EMPLOYMENT TRIBUNALS

Claimant: **Mr M Sturgess**

Respondent: **MHM (UK) Limited**

Heard at: **Lincoln**

On: **Wednesday 2 August, Thursday 3 August 2017 and Wednesday 11 October 2017 and 2 November 2017 (in chambers)**

Before: **Employment Judge Milgate (sitting alone)**

Representatives:-
Claimant: **Mrs S Ismail of Counsel**
Respondent: **Mr Lord, Consultant**

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

2. The Claimant was wrongfully dismissed by the Respondent.

3. The Claimant's claim that he suffered an unauthorised deduction from his wages (failure to pay full sick pay) fails and is dismissed.

4. The Claimant's claim that he suffered an unauthorised deduction from his wages (in relation to bonus for the year ending January 2016) succeeds, following a concession by the Respondent.

5. The claim that the Tribunal should make an award under section 38 of the Employment Act 2002 (failure to give a statement of employment particulars) fails and is dismissed.

6. It would not be just and equitable to reduce any award to the Claimant under section 207A Trade Union and Labour Relations (Consolidation) Act 1992 (failure to comply with the ACAS Code).

REASONS

A. Claims

1. By his claim form presented to the Tribunal on 30 January 2017 the Claimant brings the following claims:-

1.1 unfair dismissal;
1.2 wrongful dismissal (for eleven weeks' notice pay);
1.3 a claim that the Respondent failed to pay him full sick pay during the period 30 August 2016 to 7 October 2017 contrary to section 23 Employment Rights Act 1996 (ERA 1996); and
1.4 a claim that the Respondent failed to pay him a bonus for 2016 contrary to section 23 ERA 1996.

2. Liability for the bonus claim was conceded by the Respondent at the hearing, although the amount due is still to be determined.

B. Issues for determination

Unfair Dismissal

3. It was agreed that the Claimant resigned from his employment with the Respondent on 7 October 2016 with immediate effect. He therefore based his claim on a constructive dismissal. It was agreed that there were two issues for my determination on this issue:-

3.1 Was there a fundamental breach of contract by the Respondent entitling the clamant to resign? The Claimant argued that the Respondent's conduct towards him from the end of July 2016 until his resignation on 7 October 2016, described in more detail below, breached the implied term of trust and confidence and so constituted a fundamental breach. He also argued that the company's failure to pay him in full during his sickness absence in the summer of 2016 contributed to the breach of trust and confidence or, in the alternative, amounted to a fundamental breach in its own right.

3.2 Did the Claimant resign in response to the fundamental breach? The Respondent contends that there was no such link and that the Claimant resigned either because he simply did not wish to go through an investigation process or because he had another job.

4. The Respondent confirmed that if it lost on the constructive dismissal point then it would not seek to put forward a fair reason for the conduct that led the Claimant to resign. Nor would it argue that it had acted reasonably in all the circumstances. Paragraph 45 of the response (which deals with the fairness of the dismissal) was therefore withdrawn.

Wrongful dismissal

5. The issue for determination in respect of this claim was whether the Respondent's conduct in the period July-October 2016 amounted to a repudiatory breach of contract, thereby entitling the Claimant to accept the breach and resign without notice.

The claim for sick pay

6. It was agreed that the Claimant had a period of sickness absence from 30 August 2016 to 7 October 2016 and that he was paid statutory sick pay (SSP) during this period. The issue was therefore what was 'properly payable' within the meaning of section 13(3) Employment Rights Act 1996 during this period: was it

SSP or did the Claimant have a right to his normal pay by virtue of an implied term in his employment contract.

Issues relevant to remedy

7. Although I did not hear detailed evidence on remedy the parties made submissions on the following issues:-

7.1 whether any compensation payable to the Claimant should be reduced as a result of his failure to comply with paragraph 32 of the 2015 ACAS Code on Disciplinary and Grievance procedures (the "ACAS Code"). This requires an employee to raise a formal grievance if it is not possible to resolve an issue informally.

7.2 whether any award should be made to the Claimant under Section 38 of the Employment Act 2002 on the basis that the Respondent had failed to issue him with a written statement of employment particulars within two months of the start of his employment.

8. Mr Lord confirmed at the start of the hearing that the Respondent would not be arguing for a reduction in compensation on the basis that the Claimant had contributed to his dismissal and/or under the principles set out in Polkey v AE Dayton Services Ltd [1988] ICR 142 and accordingly paragraph 46 of the response was withdrawn .

C. Evidence

9. I heard evidence from the Claimant on his own behalf. For the Respondent I heard from Mr Mark Hall the Managing Director of the Respondent and his wife Mrs Karen Hall who is also a director. Each of the witnesses had prepared witness statements which were taken as read. I also had before me an agreed bundle of some 560 pages.

10. Evidence concluded late in the day on 3 August 2017 and there was no time for oral submissions. It was impractical to reconvene for oral submissions as Mr Lord was about to leave Peninsula to start pupillage. As the legal issues in the case were straightforward, it was agreed that written submissions should be provided and that judgment should be reserved.

D. Findings of Fact

Background

11. The Respondent is an engineering company, manufacturing recycling equipment. At the time of the events in this case it employed about 10 people. The managing director is Mark Hall. His wife, Karen Hall, is also a director of the company and acts as its company secretary. The company is successful and profitable. In 2016 it had a turnover of £682,000.

12. The Claimant started working for the company on or around 5 January 2005. He initially worked as a 'hands on' engineer and was paid by the hour. He was based at the company's Swineshead site near Boston.

13. The Claimant's career with the Respondent was a successful one. In 2006, only 18 months after he started working for the company, the Claimant was

promoted to Workshop Manager, and thereafter he was paid a salary (initially £25,000) plus a profit related bonus. In this role he developed the company's range of compactors and balers and was involved in the design of the recycling equipment manufactured by the company.

14. In October 2010 the Claimant was appointed as a Director of the company and his salary increased. However, despite this appointment, he was never treated as an equal and strategic decisions about the company remained the sole domain of Mr and Mrs Hall. The Claimant was never invited to Board meetings, did not have access to the company's bank accounts and did not have sight of the company's accounts. Nonetheless he did not complain and was committed to the company and worked hard. He was the company's most senior engineer and effectively Mr Hall's right hand man at the Swineshead site. The two men worked closely together, speaking most days.

15. The Claimant was paid weekly. In 2012 it was suggested to the Claimant that he be paid partly by salary and partly by dividends. It was explained that this was 'normal practice for Directors'. Although the Claimant did not really understand the implications of the change, he agreed to the proposal as he would be taking home the same amount. Shortly afterwards a share in the company was allotted to him. However at the time the Claimant was completely unaware of the share allocation, not least because he was never given a copy of the share certificate or shown a copy of the shareholder's agreement. In addition Mr Hall referred to him on a number of occasions as a 'non-shareholder director'. (Although Mr Hall disputed making these remarks, I preferred the Claimant's evidence on this issue as it was credible and entirely consistent with letters that were subsequently sent to Mr Hall by the Claimant's Solicitor and which demonstrated that whilst he was employed by the Respondent the Claimant had no idea he was a shareholder.)

16. In April 2012 the Claimant was given a new company van (a VW Caddy) in lieu of a salary increase. There was a dispute of fact over the Claimant's use of the van but I accepted his evidence – which stood up well to cross-examination – that from the outset he was allowed to use the van for both business and personal use. Accordingly he did so, using the van for holidays with his family. To this end the Caddy was fitted with additional seats to accommodate his family and a tow bar was fitted for the Claimant's caravan. Occasionally Mr Hall borrowed the van to tow his wife's horse trailer. Otherwise, except on one isolated occasion, the Claimant was the only person who ever drove the van. From time to time the Claimant also drove other vehicles belonging to the Respondent as the need arose, including a Renault Trafic van. Mr Hall accepted in cross-examination that he was aware the Claimant drove other vehicles in addition to the Caddy.

17. I accepted the Claimant's evidence (which was not challenged in cross-examination) that from time to time, when work was slack, the Claimant was allowed to have items manufactured for his own use. Sometimes he would be charged for the work and sometimes not. Equally, as Mrs Hall conceded, employees were sometimes allowed to order materials for their own use through the Respondent's account. (She accepted that an employee named Paul Clark had ordered a piece of sheet metal in this way.) I also accepted that around Easter 2016 the Claimant agreed with Mr Hall that he could use the workshop to make a steel gate for his own use. Mr Hall did not request any payment for this work, which was to be undertaken when the workshop was quiet. (Mr Hall denied that such a conversation had ever taken place. However I preferred the

Claimant's recollection as it was detailed and credible.)

18. The Claimant had a company email account and a company mobile. He was also given a company credit card which he used to pay for both business and personal mileage on the Caddy and which he also used occasionally to buy fuel for other company vehicles and for personal items, such as a carton of milk or a McDonalds meal. He was the only employee, other than Mr and Mrs Hall who was trusted to have a company credit card. He was never asked to keep mileage records and provided all his invoices to the company. Until the events in this case his expenses (including items for personal use) had never been queried and he had never been the subject of disciplinary proceedings.

19. Prior to the events giving rise to this case, all communications between the Claimant and Mr Hall were conducted orally and, with the exception of health and safety, the company placed no importance on formal written procedures. Accordingly the Respondent had no written disciplinary or grievance procedure at the time of the events in this case. Similarly at no time during his employment was the Claimant ever provided with a written contract of employment or a written statement of employment particulars. Equally he was never given written notification of pay rises or confirmation that he had been made a Director or shareholder.

20. At the time of the events in this case the Claimant's weekly pay was £543.75 net, made up of salary and dividends.

The sick pay issue

21. As noted above, the Claimant became a salaried employee in May 2006, However sick pay was not discussed by the parties, either at the time of the Claimant's promotion to salaried employment or afterwards. Equally no agreement or understanding about the matter was ever reduced to writing.

22. None of the company's hourly paid employees received contractual sick pay. Similarly Mr and Mrs Hall (the only other salaried employees) had no right to contractual sick pay, despite their status within the company. There was no evidence of any sickness absence reporting procedure.

23. The company had no record of the Claimant having been absent due to sickness prior to August 30 2016 (the start of the disputed sick pay period in this case). However, given the general reliability of the Claimant's evidence, I accepted that he was off sick for a day in February 2009 and then again on 4 and 5 July 2016, and that on each occasion he was paid in full. However Mr Hall was away from the site on 4 and 5 July 2016 and in light of the lax procedures at the company I was not persuaded that pay roll was ever alerted to the Claimant's sickness absence. I therefore accepted Mr Hall's evidence that, to the extent the Claimant was paid normally for these two days, it was the result of a simple mistake. So far as the sickness absence in 2009 was concerned, the Claimant did produce his pay slip for the relevant week with a handwritten annotation, apparently by a former accounts manager, suggesting that a day's sick pay was paid. However the manager was not available to give evidence and it is far from clear that she had authority to pay the Claimant at his normal rate for the day's sickness absence. On balance I accepted Mr Hall's sworn evidence to the effect that if she did pay sick pay she had no authority to do so.

The Jovisa deal

24. In June 2016 the company announced that it had concluded an exclusive distribution agreement for the whole of the UK and Ireland with a Spanish company called Jovisa. The Claimant had no prior knowledge of the deal but it was clearly a considerable coup for the company. (Mr Hall tried to play down the significance of the deal in cross-examination but his evidence was somewhat undermined by the fact that the company's email template includes a statement that the company are "proud to have been awarded the sole distributorship for sales and service for all Jovisa machines to the whole of the UK and Ireland".)

25. Around the same time, in a marked change of approach, the company appointed Peninsula to provide it with advice in relation to employment matters and to regularise its affairs by drafting employment contracts and company procedures.

Events during the summer of 2016

26. Towards the end of July 2016, shortly after the Jovisa deal was announced, the Claimant was told that the Respondent would be fitting a tracking device to the VW Caddy. The Claimant objected, particularly as he was allowed to drive the Caddy for personal use. However his objections were ignored and a tracker was fitted to the Caddy and another vehicle at the Swineshead site on 27 July 2016. However no device was fitted to the Renault Trafic (which the Claimant drove occasionally). The Claimant was very uneasy about the device being attached to the Caddy. No-one had told him how the tracker data was going to be used or why his vehicle had been chosen. Nor was there any policy in place setting out how the data would be used. Furthermore he could not understand why the company was going from a policy whereby his mileage was not even recorded in a log book to a system of tracker devices on selected vehicles.

27. Mr and Mrs Hall went on holiday during the period 23 July 2016 to 6 August 2016. During that time the Claimant arranged for the steel gate (which he had previously discussed with Mr Hall) to be manufactured. He also had an equestrian trailer built (supplying the chassis himself). He had not discussed the trailer with Mr Hall but intended to do so upon Mr Hall's return when the final invoices arrived. He did not believe it would be an issue.

28. The Claimant was due to go on holiday with his family to Cornwall in mid August 2016. However on 11 August 2016, the day before his holiday began, Mr Hall told him that he had to leave the VW Caddy at the workplace, thereby preventing him from using it on his holiday. This was the first time in the four years that the Claimant had driven the van that such a request had been made. The Claimant asked for an explanation but was simply told to 'do it'. (According to the Respondent's submissions, Mr Hall told the Claimant that the business needed to use the van whilst the Claimant was away. However there is no such statement in Mr Hall's witness statement and my notes do not record such a statement being made in cross-examination either. In any event I found the Claimant's evidence convincing and so found that the instruction to leave the van at the workplace was given without explanation.)

29. Mr Hall maintained in his witness statement that whilst the Claimant was on holiday he checked back through the Respondent's 'module sheets' for the weeks when he and Mrs Hall had been on holiday. In oral evidence he expanded on this, explaining that the sheets showed that the hours completed were 'far in

excess' of normal, and that as a result he had interviewed – and taken statements from - five members of staff about what had been going on whilst he had been away. He claimed this led to the discovery that the Claimant had used company facilities to have a trailer built. It also transpired that the Claimant had had a steel gate built during this period.

30. However Mr Hall's evidence on this issue was unsatisfactory. Although the hearing bundle contained some module sheets, it turned out these were for the wrong period and when the correct sheets were eventually produced shortly before the hearing Mr Hall accepted in cross-examination that the hours recorded on those sheets showed nothing out of the ordinary. He also suggested that, contrary to his witness statement, the trigger for his suspicions was not the module sheets but some comments by an employee (Steve Potts) that a trailer had been manufactured whilst he had been away. In short I found his evidence that in August 2016 he genuinely believed the Claimant had been manufacturing items behind his back and had been actively trying to conceal this from him to be wholly unconvincing.

31. Around the same time Mr Hall became interested in two credit card transactions for which the Claimant was responsible. The first (on 3 August 2016) was for the purchase of fuel and milk at Tesco worth £59.53. The second (on 10 August 2016) was for diesel fuel to the value of £66.69. Mr and Mrs Hall maintained in evidence that they had concerns that these transactions were 'suspicious' as the tracking data they had obtained in respect of the Claimant's VW Caddy suggested it had been parked at the Claimant's home at the time the transactions had been entered into, thereby suggesting the transactions were not for the company van. Mr and Mrs Hall maintained in evidence that they attempted to contact the Claimant whilst he was on holiday to talk to him about the transactions, but as they did not get any response they decided to cancel the card in any event. For the reasons given in paragraph 32 below I do not accept that any such attempt was made.

32. The Claimant's practice when on holiday was to keep in touch with the company by email. As a result whilst he was in Cornwall he did not put an out of office message on his e-mail account, preferring to deal with urgent e-mails himself or to redirect them if appropriate. Similarly he was in the habit of taking his company mobile away with him and although he would leave a voice mail message explaining he was on holiday, he would keep in contact with the workplace and answer calls. He followed that practice, as normal, during his August leave. However, a few days after he arrived in Cornwall, the Claimant discovered that he no longer had access to company e-mails and that his company mobile had been disconnected. He had received no prior warning that this would happen and received no explanation from the company at the time; his access was simply disconnected. He was concerned at this turn of events and resolved to deal with the matter on his return from holiday. (Although Mrs Hall maintained in evidence that she had tried to phone the Claimant before the phone and credit card were disconnected I was not persuaded that this was the case. Her evidence on this issue in cross-examination was hesitant and unconvincing, particularly as she admitted that she did not leave a voice mail message to warn him about what was about to happen as might have been expected in this situation. Equally there was no evidence she tried to contact him by text or email.)

The letter of 22 August 2016

33. The Claimant returned from holiday on 24 August 2016 to find a letter from Mr Hall waiting for him. This was the first written communication the Claimant had ever received from the company and he regarded it as ominous. On reading the letter his fears were confirmed. It contained an invitation to an investigation meeting a few days later to be conducted by Mr Hall, the purpose of which was to allow the Claimant to provide an explanation for the following "matters of concern":-

33.1 Allegations that he had been using the company credit card for personal use.
33.2 Allegations that he had been using his company vehicle for personal use and during work shop hours.
33.3 Allegations that he had used company man hours for personal use.
33.4 Allegations that he had used company materials for personal use.

34. This was the first time these issues had been raised with the Claimant and although the allegations were clearly serious – implying dishonesty - no further details were given.

35. Shortly after receipt of the letter the Claimant discovered that his company credit card had been cancelled whilst he had been away on holiday. This meant that over the course of his leave the company had denied him access to his company phone, email account and credit card, all without warning or explanation. He was now greatly concerned and started to suspect that the allegations against him were part of a plan to get rid of him, possibly to enable the Halls to sell the company now that they had secured the Jovisa deal. He therefore decided to instruct Solicitors.

36. Accordingly on 26 August 2016 his solicitor wrote to the Respondent requesting further details of the allegations, together with any documents on which the company intended to rely. As she explained, if the Claimant knew "by whom the allegations had been made and when" he would have a better understanding of what was being alleged. The letter also queried the payment of a dividend to the Claimant given the Claimant's understanding that he was not a shareholder in the company.

37. The Claimant continued to suffer a great deal of anxiety. He became ill and the investigation meeting had to be postponed. On 30 August 2016 he was signed off sick for a month, never to return to the workplace. Whilst off sick he was paid SSP.

Correspondence between the parties

38. The Claimant's Solicitor received no reply to her letter of 26 August 2016. Accordingly, on 16 September 2016, she chased the Respondent for a response. She also queried why the Claimant was receiving statutory sick pay, rather than contractual sick pay, during his sickness absence.

39. Mr Hall replied by e-mail of 20 September 2016, nearly a month after the Solicitor's initial letter. He gave no further details about the allegations and disputed the Claimant's entitlement to sick pay. The letter did not mention the statements Mr Hall had taken from his employees whilst the Claimant was on holiday. Nor did it inform the Claimant he was a shareholder in the company.

40. There was a dispute of fact over whether a junior employee, Tom Farr,

had seen (or possibly drafted) the company's email of 20 September 2016. The email header shows that the letter was originally attached to an email sent from Mr Farr's email account to Mr and Mrs Hall with the message 'If you want to edit this I have attached a word copy as well'. Mrs Hall then simply forwarded the letter to the Claimant's Solicitor without amendment. To all intents and purposes it therefore appeared that Mr Farr had been involved in the production of the letter and the Claimant clearly believed that to be the case.

41. However Mr Hall maintained in cross-examination that Mr Farr had *not* been involved and that he (Mr Hall) had simply used Mr Farr's computer to send the email as his own computer was not working, using Mr Farr's email account because Mr Farr was logged into the computer at the time. In cross-examination Mr Hall also stated (for the first time) that he had deleted the email from the system after it had been sent, thereby preserving confidentiality. However this explanation – including the suggestion that he had deleted the email from the system - lacked credibility. As Mr Hall accepted in cross-examination, he had access to a personal smart phone and an iPad, both of which could have been used to send confidential correspondence. In addition there was no supporting evidence from Mr Farr - as might have been expected given the importance of this issue to the case (there being no suggestion that Mr Farr had left the Respondent's employment by the time of the hearing). Furthermore if Mr Hall had really had no option but to send the email from Mr Farr's account he might have been expected to explain that to the Claimant either in his email of 20 September 2016 or in subsequent correspondence so as to reassure the Claimant that, despite appearances, confidentiality had not been breached. This did not happen. I therefore did not accept Mr Hall's evidence on this issue and concluded that Mr Farr had, at the very least, been aware of this correspondence and the existence of serious allegations against the Claimant.

42. On 21 September 2016, the Claimant's solicitor wrote again to Mr Hall expressing the concern that correspondence appeared to have been shared with Tom Farr. She also repeated her request for details of the allegations against the Claimant to allow the Claimant "to fully assist in the investigation process [and] provide answers and explanations". The letter also pointed out that there was still no clarity on the Claimant's status as shareholder.

43. Mr Hall replied to the Claimant's solicitor on 5 October 2016 refusing to provide further details of the allegations, explaining that the investigation meeting was an opportunity 'to gather the relevant facts and evidence so that we can establish if there is a disciplinary case to answer'. He also denied that Tom Farr had prepared or typed the response sent on 20 September 2016 and stated that the Claimant was due statutory sick pay only. Although he confirmed that the Claimant was paid partly by way of dividend he did not confirm the Claimant's shareholding in the company and so the situation was still not clear.

44. The letter of 5 October 2016 was the final straw for the Claimant. He believed he had done nothing wrong and that the Respondent was being wholly unreasonable in failing to supply further information about the serious allegations against him. In addition he felt Mr Hall's denial about Tom Farr's involvement in the matter was a 'blatant lie' and that his reputation with junior staff had been fatally undermined now that Mr Farr was aware of the allegations against him. In short he felt he was being set up to be dismissed – and that he had no option but to resign as a Director and employee of the company with immediate effect. He therefore wrote to the company to that effect on 7 October 2016 stating that the Respondent was in breach of a number of express and implied terms in his

employment contract. In particular he complained that the Respondent:-

> 44.1 Had consistently failed to provide any evidence or documentation in support of its allegations so as to allow him to prepare for the investigation meeting;
> 44.2 had failed to provide him with copies of relevant policies and procedures;
> 44.3 had removed his use of his company vehicle and had turned off his e-mail and mobile telephone facilities during his holiday; and
> 44.4 had breached his confidentiality in relation to the allegations.

He concluded by saying that the company were in breach of the implied term of mutual trust and confidence and that he did not believe the breaches could be rectified or reversed by means of a grievance and that he was therefore resigning in response to the Respondent's repudiatory breach.

Events after the Claimant's resignation

45. A few days after his resignation, in early October 2016, the Claimant conducted a search at Companies House and discovered, to his surprise, that he held one of the company's eleven shares.

46. Following the Claimant's resignation the Respondent sent a number of communications to the Claimant. The first of these, sent on 10 October 2016, suggested he reconsider his decision to resign and reminded him of 'the importance of airing any concerns' and directing him to the 'correct grievance procedure' a copy of which was enclosed. The procedure enclosed with the letter was headed 'personal harassment policy'. The Claimant had never seen it before. At paragraph 4 it directed that a grievance should first be raised 'with the person specified in [the employee's] Statement of Main Terms of Employment'. As the Claimant had never been given a written statement this rendered the procedure fairly useless. The next day the Respondent sent the Claimant a second document entitled 'grievance procedure'. However this procedure – which once again the Claimant had never seen before - set out the process for appealing against a disciplinary sanction and so was not apt to cover the Claimant's circumstances. The Claimant's Solicitor informed the Respondent that this second policy 'seemed to misunderstand completely the meaning of 'grievance' and confirmed that the Claimant would not be engaging in a grievance process.

47. On 22 October 2016, some 15 days after the termination of his employment, the Claimant was finally provided with a written statement of his employment particulars. This had clearly been prepared after the Claimant's resignation as it was signed by Mr Hall on 20 October 2016. It provided that there was no contractual sick pay scheme.

48. The Respondent sent a further letter to the Claimant's solicitor on 25 October 2016, finally setting out the details of the allegations against the Claimant. It became clear that the Claimant had been accused of, amongst other things:-

(i) using the company's employees to manufacture a trailer in work time using company materials and labour without permission. However the amount of time said to have been spent on the project appears to have been exaggerated, as the figure given was considerably higher than that

suggested in the statements taken by Mr Hall during the Claimant's holiday;

(ii) using the company's credit card for his own use, specifically a transaction for £66.69 for diesel and milk on 3 August 2016 and a transaction for £52.59 for diesel on 10 August 2016. The transactions were said to be suspicious because, based on the tracking data, on both occasions the VW Caddy was parked outside the Claimant's home. As noted above there were considerable problems with the documentation supporting these allegations;

(iii) using the company's 'Ali Express' account to purchase three personal items including a dash cam recorder. However it became apparent during Mrs Hall's cross-examination that these allegations had probably come to light *after* the Claimant was invited to the investigation meeting and so could not have formed part of the allegations made against the Claimant in the letter of 22 August 2016. In any event Mrs Hall's witness statement suggests that another employee (Tom Tatterick) might have had access to the account and in cross-examination she also stated that she did not know which method of payment had been used for these purchases (and in particular whether the company credit card had been used) – something she might have been expected to check if she was accusing the Claimant of using the credit card on his own behalf.

49. On being furnished with the detail of the allegations the Claimant asked for copies of the vehicle tracking data. Once this had been provided he was able to furnish a response to the allegations by letter of 2 November 2016. He maintained that he had done nothing wrong and provided a full (and exculpatory) explanation for each of the charges against him. It was only at this point that Mr Hall contacted the supplier of the tracking system for assistance, as a result of which, as he conceded in cross-examination, he tended to accept the Claimant's explanation that the receipt for 10 August 2010 was for a bona fide transaction. In addition he acknowledged that the allegation about the 3 August 2016 was weak, particularly given the Claimant's explanation that he had been driving the Renault van (which was not fitted with a tracking device) when he purchased the diesel.

The Claimant's search for new employment

50. Convinced that the Respondent was trying to get rid of him, and not being able to manage financially on SSP the Claimant began to search for an alternative job before he resigned. He was able to find a new job fairly quickly and started a new job on 24 October 2016, some two and a half weeks after his resignation.

E My decision

<u>The claim for sick pay</u>

<u>The relevant law</u>

51. Under section 13 ERA 1996 an employer 'shall not make a deduction from wages of a worker employed by him unless –

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract worker or

(b) the worker has previously signified in writing his agreement or consent to

the making of the deduction.'

52. "Wages' are defined for these purposes by section 27(1)(a) ERA 1996 and it is clear that the definition will only be satisfied if there is some legal entitlement to the sum in question. In addition 13(3) ERA 1996 provides that 'where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion… the amount of the deficiency shall be treated… as a deduction made by the employer from the worker's wages on that occasion.'

53. Complaints that there has been an unauthorised deduction from a worker's wages contrary to section 13 ERA 1996 are brought under section 23 ERA 1996.

Applying the law to the facts of the case

54. As noted above, the sole issue for determination is what was properly payable to the Claimant in the period August 30 2016 to 7 October 2016 when he was off work sick. Did the contract give him a right to be paid normally during this period, bearing in mind that there must be a legal entitlement to the sum due if the payment is to fall within the definition of wages in section 27(1) ERA 1996? Or was his entitlement simply to SSP - in which case there had been no unauthorised deduction?

55. There was clearly no express term dealing with sick pay in the Claimant's employment contract. The topic had never been raised by either party, let alone any agreement reached. The question was therefore whether there was an implied term obliging the employer to pay the Claimant his normal rate of pay throughout sickness absence.

56. Although neither party referred me to any authorities on this issue, it is well established that there is no general implied right to contractual sick pay and no presumption in favour of such a term. Instead the tribunal has to have regard to all the facts and circumstances of the employment relationship when interpreting the parties' agreement.

57. Having reviewed the evidence I decided that there was no such implied term. Firstly there was clearly no culture or practice in this company of paying sick pay over and above SSP, even to salaried employees. Quite the reverse, no other employee received sick pay, not even Mr and Mrs Hall. Therefore the fact that the Claimant was a salaried rather than hourly paid (which seemed to be the factor upon which he placed most reliance) was not sufficient in and of itself to establish an implied term.

58. Secondly I was not persuaded that the conduct of the parties supported such a term. As my findings of fact make clear, the payments for sickness absence in February 2009 and then again in July 2016 were more likely than not the product of a mistake or lax systems.

59. Thirdly the contract worked perfectly well without an obligation to pay sick pay, particularly as SSP was payable during periods of sickness absence. Accordingly an implied term was not needed to make sense of the agreement and it seemed to me that if I were to imply such a term I would effectively be writing the parties' contract for them – not least when it came to determining the length of the obligation to pay. I could see no justification for doing so and

therefore decided that the facts and circumstances of the employment relationship pointed against the implication of such a term. Accordingly the Claimant had been paid all that was properly payable and there had been no unlawful deduction from wages during the period of claim.

The unfair dismissal claim

The relevant law

60. The law in relation to unfair dismissal is found in the Employment Rights Act 1996 ("ERA 1996"). Section 94(1) provides that an employee has the right not to be unfairly dismissed.

61. To succeed in an unfair dismissal claim an employee must show first of all that he has been dismissed. Section 95 ERA 1996 sets out the statutory definition of dismissal. In particular section 95(1)(c) provides that an employee is regarded as dismissed by his employer if he terminates his employment contract (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is known as "constructive dismissal".

62. Case-law has established that in order to show that he has been constructively dismissed in accordance with this definition the employee must demonstrate that:

(i) the employer has committed a breach of contract so serious that it goes to the heart of the contract (**Western Excavating v Sharp** [1978] ICR 221). This concept is usually referred to as a "fundamental" or 'repudiatory' breach (the terms are interchangeable). The term alleged to have been breached can be express or implied, provided it isn fundamental.

(ii) the employee has resigned in response to the fundamental breach (although the fundamental breach need only be an effective cause, not necessarily the principal cause, of the resignation (**Holland v Glendale Industries Ltd** [1998 ICR 493 and **Wright v North Ayrshire Council** UK EAT/0017/13) and;

(iii) the employee has not affirmed the contract by delaying his resignation too long or by doing anything else that indicates affirmation of the contract.

63. It is important to note that not every breach of contract is so serious as to amount to a fundamental breach. However in this case the Claimant relied principally on a breach of the implied term of trust and confidence a breach of which is always regarded as fundamental (**Morrow v Safeway Stores PLC** [2002] IRLR 9). A breach of the trust and confidence term occurs if the employee can show that the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence that should exist between employer and employee (see **Malik v BCCI** [1997] IRLR 462 as interpreted by the EAT in **Baldwin v Brighton and Hove City Council** [2007] ICR 680).

64. It is important to note that the test of whether there has been a breach of the trust and confidence term is an objective one and does not turn on the subjective view of the Claimant - however honestly held. So much is clear from **Lewis v Motorworld Garages** [1985] IRLR 465, CA to the effect that 'conduct is repudiatory if, viewed objectively, it evinces an intention no longer to be bound by the contract'. There does not have to be deliberate misconduct or bad faith on the part of the employer for the obligation of trust and confidence to be destroyed (**Post Office v Roberts** 1980 IRLR 347). Indeed there can be a breach of the

trust and confidence term even if the employer never intended to damage trust and confidence (**Leeds Dental Team v Rose** [2013] All ER (D) 70).

65. Where reliance is placed on the implied term of trust and confidence, the 'last straw doctrine' frequently comes into play with the result that a relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. This was explained by Neill LJ in **Lewis v Motorworld Garages Ltd** (cited above):

'The breach of the 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, although 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 cumulative series of acts taken together amount to a breach of the implied term (see **Woods v WM Car Services (Peterborough) Ltd** [1981] ICR 666. This is the 'last straw' situation'.

66. In arguing that there had been a breach of the trust and confidence term, the Claimant relied on the case of **Working Men's Club and Institute Union Ltd v Balls** UKEAT/0119/11. Mr Balls was the subject of an investigation into allegations of gross misconduct, but resigned at an early stage of the process claiming, amongst other things, constructive unfair dismissal. The Tribunal found in his favour. On appeal the EAT found that overall the Tribunal had been correct to find that the initiation and subsequent conduct of disciplinary proceedings against Mr Ball was so unreasonable as to constitute a breach of the implied duty of trust and confidence, entitling him to resign and claim constructive dismissal.

67. Mrs Ismail suggested that a number of passages in the EAT's judgement were particularly pertinent to this case. For example the charges against Mr Balls were criticised for 'failing to give any clear idea of the specific allegations' (para 7). Equally it was held that the employer 'initiated disciplinary proceedings against the Claimant, alleging dishonest behaviour, without any adequate basis for doing so; that the way in which it conducted those proceedings was unreasonable; that it thereby committed a fundamental breach of contract in response to which the Claimant was entitled to resign…' (para 48).

68. The Respondent for its part maintained that the **Balls** case had to be treated with care because the process had reached the stage of a disciplinary hearing. (I have to say that does not accord with my reading of the case. Mr Balls appears to have been subject to an investigation process, nothing more.) However Mr Lord also highlighted the following passage:-

'Of course tribunals should be slow to treat the initiation of an investigation as itself a repudiatory breach: very often an employer may act reasonably in investigating allegations of misconduct which turn out in the end to be groundless. But the question of reasonableness is one of fact…'

69. Having considered these submissions, I regard the **Balls** case as confirming that it is possible for a tribunal to make a finding that an employer's conduct of the early stages of a disciplinary investigation amounts to a repudiatory breach of contract. However the test is not dependent upon the stage the disciplinary proceedings have reached - the crucial question when determining whether there has been a breach of trust and confidence remains that set out in **Malik**, namely whether there has been conduct on the part of the employer which, absent reasonable and proper cause, is calculated or likely to destroy or seriously damage the relationship of trust and confidence.

70. A constructive dismissal is not necessarily an unfair dismissal. However, as noted above, in this case the Respondent conceded that if it lost on the issue of constructive dismissal then the dismissal would be unfair.

Applying the law to the facts of the case

(i) Was there a fundamental breach of contract?

71. The Claimant argued that the Respondent's conduct towards him from the end of July 2016 until his resignation at the beginning of October 2016 amounted to a breach of the implied term of trust and confidence.

72. In considering whether this was the case I noted that the Claimant had been a longstanding, loyal and hard working employee with over 11 years of unblemished service. Apart from the Halls, he was the most senior employee on site. His talents had contributed to the success of the company. He was trusted with a company credit card and had for some years enjoyed a number of perks including use of the Caddy van for private mileage and use of the company workshop for personal items when work was slack.

73. Then, in the summer of 2016, without any explanation, the attitude of Mr Hall towards him changed. Shortly before his holiday he was instructed, without explanation, to leave the VW Caddy van at the workplace. This was a significant change to previous practice yet there had been no prior discussion, as might have expected given the hitherto close working relationship between the two men and the Claimant's seniority. Then within a few days of arriving in Cornwall his company email and mobile phone were disconnected, and his company credit card cancelled, again all without prior warning or explanation. I agree with the Claimant's submission that this course of conduct, coming as it did out of the blue, was an extremely brusque and high-handed way to behave towards a long-serving and senior employee.

74. There was more to come. When the Claimant returned home from holiday, he found a formal letter waiting for him, summoning him to an investigation meeting to discuss a number of allegations of serious misconduct. The fact that matters were first raised by letter, rather than informally, was significant. Previously all work matters had been dealt with verbally, reflecting the close working relationship between the Claimant and Mr Hall. Now, suddenly, there was to be no discussion and instead the Claimant, who had been a loyal and trusted employee, was to be pitched straight in to a formal process. What is more at least one of the allegations against him (that he had used his company vehicle for personal use and during work shop hours) appeared to be entirely spurious – there was a longstanding agreement that he could use the Caddy for private mileage. Indeed until recently he had taken it on holiday with him. In addition the remaining allegations were undated and vague.

75. These issues inevitably aroused the Claimant's suspicions that he was being set up and the lack of information made it very difficult for him to prepare for the investigation meeting. Yet when the Claimant's Solicitor, quite reasonably in my view, asked for further information she was rebuffed on several occasions. It would not have been an onerous task for the company to provide the information and the refusal was therefore deeply damaging to the employment relationship. Whilst it is true, as Mr Lord pointed out, that the Respondent had no legal obligation to supply further information at this stage and its refusal did not breach the letter of the ACAS Code, the position adopted by the Respondent did breach the spirit of the Code. So for example the Guidance issued with the Code states that when investigating a disciplinary matter care should be taken to deal with the

employee 'in a fair and reasonable manner'. Furthermore if an investigation meeting is held the employee should be given 'advance warning and time to prepare'. By failing to supply the Claimant with even the most basic information (such as the disputed credit card receipts and the tracking data) the company were disabling the Claimant from being able to prepare in any meaningful way. This unreasonable approach by the company served to fuel the Claimant's belief that the allegations against him were without foundation and increased his concerns that the company was not interested in a fair and genuine investigation process.

76. In addition there were other aspects of Mr Hall's conduct of the investigation that, viewed objectively, contributed to a breakdown in the employment relationship. Firstly it took Mr Hall over a month to respond to the first letter from the Claimant's Solicitor. Secondly when he did respond he involved a junior employee - Tom Farr - in the correspondence. This was calculated to seriously damage the Claimant's confidence in the employment relationship – it gave the impression that by this stage the Claimant counted for little within the organisation, that his rights were not being respected and that he had no future with the company.

77. The final straw came with Mr Hall's letter of the 5 October 2016. This rejected the suggestion that Tom Farr had been involved in confidential correspondence, explaining that the email of 20 September 2016 had been sent by Mr Hall on Mr Farr's computer. Given that the correspondence of 20 September 2016 had been sent not just from Mr Farr's computer but *from Mr Farr's email account* (something the letter did not even attempt to explain) this explanation was inadequate and unconvincing. It did little to dispel the concern that confidentiality had been breached. In addition the letter repeated the company's refusal to give further details about the allegations, stating:-

'We note that you accept there are no statutory requirements to give advance notice of an investigation meeting. Consequently it follows that there is no requirement for us to confirm the allegations in writing before the investigation meeting or to provide any documentation.'

78. The Respondent was therefore still refusing - point blank - to give any further detail, even though this would have been a relatively straightforward task. In addition it had failed to provide a convincing explanation of how the email of 20 September could have been sent from Mr Farr's account without him being privy to the correspondence. In my view, when viewed objectively, the contents of the letter when taken together with the events over the previous few months were calculated to destroy the Claimant's trust and confidence in the employment relationship – and they did so. The letter simply served to reinforce the Claimant's view that the allegations against him were spurious, that he was not going to be given a fair opportunity to deal with them and that he was being manipulated out of the business. He therefore resigned two days later.

79. I then considered whether there was reasonable and proper cause for the Respondent's conduct. However the Respondent's evidence on this issue lacked credibility. So, for example, the reasons put forward by Mr Hall for cancelling the credit card whilst the Claimant was on holiday were inconsistent. At one point he maintained that he and his wife did not know whether the card had been lost or stolen and that cancellation of the card 'was not in any way suggestive' of the Claimant's guilt. However at another he appeared to suggest that he suspected the Claimant was misusing the card. Equally his explanation that the Claimant's

access to his emails was cut off because urgent emails were being left unanswered was unconvincing. The Claimant's practice with regard to emails during his holiday was the same in August 2016 as it had been in previous years. It had caused no problems before and there was no credible evidence that it was causing problems in 2016.

80. Moreover, as became clear during cross-examination of Mr and Mrs Hall, there was scant basis for a number of the allegations levelled against the Claimant on his return from holiday and in some cases the case against him had glaring holes in it. So for example, although Mr Hall's witness statement maintained that tracking data had given rise to suspicions about the Claimant's use of the credit card, it became clear in cross-examination that some of the data relied on did not relate to the Claimant's VW Caddy at all, but to a completely different vehicle (EK65 AUC) - as any cursory glance at the data would have shown. (It was suggested in re-examination that this part of his witness statement was incorrect, but this was a leading question and so I was not prepared to give Mr Hall's response any weight). Moreover, so far as the data for 10 August 2016 was concerned, a close examination of the tracking data for the Caddy would have shown that crucial data appeared to be missing. Rather than take care to ensure that the information they were relying on was reliable, the Halls were all too ready to fire off the letter of the 22 August 2016 and to make serious allegations against the Claimant on the flimsiest of foundations. Similarly Mr Hall's evidence that he was alerted to the Claimant's unauthorised use of the company's materials and labour by the number of hours on the module sheets was totally undermined in cross-examination. Moreover the allegations that the Claimant had been using the company vehicle 'for personal use and during workshop hours' was completely disingenuous. As Mr Hall well knew, the Claimant had long been allowed to use the VW Caddy for private mileage. I was therefore persuaded that at the time the allegations were raised Mr and Mrs Hall were simply looking for accusations to level against the Claimant, regardless of whether or not the case against him stacked up.

81. In addition the Respondent failed to put forward any reasonable explanation for the failure to supply details of the allegations to the Claimant's Solicitor. As noted above, the provision of such information would not have been a difficult exercise and would have enabled the investigation meeting to be more effective and within the spirit of the ACAS Code. Moreover the fact that, according to Mr Hall, he was acting at all times on the advice of Peninsula in refusing to supply further information did not assist. Whether there has been a breach of the trust and confidence term has to be considered objectively. Mr Hall's motive for acting as he did was therefore irrelevant.

82 There was therefore no reasonable or proper cause for the Respondent's conduct with the result that it had committed a fundamental breach of contract.

Did the Claimant resign in response to the fundamental breach?

83. The Respondent argued that the Claimant resigned because he had got a new job and/or he simply did not want to go through an investigation process. I rejected that argument. The Claimant had had a successful career with the Respondent. He had a senior position and until the events of the summer of 2016 had been a committed employee with no reason to look for another job. It was the employer's conduct from the end of July 2016 that led him to the conclusion he had no option but to resign, as his resignation letter makes clear. I therefore find that there was a clear causal link between the Respondent's repudiatory

behaviour and the Claimant's resignation. The former was an effective cause of the latter. The unfair dismissal claim therefore succeeds.

The Wrongful dismissal claim

The relevant law

84. Where an employer is in fundamental/repudiatory breach of contract the Claimant is entitled to resign without notice. This is an application of the general rule of contract law that following a repudiatory breach the innocent party has the option to terminate or affirm the contract. In this case the Claimant decided to terminate and is claiming eleven weeks' notice pay.

Applying the law to the facts of this case

85. For the reasons set out in paragraphs 71 to 83 above, I find that the Respondent committed a fundamental breach of contract (namely a breach of the implied term of trust and confidence) entitling the Claimant to resign without notice. This claim also succeeds.

Issues relevant to remedy

The failure to provide a timely written statement of employment particulars

The applicable law

86. Under section 1(1) ERA 1996 an employer is obliged to given an employee a written statement of the particulars of his employment. Under section 1(2) ERA 1996 the statement must be given not later than two months after the beginning of the employment. There is no freestanding right to bring a claim for failure to comply with section 1. However if an employment tribunal makes an award to an employee in respect of certain claims (including claims for unfair dismissal and breach of contract) then, under section 38 Employment Act 2002, the employment tribunal must increase any award it makes by two weeks' pay (or, if it thinks it just and equitable, by four weeks' pay) provided that 'when the [employment tribunal] proceedings were begun the employer was in breach of his duty to the employee under section 1(1) ERA 1996': see EA 2002 s38(3).

Applying the law to the facts of this case

87. The Respondent concedes that the Claimant was not issued with a written statement within two months of the start of his employment as section 1 requires. However Mr Lord points out that such a statement was issued belatedly (and one suspects rather cynically) to the Claimant on 22 October 2016, before he commenced proceedings in the employment tribunal. That being the case Mr Lord argues that *at the time of presentation of the claim* the employer had duly provided the written statement to the employee – which is all section 1(1) requires. He therefore argues that I have no power under the Employment Act 2002 to make an award under section 38.

88. Unattractive though that argument may be in the circumstances of this case, I have to agree with him. As noted above the requirement to provide the statement within two months of starting work is contained in section 1(2) ERA 1996 - but that section is not referred to in section 38 EA 2002. Instead section 38 is concerned solely with section 1(1) ERA 1996, which sets out the duty to provide the written statement and nothing more. It therefore appears that where, as in this case, the statement is issued after termination *but before a claim is presented to the tribunal*, the bare terms of section 1(1) have been satisfied and

section 38 has nothing upon which to bite. I therefore have no jurisdiction to make an award under section 38 EA 2002 and so this aspect of the claim fails. Whether that is the outcome Parliament intended is a different matter.

Failure to follow the ACAS Code

The applicable law

89. Section 207A(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:-

> "If, in the case of proceedings to which this section applies, it appears to the employment tribunal that-
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
> (b) the employee has failed to comply with that Code in relation to that matter, and
> (c) that failure was unreasonable
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to an employee by no more than 25 per cent.'

90. There was no dispute that the section applies to proceedings for unfair and wrongful dismissal. Equally it was accepted by both parties that the reference to 'a relevant Code of Practice' means, in effect, the 2015 ACAS Code of Practice on Disciplinary and Grievance Procedures. Paragraph 38 of the Code states that 'if it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance'.

Applying the law to the facts of this case.

91. It was the Respondent's case that in failing to raise a grievance prior to his resignation about the withdrawal of his email and company phone and/or the instruction to leave the VW Caddy behind whilst he went on holiday the Claimant had been in breach of paragraph 38 of the Code. The Respondent also argued that the failure had been unreasonable and that any award should therefore be reduced by the maximum amount.

92. Mrs Ismail argued that the failure could not be characterised as unreasonable, given that there was no grievance procedure in existence during the Claimant's employment. Although grievance policies were produced after his resignation, these documents were completely new - and in any event one was completely unsuitable for his situation and the other was unworkable given the person to whom he was supposed to submit a grievance had never been specified. In addition the Claimant could have no confidence that a genuine process would be undertaken by the Respondent given that Mr Hall was refusing to provide even the most basic details of the allegations against him.

93. I preferred the Claimant's arguments on this point and decided that the failure was not unreasonable. There is therefore no basis on which compensation should be reduced under section 207 of TULRCA 1992.

Remedy hearing

94. The remedy hearing set for 6 December 2017 will therefore go ahead. If in the meantime the parties agree a settlement in respect of remedy they should inform the Tribunal immediately.

Employment Judge Milgate

Date 17.11 17.

JUDGMENT SENT TO THE PARTIES ON

18 November 2017

FOR THE TRIBUNAL OFFICE