unreasonable?

Wrongful dismissal

3 Was the claimant constructively dismissed? See paragraph 1 above.

4 If so, is the claimant entitled to a payment fox 6 weeks' notice. See paragraphs 5(b) and (c) below.

Remedy

5 If the tribunal finds that the claimant was unfairly dismissed:

a. Would it be just and equitable to award any compensation?

b. Was the claimant overpaid £534 in his final month's salary? If so, should any compensation be reduced by that amount?

c. Has the claimant taken reasonable steps to mitigate his loss?

d. Did the claimant comply with the ACAS Code of Practice? The respondent will say that the claimant failed to raise a grievance before he resigned, and that any compensation awarded should therefore be reduced by up to 25%.

Holiday Pay

6 Were the wages paid to the claimant on 22 January 2016, less than the amount properly payable to him on that date? In particular, the claimant claims that he was entitled to 11 days of holiday pay in respect of accrued but untaken annual leave that was not paid in his final pay.

Evidence

4. The tribunal heard evidence from the claimant and from his son, Jake Knight, on his behalf and from the following witnesses on behalf of the respondent: Mr Richard Kay, Finance Director and Patrick Herlihy, Managing Director.

5. The witnesses' evidence in chief was received by written statements upon which they were then cross examined. The tribunal had before it a bundle of documents Exhibit R1. From the document seen and the evidence heard, the tribunal finds the following material facts.

Facts

6. The respondent operates in the meat, game and poultry industry supplying restaurants and hotels. The respondent's head office is in Derby. The

respondent has branches in Scotland, Boroughbridge, Liverpool, Birmingham and Exeter and employs approximately 400 employees.

7. The claimant was employed as an operations manager, commencing employment on 31 October 2009. He was engaged at the respondent's London branch.

8. It is not in dispute that, the claimant was contracted to work 40 hours per week, and would work every second Saturday for three hours per shift, at a salary of £40,000.00 per annum.

9. It is the claimant's claim that, during his employment he suffered a number of breaches to his contract of employment by the respondent, for which on there being a further breach on 5 January or otherwise 25 January 2016, he terminated his employment.

10. With regards these breaches, it is not in dispute that, save for the breach in January 2016, by the claimant continuing to perform his duties, he had thereby waived those earlier breaches. The claimant however maintains that the breaches are material in that they are a part of a series of breaches, to which the events in January, if not a breach in itself, is sufficient to amount to a last straw event in respect of the earlier breaches.

11. With regard to the historic events of which the claimant complains, it is an unfortunate feature of this case that there is nothing in writing registering the claimant's response to the alleged breaches. The respondent does not deny the events, save for the event in respect of a car allowance to which I will return herein, albeit the respondent maintains that the claimant had not objected thereto and had undertaken the tasks freely and without complaint.

12. I have accordingly been asked to determine the case giving preference to the claimant's evidence as being more credible than that of the respondent. From the evidence presented to the tribunal, I have not found any one individual's evidence more compelling than the other, albeit fair to say that, in finding for one party as against the other, by the nature of the case, by implication, I have had to find that a party was lying. I do not however have direct evidence hereof.

13. The historic issues of which the claimant complains are as follows.

<u>February 2013</u>

14. It is not in dispute that the claimant, who had been working day shifts since commencing employment, was approached by the respondent and asked to work on the night shift. The claimant maintains he was asked to so work for a period of one week, to cover senior management. The respondent disputes this, and maintains that there had been no time stipulation. The claimant accepts that he had agreed to work the shifts but only on the premise that it was for a short period. This working arrangement lasted until May 2013. It is the claimant's claim that, he frequently verbally complained

to the Managing Director, Mr Herlihy, that he had not agreed to work nights for more than the one week. This is denied by Mr Herlihy. There is no written evidence in respect hereof.

15. With regards working nights, it is the claimant's evidence that he raised with Mr Herlihy concerns that, working night shifts were having a detrimental effect on his health; affecting his sleep, eating times, and that he had suffered extreme weight loss, for which the claimant states no action was taken to resolve the situation and of which the claimant claims was a breach of the respondent's duty of care towards him.

16. The respondent does not accept that the claimant suffered any noticeable weight loss or otherwise was aware of any concerns with the claimant's health at the material time, and states that no concern was raised by the claimant.

17. With regards to the claimant's health, the tribunal has not been furnished with any documentary evidence or otherwise medical records to support the same.

18. It is further the claimant's claim that, in August 2013, he again raised the issue with Mr Herlihy as to his poor health, caused by working the night shift, but again no action was taken to resolve the situation.

19. Whilst it is Mr Herlihy's evidence that the claimant had not raised such issues with him, Mr Herlihy has advanced evidence that, the position was the converse, that on numerous occasions the claimant had told him that he liked the fact he was working nights as he was driving when roads were quieter, cutting down his travel time when he had moved back to Derbyshire.

20. The relevance of the claimant's moving to Derbyshire is that it places into context the claimant's claim as to issues he had encountered, and the unreasonableness of the respondent giving rise to further breaches.

21. Exactly where and when, the claimant lived at any particular location is not clear, as by the respondent's records, it evinces the claimant's residence as being in Swadlincote, Derby, on his commencing employment with the respondent in 2009. The claimant was subsequently living in Great Billington, Bedfordshire, in September 2010, and then returning to Swadlincote, Derbyshire, in January 2014. The claimant does not dispute the recorded addresses, however he maintains that the Swadlincote address, being his family home, was recorded as his residence but he did not then reside there, being resident with his partner in Leighton Buzzard, and on the break up of that relationship after moving back to Derbyshire, he was subsequent thereto residing in Milton Keynes. There is no documentary evidence for the claimant residing as alleged; the respondent advancing that their record is the true state of affairs and the dates upon which they operate.

November 2013

22. It is the claimant's evidence that, in November 2013, having approached Mr Herlihy further about his working the night shift that, he could no longer so work due to the detrimental effect it was having on his health, he was then sent to work in the respondent's Gillingham branch.

23. The respondent disputes that the claimant was transferred to work in their Gillingham branch because of any concerns raised by the claimant, and submit that this placement was a temporary arrangement owing to the demands of their customer, QVC, over the Christmas period; the placement was to last for three weeks. The placement was again nights. The claimant here submits that, in respect of his request for a move, Mr Herlihy advised him that "that's all we have for you" which the claimant maintains he took as a direct ultimatum, that, either he did what they told him to do or he would not have any work.

24. There is again no documentary evidence in respect of this placement, and there is no evidence of the claimant raising any complaint in writing.

25. For the purposes of the placement, whilst working at Gillingham, the claimant was put up in a hotel.

26. With regards the above, the claimant maintains that the respondent has not addressed his grievance with regard to his health concerns. The claimant nevertheless states that, on his final day's working at Gillingham, he was promised by Mr Herlihy that he would be allowed to work in the respondent's London branch as per his contract of employment. Mr Herlihy again denies any such conversation or promise.

27. The respondent's grievance procedure is at R1 page 44 which provides:

> "If you have any problems of grievance in your work, you should take them up initially with your manager, unless your grievance relates to your manager's conduct in which case you should refer to your manager's immediate superior. If this fails to resolve the matter, you should refer it to the next level of management in writing. … The decision of a director of the Company shall be final."

28. With regard to the claimant presenting a grievance, there is nothing presented to this tribunal evincing the claimant availing himself of this procedure or otherwise raising a concern, or otherwise of the claimant raising issue that his grievance was not being addressed.

29. With regards the claimant's move to Gillingham, the claimant submits that the respondent then employed a Mr Daryl Moore, as a replacement for him in London. I deal with this point briefly in that, the respondent does not deny engaging Mr Moore, but maintain that he was not engaged in the role of the claimant, of operations manager, but in the role of general manager and had no reference to the claimant's role. The respondent has not been challenged on this point.

December 2013

30. On 16 December 2013, the claimant received an email from Mr Kay, Finance Director, stating:

> "As you are aware, we need your help in the Birmingham branch and need you to work with the team there, both supervising and managing the product from the point that it comes off the production packaging machinery, or butchered, to the point it is despatched..."

31. The claimant was thereon advised as to what he would be required to do and to whom he would be reporting, and further advised:

> "If you have any concerns/doubts, they need to be raised immediately as we cannot afford any more potential issues to come from customers.
>
> This needs to start tomorrow. Can you please ensure you are at the branch, in production, from 6.00 am each day and work til close as per Steve Albray..."

32. The claimant was thereon advised as to the periods of work through the months of December and January.

33. The claimant accepts that he accepted this placement, but maintains that this was on the understanding that it was a temporary placement to end at the end of January 2014.

34. In the event, the placement lasted for approximately 20 months, and it is the claimant's claim that during his time he consistently raised complaints with the respondent as to his dissatisfaction, and that he wanted to get back to his contracted work.

35. The respondent denies receiving any complaints from the claimant. Again, there is nothing in writing from the claimant registering any complaint; this despite the claimant's evidence that he had not had any success addressing the issue orally.

36. With regards to the claimant working in Birmingham, it is the respondent's evidence that the claimant had been proffered for this branch on the premise that, he had since moved back to his home in Swadlincote, Derbyshire, and that it was convenient for his travel. The claimant denies this, maintaining that he was travelling in excess of 1,000 miles per week owing to his residing then in Milton Keynes, which the claimant maintains the respondent was aware of, as they had him make deliveries within the Milton Keynes area for them at the material time. The respondent denies such knowledge, and maintains that by their records, the claimant was resident in Derbyshire, and they were not aware of the claimant travelling in excess of 1,000 miles per week, living in Milton Keynes.

37. Again, there is no record of the claimant having made any complaint in respect hereof, save for his raising an issue in respect of fuel allowance in

October 2015, in respect of the claimant being requested to work in the respondent's London branch; the claimant stating, *"Can you please elaborate on the comment about fuel as I have always had access to company fuel, you wouldn't expect me to drive nearly 1,000 miles a week and pay for it myself*"; the claimant having been informed that fuel would be paid for as a goodwill gesture.

38. It is the claimant's claim that, the respondent breached its contract of employment by requiring him to work at a branch that was a distance away from his home address, and not the branch he was contracted to work.

39. In respect of the claimant's travel, he maintains that this was further raised with Mr Herlihy in June 2014, amounting to a grievance, but that he again did not get a meaningful or helpful response. There is again no evidence of this grievance in writing or otherwise of evidence of the claimant escalating this in writing, despite the claimant stating before the tribunal that:

> *"I have complained about my working arrangements since I have been put on the night shifts and I have been complaining since, with regard to the hours I had to work and the long commutes I was having to take to get to work. When I had tried to complain on a number of occasions, Mr Herlihy had refused to answer my calls*".

40. On Mr Herlihy avoiding the claimant, as alleged by the claimant, the claimant still did not address the issue in writing, so as to unequivocally put his concerns forward for action, where it is evident, on his evidence, that he was frustrated by the inaction of Mr Herlihy.

Car allowance

41. It is the claimant's evidence that, on commencing employment with the respondent in 2009, he was awarded a car allowance which the claimant states was to assist with the maintenance of his car and travel expenses to work. The claimant owned his car before commencing employment with the respondent, and there is no suggestion that the claimant was required to use his car for the purposes of work; the claimant being for all intents and purposes, at the material time, on engagement based at the respondent's London branch and worked from a single site. The claimant maintains that in breach of contract, his car allowance was withdrawn in June 2014, without consultation or otherwise explanation from the respondent.

42. The respondent denies the claimant having such an allowance. There is equally no evidence of the claimant raising any issue in respect of the withdrawal of any car allowance at the material time.

43. The tribunal has however, been taken to a statement of Mr Woodford in June 2016, (the manager of the Birmingham branch) that, the claimant had told him some time after leaving London to work in Birmingham, that "his car allowance had been stopped and did not know why" further stating that, the claimant had informed him that he would address the issue with Mr Herlihy, and further correspondence of 16 October 2015, above referred to, of the

claimant, in respect of being paid in respect of fuel as a goodwill gesture on moving from Birmingham to London, stating:

> "You have possibly got mixed up with my car allowance which was withdrawn without consultation following my transfer to Birmingham that was only for a month but is now in month 20.
>
> I will gladly accept the reinstatement of this allowance if I am going back to London as a goodwill gesture."

44. For completeness, I here recorded the response advanced by the claimant to have been received from Mr Woodward, (Operations Director), on his raising the issue with Mr Woodward, being told that it had *"been withdrawn as it was part of a London deal"* and that *"I was paid too much". "I also attempted to telephone Mr Herlihy directly but he would not take any of my calls. In my desperate state to try to get this issue resolved, I travelled from Birmingham to London to discuss this in more detail, but again I was offered no help by the respondent as nobody would see me."*

45. It is again material that the claimant did not escalate this matter in writing, in the circumstances as alleged by the claimant.

46. The claimant contention is supported by his son, who has informed the tribunal that he had had occasion to collect an envelope from Mr Herlihy, and that he had witnessed his father opening the envelope containing £350 cash.

47. Mr Herlihy in his evidence to the tribunal, is adamant that there was no such car allowance and in respect of the claimant's evidence that payments were made in cash in the sum of £350 per month, from Mr Herlihy, totalling £6,000 gross, Mr Herlihy is equally adamant that this was never the case. There is equally no evidence of such payments being accounted for by the respondent's pay records or otherwise the claimant producing evidence of such payments by his payslips.

48. The evidence of the claimant and his son in respect of the car allowance is compelling. However, for the purposes of the issues in this case going to breach, I find that whatever the arrangements were, without determining the fact whether such payments were made, on their withdrawal, it is evident that the event of withdrawal was not deemed a breach by the claimant at the material time, in that, had the claimant had the allowance stopped as he alleges, it is inconceivable that the claimant would not have raised the issue so as to get an explanation for its withdrawal, which the claimant says he did not receive, or otherwise that, in the absence of any explanation forthcoming he would not have made enquiries in writing for its withdrawal to evince his dissatisfaction.

49. By the failure of the claimant to act, it is indicative of the claimant at the material time, not receiving the circumstance to have been a breach of any entitlement to which he had.

Holidays

50. It is the claimant's claim that, in breach of contract he was only allowed holidays on the respondent's terms, and denied leave at the time he requested.

51. I deal with this briefly, in that, it is the respondent's evidence, which is not challenged, that annual leave is operated on a first come, first served basis and that in respect of managers' annual leave, this is managed from head office, on the manager putting forward their request which is then approved relevant to the needs of the business and other managers' leave as previously booked.

52. In this respect, on the claimant making a request for leave from 14 July to 28 July 2014, a period of ten days, which was subsequently amended to 21 July to 28 July on the claimant discovering that another manager was off for the week commencing 14 July, the claimant was informed by Ms Purewal from head office that, *"I am afraid there are no dates for the rest of July and August*", Ms Purewal further advising, *"we do have the following dates available: last two weeks in September and first two weeks in October. Please advise if you wish to take any of these dates, and then we will confirm back."*

53. The claimant maintains that by the above, restrictions were placed on him by the respondent to take leave at the times he had requested.

54. From a reading of the correspondence of Ms Purewal, and in light of the respondent's practice, there is no evidence to support the claimant's contention that his leave was restricted in breach of any term to be implied, or otherwise any express term (the claimant has not identified any express term in respect hereof).

London placement – November 2015 to 25 January 2016

55. On 12 November 2015, the claimant being engaged at the respondent's Birmingham branch, received correspondence from Mr Holding, the Executive Chairman, under the subject *"Russell Hume London requirements w/c 16.11*", the correspondence stating:

> "…
> Please can you help Patrick at the Russell Hume London branch from week commencing 16 November. As yet I am unsure as to how long Russell Hume London will need your assistance but I will confirm this with you over the next few weeks. For the next few weeks, I will need you there six days a week please.
> Please see the below details of how you will help whilst at Russell Hume London.
> Details
> **Please can you start at 5.00 am and finish at 3.30 am.**
> These times not only fit in with the business but will enable you to miss the traffic on your journey to work and on departure.
> **Saturdays**

> finish times may vary – possibly finishing at 2.00 pm.
> **On arrival at 5.00 am**
> On your arrival at 5.00am can you go to the portion control operation in Trust Meats and set up and organise in preparation for the arrival of the rest of the staff at 530 / 6am. …"

56. The correspondence then set out the specific tasks the claimant was required to do, the letter concluding:

> "I would also like to take this opportunity to thank you for your help at Russell Hume London and I hope the reduced travelling time will also be a help to you."

57. It is the claimant's evidence that in respect of this email, he was informed by Mr Albray, General Manager, and Mr Woodford, operations Manager, that Mr Holding had instructed them to inform him that *"this instruction "was not a request" and that I "had no choice""*. The claimant here maintains that the respondent was aware that at this period in time, he was resident in Milton Keynes, as the respondent had him doing customer deliveries in Milton Keynes.

58. The claimant commenced work at the London branch on 16 November and there is no suggestion that he objected to that placement.

59. In respect of this placement, the claimant acknowledges that whilst by the hours stipulated he would have worked in excess of 60 hours per week, he nevertheless worked his contractual 45 hours a week, and that he had raised with Mr Herlihy that he was being instructed to work in excess of 60 hours per week, the claimant stating that Mr Herlihy had informed him that it was "*all that was on offer and that I had to take it,"* further stating that Mr Herlihy then apologised for having to tell him so, but that it was head office's actions.

60. Mr Herlihy does not dispute the claimant raising with him the hours of work, but maintains that he had informed the claimant that, as was practice, he would work to the needs of the business and that as a manager he would manage his hours working his 45 hours per week, advising the tribunal that on some weeks the claimant may work in excess of 45 hours but in other weeks worked less than 45 hours, further informing the tribunal that the hours stipulated by Mr Holding's correspondence merely set out the parameters that may need to be worked, but that it was then for the managers to manage their time and that there were no checks made of the managers' hours worked.

61. Mr Herlihy does not however accept that he held a conversation with the claimant wherein he informed the claimant that "that was all that was on offer and that [the claimant] had to take it" or otherwise apologised to the claimant stating that he was embarrassed by head office's actions.

62. Mr Herlihy was clear that there was no expectation that the claimant would work in excess of his contracted 45 hours and he, as operations manager in London branch, would not have sought the claimant work 60 hours per

week, but acknowledged that the claimant would be required to work according to the needs of the business. For completeness, it is noted that the claimant did not work in excess of his 45 hours per week whilst at the London branch.

63. In respect of the hours worked, it was accepted by the claimant in evidence that, he had not been required to work in excess of his contracted 45 hours per week and that where he worked more hours in a day, he would compensate for the extra hours worked the following day, by coming in late or leaving early, arranging his working time with his colleague managers to meet the needs of the business.

64. In or around January 2016, a clocking-in system was re-introduced in the London branch. A clock-in system had previously existed for temporary staff which had since been broken. The new system was to apply to all members of staff to include management.

65. It is not in dispute that there was resistance from staff and some managers, to using the clocking-in system, of which the claimant was one.

66. The claimant's failure to use the clocking-in system subsequently became known to head office, exactly how is not clear; whether it was the product of Mr Herlihy informing head office or otherwise the product of the accounting system identifying that no hours were being registered for the claimant by the clocking-in system cannot be determined. Despite this, the fact being raised is not material to the issues arising for the tribunal's determination, save to note that as a consequence of it coming to head office's attention, it was discovered that the claimant was not commencing work at 5.00 am, but 6am, on it being a particular requirement for the claimant, in working at the London branch, that he started at 5.00am, to start up and prepare machinery for the shift at 5.30/6.00am.

67. It is the claimant's evidence that on 5 January 2016, he was again informed by Mr Herlihy that Head Office had instructed him to work in excess of 60 hours a week including every Saturday for the period of time that he was to be based at the London branch in line with the instructions of the email of 12 November, and that that was all that was on offer and that he had to take it.

68. With regards to this period in time, it is the claimant's further evidence that having received instructions from Head Office and having had an apology from Mr Herlihy for having to inform him thereof, Mr Herlihy had informed the claimant that he was to continue working to his contractual hours and they would "hide the fact" from Head Office, which position endured until 21 January when the copy email of 12 November, was re-sent

69. On 21 January 2016, Mr Holding's personal assistant wrote to the claimant and Mr Herlihy, copy to Ms Purewal and Mr Kay, forwarding a copy of Mr Holding's correspondence of 12 November. Mr Holding's PA's correspondence provided:

> "Good morning
> Please see below email sent on 12 November 2015
> Thank you
> Katherine"

70. The claimant responded hereto, to Mr Kay, copy Mr Herlihy and Ms Purewal, stating:

> "Richard
> Not sure of the relevance of resending this email.
> Are you implying that this email now constitutes my contract of employment with Russell Hume?"

71. There was no response to this correspondence and the claimant has not chased up for a response, however, it is the claimant's evidence to the tribunal that;

> "I received no reply to this email from the Respondent and I considered it to be a very important matter which should have been replied to, this further breaking down the relationship of trust and confidence I had with the Respondent"

72. It is Mr Kay's evidence that, having received the claimant's email, rather than respond thereto, he thought it a sensible course of action to go to the London branch to meet with the claimant to discuss his working hours and the requirement to comply with the clocking-in procedure, which visit to London he had scheduled for Monday 25 January.

73. It is Mr Herlihy's evidence that, he had not responded to the claimant's correspondence because it had not been addressed to him, albeit he does accept that the claimant had raised concerns with him, but draws a distinction from the claimant's allegations, in that the concerns being raised with him was about working to 2.00pm on Saturdays, for which he states he asked the claimant *"whenever has he worked to 2.00pm on a Saturday ever?*". Mr Herlihy further advances that after he had seen the claimant's email of 21 January, he had informed the claimant that he would make sure that he would have a meeting with Mr Kay the next time he was in London, following which he spoke with Mr Kay who informed him that he would be in London on 25 January, which was then communicated to the claimant.

74. The claimant dos not accept that Mr Herlihy advised him of Mr Kay's visit, stating he had met Mr Herlihy in the fridge in the morning, that:

> "On 25 January 2016 at 8am I met Mr Herlihy who informed me that I would "only be allowed to continue in employment" with the respondent if I agreed to their proposed condition of working a minimum 60 hours per week, with this including work on every Saturday. I informed Mr Herlihy that I was not prepared to accept these terms of employment and the change to my existing contract of employment. I found Mr Herlihy's comment that I would "only be allowed to continue in employment" to be very threatening and I did not feel this kind of threatening behaviour was acceptable from the respondent. I felt this was the last straw in what had been an ongoing breakdown in the relationship of trust and confidence between myself and the respondent. Further, in insisting upon

changing my contracted hours of employment to 60 hours per week instead of 45 hours per week, I considered that the respondents were about to fundamentally breach the terms and conditions of my employment once again."

75. Around midday on 25 January, Mr Kay, having been at the London branch from around 9:15am, met with the claimant.

76. On the claimant meeting Mr Kay, it is Mr Kay's evidence that before he could open the meeting the claimant informed him that he was not prepared to accept changes to his contract, that his original contract in London was for 40 hours a week working 6am to 4pm and every other Saturday, that he had not had a holiday for eight months and that he was leaving immediately as he did not need to give notice due to the respondent's "repudiatory breach". Notes of this meeting are at R1 page 79.

77. The claimant does not dispute these facts stating that, the meeting only took place as Mr Kay was at the premises on other business and it was "hardly a meeting at all as it was so informal".

78. After the claimant made his statement he thereon left.

79. On 26 January, the claimant wrote to the respondent to confirm his resignation. The letter of resignation stated, which is here set out in full, as it sets out the claimant's rationale.

"Further to our meeting yesterday please note the following points.

1. I strongly object to the changes in my conditions of employment and the fact that my grievances have been completely ignored right up to the most senior level in the company. At no point have I accepted these enforced changes and have indeed not followed them at any time. I made Pat Herlihy aware at the time that your email with the proposed changes did not apply to me as I had not agreed to them. You resent the email on the 21st January and I replied asking if you thought the email constituted my contract of employment. My reply was ignored!

2. Once again I have had holiday requests turned down, meaning that I will have to go nearly eight months without a break despite all other managers being able to take there (sic) entitlement.

3. I feel that your email last week directing me to work six days a week and a total of over 60 hours is completely unreasonable and not in keeping with other colleagues working hours and conditions and that singling me out is both unfair and unjustified.

4. I believe all of the above constitutes a breach of contract and therefore you leave me with no option but to resign my position immediately as it has clearly become untenable.

Regards,

Jamie Knight"

80. By correspondence of 1 February 2016, Mr Kay responded by email to the claimant's

81. The claimant states he has not received this correspondence owing to his not having access to his work email account following his resignation, and that a subsequent copy forwarded to his personal email account on 4 February 2016, has equally not been received.

82. The correspondence of Mr Kay provided:

> "Dear Jamie,
> I was both shocked and disappointed by your actions on Monday 25 January.
>
> This is down to the fact that when we met, you stated very clearly that you were unhappy with your working hours, that you had not had a holiday for the last 8 months and that you were leaving at that point and going to take advice.
>
> I understood at the time that you were upset and leaving for the day. It was only as you walked out the door that I fully came to the realisation that you meant you were leaving employment with us – and that, as you considered we were in 'repudiatory breach' by changing your contract you did not have to give notice.
>
> We have now received your email of 26th January 2016 entitled "Official grievance Letter"
>
> Taking each point in turn:
>
> 1. I would point out that the 'meeting' you refer to on Monday was totally one sided whereby you announced your intensions and then left. It was made clear by your attitude that there was no discussion to be had. You stated your comments and then left.
>
> 2. You note on point 1 that you have a grievance that has been ignored – yet this is the first correspondence we have regarding you lodging a grievance.
>
> 3. You refer to "changes in my conditions of employment" and that your grievance has been totally ignored right up to the most senior level of the company. I have looked at this and have the following comments;
>
>   a. I covered an initial email on 16th October – assistance in London – part time – split between London and Birmingham. At the time you responded to me saying that you were discussing the situation with your other half querying fuel – which is a situation I could not find any agreement on. You stated "I will gladly accept the reinstatement of this allowance if I'm going back to London as a goodwill gesture". You complied with the request and commenced working from London part time.
>
>   b. This was followed up with an email from David Holding on 12 November requesting you to help full time in London on a temporary basis from week commencing 16th November. I cannot find any response to that email and have also questioned Patrick Herlihy. Whilst he des recall that you made some comments about the request, they were said as

an aside, rather than a complaint/issue. You complied with the request and commenced working from London full time on 16 November.

c. There were concerns the other day whether the hours as stated on the email were being worked, as you have refused to accept the clocking system, even though as explained personally by myself that this applied to all staff including supervisors and managers and that it was not singling any one person out. As such Katherine Holding sent a coy of the email of 12th November to you (as a copy)_ on 21st January. You replied stating that you were not sure of the relevance of my email and questioning whether I was implying that it now constituted your contract of employment. You clearly did not believe that I was making an assertion that your contractual terms had been changed. I was hoping that we would discuss the arrangements for your working in London and your attendance when we met on 25 January. You did not give me that opportunity.

4. Right through your employment the company has helped you – moving to Birmingham – when you were living in Swadlincote – and now facilitating working from London temporarily (which you confirmed personally to me was better for you when you started living in Milton Keynes again).

5. You allege at point 2 that you have been nearly eight months without a holiday. Whilst I confirm that a number of holidays requested on short notice have been rejected – one at the beginning of January when Patrick Herlihy was also away so could not be accommodated, one last week when, due to the stocktake requirements, it was also rejected and a request put in for February that could not be accepted due to valentine's day requirements. I also note that you had a holiday on 28 September 20156 for 2 weeks, returning 12th October – just over three months ago. Your claim that you have not had a holiday for nearly eight months is therefore incorrect.

6. You have not been singled out. All employees and managers are subject to restrictions on when holiday can be taken – due to the nature of our business.

7. There is no question of the Company being in breach of Contract – you left site and stated that you were leaving immediately without giving me an opportunity of discussing the situation with you. I do not believe that you held a genuine belief that we were in breach of contract.

8. You will be paid up to 25 January 2016 and your P45 will be issued in due course.

Regards

Richard

Richard Kay
Group Financial Director
Russell Hume Limited

83. On the claimant maintaining that he did not receive such correspondence he has not responded thereto.

84. The claimant presented his complaint to the tribunal on 4 May 2016.

The Law

85. The law relevant to constructive dismissal was set out by Lord Denning, MR in the case *Western Excavating (ECC) Limited v Sharp 1978* ICR page 221, as follows:

86. *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

87. On the contention that there was a fundamental breach of the contract of employment, by breach of the implied term of mutual trust and confidence, this breach has been considered in the case of *Post Office v Roberts* [1980] IRLR, page 347 at paragraph 45 per Talbot J, referring to Kilner Brown J. in Robinson v Compton Parkinson Ltd [1978] IRLR 61, that:

88. *45. …."It seems to us although there is no direct authority to which we have been referred, that the law is perfectly plain and needs to be restated so that there shall be no opportunity for confusion in the future. In a contract of employment, and in conditions of employment, there has to be mutual trust and confidence between master and servant. Although most of the reported cases deal with the master seeking remedy against a servant or former servant for acting in breach of confidence or in breach of trust, that action can only be upon the basis that trust and confidence is mutual*. Consequently, where a man says to his *employer "I claim that you have broken your contract because you have clearly shown you have no confidence in me, and you have behaved in a way which is contrary to that mutual trust which ought to exist between master and servant" he is entitled in those circumstances; it seems to us, to say that there is conduct which amounted to a repudiation of the contract*."

89. 46. *In stating that principle, in our view Kilner Brown J does not set out any requirement that there should be deliberation, or intent, or bad faith.*

90. *47. Finally, there are very important words in a part of the judgment in Palmanor Ltd v Cedron [1978] IRLR 303, the words appearing in the judgment of Slynn J at page 305. It is a short quotation and reads as follows:*

91. *"It seems to us that in a case of this kind the tribunal is required to ask itself the question of whether the conduct was so unreasonable that it really went beyond the limits of the contract. We observe that in the course of the argument on behalf of the employee, it was submitted that the treatment that he was accorded was a repudiation of the contract."*

92. *48…..We would agree …. that there may be conduct so intolerable that it amounts to a repudiation of contract. There are threads then running through the authorities whether it is the implied obligation of mutual trust and confidence, whether it is that intolerable conduct may terminate a contract, or whether it is that the conduct is so unreasonable that it goes beyond the limits of the contract. But in each case, in our view, you have to look at the conduct of the party whose behaviour is challenged and determine whether it is such that its effect, judged reasonably and sensibly, is to disable the other party from properly carrying out his or her obligations. If it is so found that that is the result, then it may be that a Tribunal could find a repudiation of contract.*

93. With reference the nature of the breach being of a final straw incident, this concept was considered in, London Borough of Waltham Forest v Omilaju [2005] IRLR, page 35 per Dyson L J, at paragraph 19, who addressed the questions in this fashion.

94. 19. .."What is the necessary quality of a final straw, if it is to be successfully relied on by the employee as a repudiation of the contract? When Glidewell L J said that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in Woods at p531 where Brown-Wilkinson J referred to the employer who, stopping short of a breach of contract "squeezes out an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series ", in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

95. 20. I see no need to characterise the final straw as "unreasonable" or blameworthy conduct. It may be true that an act which is in the last in a series of acts which, taken together, amount to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy, but, viewed in isolation, the final straw may not always be unreasonable still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

96. 21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

97. 22. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the acts as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective.".

98. The law as regards affirmation is succinctly set out at paragraphs 8 to 11 of the respondent's written submissions which are adopted as if here set out.

Submissions

99. The tribunal received written submissions on behalf of the respondent which was then supplemented by oral submissions. The claimant presented submissions orally. The submissions have been carefully considered.

Conclusions.

100. As stated at paragraph 10 above the claimant does not rely on any breach prior to January 2016 save to the extent that the events of January were last straw events for which he was then entitled to bring the employment relationship to an end, or otherwise was an anticipatory breach of a fundamental nature entitling him to terminate the employment relationship.

101. With regards the acts complained of as amounting to breaches, as set out by the facts above found, I have been unable to find evidence of any breach by the respondent, whether or any express term or otherwise the implied term of mutual trust and confidence.

102. Turning to the events of January 2016, on the claimant's evidence being that, having received instructions from Head Office as to hours of work and on instructions from Mr Herlihy that he was to disregard those instructions and work to his contractual hours in circumstances where Mr Herlihy was the responsible manager of the London branch, I am unable to see how, on the account of the claimant as to the events of 5 January, this can amount to a breach of any express term or otherwise the implied term of mutual trust and confidence; the claimant not being required to do that which he alleges was the breach.

103. Turning to the subsequent events of 21 January being the next event of which the tribunal has been taken to, being the re-sending of the 12 November correspondence, it is recorded for completeness that the claimant has not identified this event to be an act amounting to a breach.

104. Turning then to the events of 25 January, from the evidence presented to the tribunal, I prefer the evidence of the respondent that, whilst it is highly probable that Mr Herlihy and the claimant met in the fridge in the morning, which was not uncommon, the discussion alleged to have taken place, of Mr Herlihy informing the claimant that he would only be allowed to continue in employment with the respondent if he agreed to work in excess of 60 hours a week, including every Saturday, did not take place. I accept the evidence of Mr Herlihy and Mr Kay as to arrangements being made for Mr Kay to speak to the claimant on 25 January to address the very issue, and for which it is not plausible that in those circumstances, Mr Herlihy would have made a definitive statement of the nature alleged, on that impending meeting.

105. On the claimant subsequently attending the meeting with Mr Kay, where he set out his concerns and tendered his resignation, Mr Kay merely respective of the claimant's statement, there is no act thereby for which the claimant can advance a breach by the respondent.

106. It is also illuminating from the claimant's letter of resignation, furnished on 26 January 2016, that the reasons advanced for his resignation, namely; objecting to changes in his conditions of employment, that his grievance had been ignored, that holiday requests had been turned down and the email of 21 January directing him to work six days a week for a total of over 60 hours being unreasonable, and as a composite, constituted a breach of contract for which he was left with no option but to resign, are premised on facts which the tribunal has not found established.

107. For the reasons stated, I do not find there to have been acts of the respondent that amount to a breach of either an express term or otherwise the implied term of mutual trust and confidence.

108. Despite the above, I have nevertheless considered whether the circumstance existing in January 2016 as a whole, were events of such character as to amount to a last straw circumstance. I have been unable to find evidence to support the claimant's contention in this respect.

109. I accordingly find that there has not been a breach of the employment relationship so as to entitle the claimant to treat the employment relationship as at an end when he did, on 25 January 2016.

Wrongful dismissal

110. On the findings of the tribunal above, the tribunal does not find the claimant to have been wrongfully dismissed.

111. The claimant is not entitled to a payment of notice when he terminated his employment relationship with the respondent.

Annual leave

112. On the parties agreeing that the claimant had accrued five days leave which remained outstanding on the termination of employment the respondent has submitted that on 22 January 2016, the claimant being paid his full month's salary, then resigning on 25 January, the claimant had been paid for five days which he had not worked. The respondent accordingly, maintain that the claimant has been paid a sum equal to the amount which would have been due to him under regulation 16 of the Working Time Regulations in respect of the period of leave payable pursuant to regulation 14(3).

113. The tribunal has some sympathy for the respondent's submissions, however, payment relevant thereto must be a payment determined and paid in accordance therewith. There is no provision for set off. In this respect, I am compelled to find that the claimant, having accrued five days leave which remained outstanding at the time of termination, is entitled to a payment in respect thereof which has not been paid.

114. Any claim for set off to which the respondent would be entitled, would have to have been the subject of an employer's claim which is not before the tribunal. The tribunal accordingly has no jurisdiction to set off the sums.

115. The claimant's net weekly salary was £682.22. The claimant worked a five day week. The tribunal accordingly awards the claimant, in respect of holiday entitlement accrued but remained outstanding at termination of employment, the sum of £682.22.

116. The tribunal accordingly dismisses the claimant's claims for constructive unfair dismissal and wrongful dismissal and awards the claimant £682.22 in respect of holiday pay.

_____
Employment Judge Henry

Date: 17 August 2017……..

Judgment and Reasons

Sent to the parties on:

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For the Tribunal Office