EMPLOYMENT TRIBUNALS

Claimant:	**Mr W. Williams**
Respondent:	**South East London & Kent Bus Company Limited**
Heard at:	**East London Hearing Centre**
On:	**7–9 January 2020**
Before:	**Employment Judge Massarella**
Representation Claimant:	**In person (assisted by his wife, Mrs Hannah Williams)**
Respondent:	**Mr C. Ludlow (Counsel)**

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. **the Claimant's claim of unauthorised deduction from wages in respect of statutory sick pay succeeds;**

2. **the Claimant's claim of unauthorised deduction from wages in respect of contractual sick pay is not well-founded and is dismissed;**

3. **the Claimant's claim of unfair (constructive) dismissal is not well-founded and is dismissed;**

4. **the Claimant's claims of race discrimination, sex discrimination and wrongful dismissal are dismissed, having been withdrawn by him at the preliminary hearing on 11 April 2019.**

REASONS

1. By a claim form presented to the Tribunal on 15 January 2019, after an ACAS early conciliation period between 10 and 11 January 2019 the Claimant, Mr Wayne Williams, complained of unfair (constructive) dismissal, wrongful dismissal, unauthorised deduction from wages, sex discrimination and race discrimination.

2. The Respondent presented its response on 6 March 2019: it denied that the Claimant had been constructively or wrongfully dismissed; contended that the claims of race and sex discrimination were misconceived; and sought further information in respect of the monetary claims.

3. The Claimant withdrew the claims of sex and race discrimination and wrongful dismissal at a preliminary hearing on 11 April 2019 before Regional Employment Judge Taylor. She ordered that the Claimant confirm which breach (or breaches) of contract he relied on for the purposes of his constructive dismissal claim, and she gave the Respondent permission to amend its ET3 in response to that clarification. Both parties complied with those orders.

The Hearing

4. The hearing took place over three days. There was sufficient time remaining on the third day for me to deliberate and reach a decision. Unfortunately, there was then a delay in writing up the Judgment, for which I apologise to the parties. This was caused by competing commitments on other cases.

5. Mr Ludlow, Counsel for the Respondent, clarified that its correct name is South East London & Kent Bus Company Limited. By consent, the name of the Respondent in these proceedings was amended accordingly.

6. A list of issues had been prepared by the Respondent, on the order of REJ Taylor. I considered that it did not adequately reflect the further information provided by the Claimant, and after discussion with the parties a revised list was agreed, which is set out below.

7. I had before me an agreed bundle of documents, running to some 160 pages. I heard evidence from the Claimant and his wife, Mrs Hannah Williams. For the Respondent, I heard evidence from Mr Ross Barton, who was employed between April 2017 and April 2019, and was at the material time Garage Operations Manager at the Respondent's Plumstead garage; and from Ms Katie Wagstaff, who succeeded Mr Barton from August 2018 onwards.

8. Although Mrs Williams attended in a supportive capacity, and was not formally acting as the Claimant's representative, when it came to re-examination of the Claimant, and without objection from Mr Ludlow, I agreed that she could ask him questions, as she had been taking a note of his evidence in cross-examination.

9. A disclosure issue arose on the second day of the hearing. After the conclusion of Mr Ludlow's cross-examination of the Claimant, I asked my questions of the

Claimant, during which he gave further information about the circumstances of his finding new employment almost immediately after his resignation. Mr Ludlow pointed out that that evidence had not been included in his witness statement, nor had the Claimant disclosed any documents in relation to these matters; he invited me to order him to do so.

10. The Respondent had known since the Claimant provided his schedule of loss that he had started new employment very soon after his resignation. If they had suspected that he had applied for, or secured, that employment before his decision to resign, they could have made a request for disclosure then, but they did not. I considered that it was too late to make an application shortly before the Claimant completed his evidence, as it would disrupt the proceedings: it might require the Claimant to be recalled the following day; it might even lead to an adjournment. It would not be in accordance with the overriding objective and I refused the application. However, to achieve fairness between the parties, I allowed Mr Ludlow a further opportunity to cross-examine the Claimant on the issue, in the course of which he called into question the reason why the Claimant resigned when he did.

The issues

11. The issues for determination were as follows.

Unfair (constructive) dismissal

1. Did the Claimant terminate his contract of employment with the Respondent (without notice) in circumstances where he was entitled to do so, by reason of the Respondent's conduct, pursuant to s.95(1)(c) Employment Rights Act 1996 ('ERA')?

2. Was there a fundamental/repudiatory breach of the Claimant's contract of employment by the Respondent? The Claimant relies on the following breaches.

    2.1. A breach, alternatively an anticipatory breach, of an express term of the contract: failure to pay sick pay (statutory and contractual), to which the Claimant was entitled.

    2.2. A breach of the implied term of trust and confidence. The following matters are relied upon, singly and cumulatively:

        2.2.1. refusing his flexible working application, dated 6 June 2017;

        2.2.2. refusing his flexible working application/appeal, presented in September 2017;

        2.2.3. Mr Barton failing to follow up on a promise in May 2018 to put an agreement regarding flexible working in place as quickly as possible;

        2.2.4. when the Claimant raised these issues with Ms Wagstaff in November 2018, she questioned his commitment to the Respondent;

2.2.5. at the same time Ms Wagstaff told the Claimant that he was not doing enough to arrange exchanges with other drivers;

2.2.6. Ms Wagstaff failed reasonably to consider the points raised by the Claimant in the conversation in November 2018;

2.2.7. the Claimant was informed on 2 December 2018 that Ms Wagstaff instructed Mr Keith Moss not to change the Claimant's duties;

2.2.8. Ms Emma Povey informed the Claimant on 7 December 2018 that he would not be paid sick pay in respect of his absence between 3 and 7 December 2018;

2.2.9. on 7 December 2018 Ms Wagstaff told the Claimant that he would be paid neither Statutory Sick Pay ('SSP') nor contractual sick pay for the period 4 to 14 December 2018;

2.2.10. Ms Wagstaff told the Claimant that a disciplinary meeting had been arranged for 10 December 2018 to consider whether his absence was genuine or predetermined;

2.2.11. in the meantime, Ms Wagstaff told the Claimant that she was unable to accept his medical certificate;

2.2.12. HR failed properly to communicate with Ms Wagstaff and to take forward the concerns raised by the Claimant in his complaints of 3 and 7 December 2018.

3. Did the breaches occur?

4. If so, did the Claimant resign, in part at least, in response to them?

5. Did the Claimant delay too long before resigning, thereby affirming the contract?

6. If the Claimant is found to have been dismissed, has the Respondent shown that there was a potentially fair reason for dismissal? If the Respondent dismissed the Claimant, it relies on section 98(2)(b) ERA, namely his conduct of having a premeditated, unauthorised absence from 3rd December 2017 until the last day of his employment on 14th December 2017.

7. If it is found that the Claimant's dismissal was for a potentially fair reason, was the dismissal fair pursuant to s.98(4) ERA?

8. If the Claimant is found to have been unfairly dismissed, does the Tribunal consider that any conduct by the Claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, pursuant to section 122(2) ERA?

9. If the Claimant is found to have been unfairly dismissed, was his dismissal caused or contributed to by any action of his, such that the Tribunal should reduce the amount of the compensatory award by such proportion as it considers just and equitable, pursuant to s.123(6) ERA?

10. If the Claimant is found to have been unfairly dismissed, would he have been dismissed if a fair procedure had been followed, such that a *Polkey* reduction should be made?

11. Has the Claimant mitigated his loss?

Unauthorised deduction from wages

12. Did the Respondent make unauthorised deductions from the Claimant's wages in respect of sick pay for the period 4 December to 14 December 2018? The Respondent made payment of SSP in the sum of £103.27 (less deductions for tax and NICs) in respect of this period on 18 April 2019.

13. Did the Claimant have an entitlement, contractual or otherwise, to discretionary sick pay, over and above SSP, for the period 4 December to 14 December 2018?

Findings of fact

12. The Respondent is a bus operator with garages at sites in Bromley, Catford and Plumstead. It operates bus services under contract to Transport for London and recognises Unite the Union.

The Claimant's employment history

13. The Claimant trained as an accountant, obtaining a qualification in 2008. Despite his best efforts he did not manage to find employment in that field. Instead he secured work as a bus driver for Abellio at a small garage in Northfleet, which was within walking distance of his home at the time. From there he moved to join the Respondent, and was employed at the Respondent's Plumstead garage as a bus driver between 28 November 2016 and 14 December 2018, when he resigned without notice.

14. Mrs Williams is an accountant and, at the material time, worked in central London, commuting daily from Kent.

The start of the Claimant's employment and the contractual terms

15. The Claimant was interviewed on 17 November 2016. At the interview he was given a copy of the Respondent's main conditions of employment and told that, on appointment, he would be given a detailed statement of the applicable terms. According to the main conditions, the working week consisted of 40 hours. As a new driver he would be added to the Spare Driver list, which meant that he would be covering duties for other members of staff who were absent from work because of holidays or sickness. There would be variations to his start and finish times from day to day. The conditions further clarified that his employment involved shift work between the hours of 03:00 and 03:00, including working at weekends and on public holidays as required. The Claimant confirmed that he received this document and was familiar with it.

16. The offer of employment was contained in a letter of 25 November 2016, which explained that there would be a period of training, after which he would begin work at his preferred location in Plumstead. There was some lack of clarity as to how long the training lasted (whether two or four weeks). On the balance of probabilities, and because the Claimant joined the Respondent as an

experienced driver, I accept his evidence that it was only around two weeks. He was paid for those weeks and worked fixed hours beginning at 07:45 each day.

The contract of employment

17. The Claimant signed the contract of employment on his first day, 26 November 2016. Clause 7 deals with hours of work and provides as follows:

> 'Standard week of work (which commences on Saturdays) will be:
>
> > 40 hours over five days with two rest days each week. The first duty will start at approximately 03:00 hours and the last one will finish about 03:00 hours. However, you may be required to work on the night bus rota when requested, the first duty will start at approximately 19:00 hours and the last one will finish at about 09:46 hours. An additional per duty allowance is payable when night duties are worked.
> >
> > …'

18. The Claimant accepted in evidence that he understood that he would be required to work the full spectrum of shifts when he signed the contract: early shifts finish by 14:00 hours; middle shifts by 19:00 hours; and late shifts follow thereafter. I accept the Respondent's evidence that early shifts were by far the most popular among drivers. I also accept that the Claimant knew this at the time: in his dealings with colleagues he must have become aware of this general preference.

19. Clause 11 of the contract deals with sick pay and provides that the company pays SSP and that:

> 'In addition to SSP, but subject to you having completed your probationary period, and at the discretion of management, you are entitled to: -
>
> …
>
> 2 years' service and over … 13 weeks' full sick rate, 13 weeks' half sick rate …
>
> …
>
> On the anniversary of your 2nd, 3rd and 4th year of service - £345.96 per week, including SSP.'

The grievance, disciplinary and flexible working policies

20. The Respondent's grievance policy provides that a grievance should be raised in the first instance with the employee's line manager, and continues (as relevant):

> 'In circumstances where it is not appropriate to pursue a matter with the immediate supervisor or manager (e.g. because that person is the subject of the grievance being raised) it may be raised with the next appropriate manager in the line of reporting.

…

We will invite the employee to a meeting to discuss the grievance once we have had a reasonable opportunity to consider our response to the information provided.'

21. The Company Policy Statement on Discipline provides (as relevant):

'Employees are required to comply with certain standards of performance and behaviour in carrying out their work…

The requirements of an employee may be summarised as:

(a) attendance for specified working hours;

…

Failure to meet these requirements will be regarded as a breach of discipline and will result in action in accordance with the Company's disciplinary procedure.'

22. The Claimant accepted that he understood that a breach of this requirement would be a disciplinary matter.

23. The Respondent's Attendance Procedure provides that, if an employee is ill he must personally notify his supervisor as soon as possible, and in any event not later than an hour before the start of his shift, providing certain information, including the date on which the ill-health began. The employee is required to submit a self-certification certificate form within three days from the beginning of the absence. The Claimant confirmed in evidence that he was also familiar with these requirements.

24. The Respondent's grievance procedure provides that grievances should be raised with the employee's line manager, unless that person is the subject of the grievance, in which case it should be raised with the next appropriate manager in the line of reporting.

25. The Respondent has a flexible working policy, which mirrors the statutory scheme. It provides that any application will be dealt with within three months from receipt of the completed application, which must be made on the designated form. It also provides that an application may only be considered if the applicant has not made an application during the previous twelve months. I find that the Claimant was aware of this criterion as it is expressly referred to in the application form itself.

26. The policy states that a flexible working request may only be refused where there is a clear business reason; the permissible grounds for refusal are then listed and include 'inability to reorganise existing work among existing staff'.

<u>The Claimant's work pattern</u>

27. On completion of the training period the Claimant reported to his manager, Mr Barrett. The Claimant explained his family situation: that he was married and had two young children, and that his wife was an accountant, who worked in London and had difficulty working flexibly. The Claimant's evidence was that Mr

Barrett immediately offered him a flexible working arrangement. I found his evidence on this issue unsatisfactory: he accepted that there was a period when he worked the full range of shifts; he referred to a written request that he made at the time, although the Respondent has no record of that and the Claimant did not produce it in evidence; his evidence as to what patterns he worked in the early days was contradictory.

28. The Claimant eventually accepted that, insofar as an arrangement was in place, it was informal only, and operated week by week. That is consistent with Mrs Williams's evidence: in her statement she said that she had to assist in doing the school run, 'as his duties changed', and that she found this challenging; in cross-examination she explained that the situation was difficult 'because [the Claimant] was changing patterns weekly'. On the balance of probabilities, I find that Mr Barrett did his best on *ad hoc* basis to accommodate the Claimant's requests, but there was no fixed arrangement in place: on his own evidence, he still worked the full range of different shifts.

The position under Mr Barton

29. When Mr Barton arrived at Plumstead there was a shortage of drivers and a multiplicity of special working arrangements (Mr Barton estimated around ninety), which had been informally agreed for a variety of reasons. From the Respondent's point of view these informal arrangements were problematic, precisely because there were no records of them, and consequently they were difficult to monitor; they had never been formally reviewed; and they created serious operational difficulties for the company. Some of the informal arrangements meant that drivers worked early shifts only; other drivers were having to do more late duties than was equitable; it was difficult to find drivers to cover some shifts; drivers without these arrangements were resentful of those who did have them; and the company was incurring fees from Transport for London for failing to operate its contracted mileage. Mr Barton concluded that the position had to be rationalised and steps taken to ensure that drivers were available to cover the full range of shifts in accordance with their contracts of employment. Profit margins were small, driver costs constituted the largest proportion of the contract price, and it was imperative that drivers were rostered as cost-effectively as possible.

30. Mr Barton began the process of reviewing the informal arrangements. Given the number of them, it was not possible for him to do so in a single exercise, and so he began the process by looking at around thirty of them, chosen at random and including the Claimant. This was not the sole means by which Mr Barton sought to improve efficiency: he pursued performance management with staff members, put measures in place to improve the rate of sickness absence, and reviewed the allocation of holidays to ensure that this did not impact adversely on the ability to cover shifts. Mr Barton acknowledged that this was a difficult process for all concerned, but one which was vital to ensure the long-term viability of the company and the security of its employees.

The Claimant's request in June 2017

31. Mr Barton sent a generic letter to the initial group of thirty drivers on 16 May 2017, inviting them to a review meeting. His letter noted that the employees in question were currently working on adjusted work patterns, rather than following

a standard pattern, consisting of early, middle and late shifts. He wrote that the arrangements were overdue for a formal review and that any special arrangements would cease, unless formally approved by him by no later than 16 June 2017. He invited them to make a formal application for flexible working by that date.

32. The Claimant made his request on 6 June 2017. He asked either to work early in the morning and finish by 14:30; or to start after 10:30 and finish any time. He explained that this was to enable him to do one or other of the school runs. On 3 July 2017 Mr Barton wrote to the Claimant inviting him to attend a meeting the next day to review his request. There are handwritten notes of the meeting. I reject the Claimant's evidence that Mr Barton told him that he would 'almost certainly' approve his request. It is inconsistent with Mr Barton's clear intention to deal with applications formally.

33. Over a month after the meeting with Mr Barton, on 9 August 2017, the Claimant completed a staff memo addressed to Emma Povey, requesting a change in his rota to 'straight early shifts'. The Claimant accepted that he did not ask Ms Povey to pass this request on to Mr Barton. Had she done so, I find that he would have been even less likely to approve the Claimant's application, since it would have further restricted the Respondent's options in terms of assigning the Claimant to different shifts. In the event, it was not passed to Mr Barton and it did not form part of his consideration of the Claimant's June application, which was based on the Claimant's original request.

34. On 23 August 2017 Mr Barton wrote to the Claimant to tell him that his request had been rejected. The reason Mr Barton gave was 'an inability to reorganise existing work among existing staff', which is one of the permissible reasons for rejecting an application for flexible working under the Respondent's policy and under the statutory scheme. The letter explained that the Claimant's existing, informal working pattern would cease and he would return to his normal contractual shift pattern with effect from 16 September 2017. The letter explicitly set out his right of appeal and explained the procedure for doing so:

> 'If you disagree with this decision, you have the right to appeal. Should you wish to do so, you must contact me within seven days of this letter stating your reasons.'

35. Mr Barton accepted that the seven-day period was too short: the flexible working policy provided that an employee should have fourteen days to submit an appeal after receiving the written decision. The deadline for the Claimant to appeal was, therefore, 6 September 2017. That was Mr Barton's mistake, based on the fact that seven days was the usual limit in other contexts (appeals against disciplinary outcomes for example). Nonetheless, three drivers did appeal the rejection of their applications and their appeals were dealt with by the operations director.

36. There is a manuscript note on Mr Barton's original notes of his meeting with the Claimant in June 2017: next to his note of the Claimant's original request, and in a different pen, Mr Barton has written [*original format retained]:* 'changed to req late duties after 4 p.m.' Mr Barton accepted that the Claimant came to see him to make this request but could not remember when. The Claimant's evidence was that it was after he received the rejection letter and I accept that

evidence. On the balance of probabilities, I consider that the most likely date for the conversation was when the Claimant submitted the second application form in September, which I deal with below. Both the Claimant and Mr Barton accept that there was a discussion between them about that form and I consider it is likely that that is when Mr Barton made the manuscript annotation, recording a request which is essentially the same as the one contained in the form.

37. The Claimant asserted that this discussion about a different proposal constituted an appeal against the rejection of his original proposal. According to Mr Barton the Claimant did not use the word appeal; Mr Barton understood that this was a fresh request. I prefer Mr Barton's evidence on this issue: Mr Barton's master spreadsheet has a column in which he indicated whether an appeal was lodged and the column relating to the Claimant is marked 'No'. There is no reference in any of the contemporaneous documents to the Claimant having lodged an appeal and, had he done so and it not been dealt with, I have no doubt that he would have pursued the matter. Furthermore, the pattern he was proposing was different from the original pattern, which is more consistent with a fresh request.

The Claimant's application in September 2017

38. The Claimant completed a second application form for flexible working in September 2017. As I have indicated above, this was a fresh application, made on the relevant form, which did not seek to appeal the rejection of the original request; rather, it made a new and request. He asked to work late duties, starting after 16:00, or to work as a night driver. I note also that the Claimant, in his witness statement, referred to this as 'my second flexible application'.

39. There is a dispute as to precisely when that form was submitted. It is completed by hand and signed and dated 18 September 2017, i.e. outside the time limit for an appeal. The Claimant denied that this was the date he submitted it and stated that the date was not in his handwriting. He relied on the fact that the form itself asked for the working pattern to commence from 4 September 2017, i.e. inside the time limit for an appeal. That is anomalous, but I have no doubt that the handwriting of the date of the form is identical: in particular, there is a distinctive bar on the figure 7 and a dot after it, exactly as it appears on the previous page where a date is given. Why the Claimant delayed and lodged this form after the starting date he was asking for is unclear; what is clear is that it was presented on 18 September 2017.

40. This was not a valid application, as the Claimant had already made an application within the previous twelve months, which Mr Barton had rejected. The application was discussed in person between the Claimant and Mr Barton, on or after 18 September 2017. Mr Barton explained to him that it could not be considered because of the time issue, but he told the Claimant that there was nothing to stop him approaching other drivers and seeking to exchange shifts with them, or approaching shift allocators to ask if they could help arrange to swap.

The period between September 2017 and May 2018

41. The Claimant duly reverted back to shift work, arrange swaps with colleagues when he needed to. He learnt as many routes as he could, so that he could

swap with a wide range of drivers, and sought assistance from shift allocators, such as Ms Povey. By and large this worked satisfactorily.

42. Mrs Williams confirmed in her evidence that she was able to come to an informal arrangement with her own employer, which allowed her to vary her hours to do one or other of the school runs. As long as she did her contracted hours, her employer did not object to her varying her start and finish times.

43. The Claimant's evidence in his statement was that this took a toll on his health. Although his GP records record that he was experiencing some health issues, there was no evidence to suggest that this was connected in any way with his work. The most serious of those health conditions was a heart problem which caused the Claimant to experience palpitations, particularly when falling asleep. However, the Claimant was quite clear that this did not present any difficulties at work and his GP records record that by May 2018, after a period of monitoring, the Claimant no longer had any symptoms and 'feels well in himself. The Claimant made no complaint to the Respondent and did not take any time off work for ill-health. He continued to work under the contract for eight months, without objection.

The Claimant's approach to HR in May 2018

44. On 21 May 2018 the Claimant approached HR and said he was unhappy with his working pattern. HR contacted Mr Barton; Mr Barton was surprised, as the Claimant had not approached him in the previous months to raise concerns.

45. They met on 23 May 2018. The Claimant asked to start work after 16:00. The Claimant's account of what Mr Barton said at this meeting has changed over time: in his ET1 he wrote that 'Mr Barton assured me he would be looking into the case afresh and that he was confident that he would grant me my request'; in his Further Information document he wrote that Mr Barton 'assured me he would do all he could to put an agreement in place as quickly as possible'; in his witness statement he stated that Mr Barton 'said to me he would be checking the availabilities of other duties'. The fact that, in cross-examination, the Claimant would not accept that these accounts differed greatly further undermined my confidence in his evidence on this issue.

46. I find that the third of these accounts the most plausible. Mr Barton explained that his original decision stood, but said that he would see what he could do to help in the short term; he gave no assurances and certainly made no promises (which would have run counter to the formal approach he had introduced the previous year). He agreed to meet the Claimant the following day, but that meeting did not take place. The Claimant's evidence was that he went to look for Mr Barton, but was told that Mr Barton had gone on secondment elsewhere. In that he is clearly mistaken: Mr Barton did go on secondment (with Stagecoach East in Cambridge, as Acting Operations Director before taking up the position permanently on 1 May 2019) but not until August 2018. Mr Barton's explanation for not seeking the Claimant out himself is that it was a busy time for him, and he simply forgot. I accept that evidence. The Claimant acknowledged that at no time between May and August did he seek out Mr Barton, send him an email or otherwise follow up on his enquiry.

47. In the event, a further six months passed before the Claimant raised the issue of his working pattern again, this time with Ms Wagstaff who had succeeded Mr Barton. During that time, he continued to work under the contract, performing the full range of shifts subject his ability to swap with other drivers. He did not complain or raise a grievance.

48. The Claimant accepted that he knew that, from June 2018 (twelve months after his previous application), he could make a further, formal flexible working application under the Respondent's policy; he did not do so at any point up to his resignation

The Claimant's request in October/November 2018

49. The Claimant spoke to Ms Wagstaff in around the second week of November about his unhappiness with his shifts. Ms Wagstaff has no memory of this meeting. I accept her explanation that she had many conversations every day with drivers, and she did not take a note of most of them.

50. I accept the Claimant's evidence that Ms Wagstaff told him that he was not doing enough to arrange swaps with other drivers and that, as well as using the drivers' WhatsApp group, he should also use the 'mutual exchanges board'; this referred to a noticeboard near her office, which was an alternative way of swapping shifts. That is consistent with the content of an email she sent to HR on 7 December 2018.

51. The Claimant alleges that 'she then asks me to consider my career if this is the sort of job I would want to do.' I find that Ms Wagstaff did make a remark along these lines but not in those words. I consider it more likely that she was simply raising with the Claimant whether this particular job, in this particular location, was compatible in the long-term with his family commitments in Kent. I note that the locum GP he saw in December 2018 made an almost identical observation ('in longer term may need to look for alternative job compatible with his circumstances').

52. I reject as implausible the Claimant's evidence that Ms Wagstaff questioned his capability on this occasion: there was no evidence of any capability or performance concerns on the part of any of his managers. Nor do I think it likely that she made this remark in a critical way, or suggested that he lacked commitment. On the contrary, as the Claimant accepted in oral evidence, Ms Wagstaff suggested that he should fill out a new flexible working application, as more than a year had passed since the rejection of his original request. She took the trouble to print out a copy of the form for him, and attached it to his duty document, a fact which the Claimant neglected to mention in his statement. He accepted that he never did lodge a further request. The Claimant explained that he did not think there was any chance of the request being granted because it had been rejected before. However, this was a different request (for late shifts), rather than his June 2017 request for the more popular early shifts. I find that Ms Wagstaff was acting in good faith by encouraging him to make a further application.

The Claimant's complaint and absence from work in December 2018

53. The Claimant was allocated early duties for the week commencing 3 December 2018. This presented a problem, as Mrs Williams was unable to vary her hours

that week. On 29 November 2018 the Claimant messaged other drivers in the WhatsApp group, asking whether anyone would be interested in swapping shifts with him, but without success. He phoned a shift allocator, Mr Keith Moss, on Sunday 2 December 2018 to ask if he could help to change his duties. Mr Moss told him to phone back in an hour and he would see what he could do. When the Claimant phoned again Mr Moss told him that he was unable to change his duties. It is the Claimant's case that Mr Moss told him that Ms Wagstaff had instructed him not to change the shifts.

54. Ms Wagstaff has no memory of doing so but she did not rule it out. Given that the Claimant's evidence was unequivocal, I find on the balance of prababilities that she did. That finding is partly because I found Ms Wagstaff's explanation as to why she might have done so logical and persuasive. Firstly, she pointed out that Mr Moss was fully authorised to swap the Claimant's shift, if he could find another driver to agree. If that was the position, there would have been no reason for him to disturb her at home on a Sunday evening. Far more likely was that Mr Moss had been *unable* to find a driver who would swap with the Claimant and the only option was to assign the Claimant as a standby driver. That was something which would require her authorisation and it is a request which, Ms Wagstaff stated, she would have refused because by then a standby driver would already have been allocated to the shift and there was no need for another: it would give rise to a cost to the business, because standby drivers may end up sitting in the garage if no work becomes available.

55. I think it likely that she told Mr Moss that, if a swap could not be arranged in the ordinary way, then the Claimant must work his allocated shift. It was not a decision taken to target or frustrate the Claimant, it was simply a practical decision, which was consistent with the Respondent's approach more generally - at least since Mr Barton's tenure - which was stricter on such issues than it had previously been. It was a decision which Ms Wagstaff was perfectly entitled to make.

56. In the course of cross-examination, the Claimant said that he told Mr Moss: 'if the duty can't change then you know Keith I can't come in'. On the morning of 3 December 2018 the Claimant called HR at head office and told Ms Natasha Appadoo of HR that he would not be attending work that day because his shift had not been changed and he had childcare commitments. He accepted in cross-examination that he made no mention of ill-health: 'at the time my issue was around the duty itself not changing'. He did not attend work and his absence was marked as unauthorised.

57. On 3 December 2018 the Claimant made a formal, written complaint to Ms Appadoo, rather than to his line manager (or their manager) as the policy required him to do.

58. On 4 December 2018 the Claimant went to his doctor's surgery and saw a locum. The GP notes record the following [*original format retained*]:

> 'Headache. Seen own GP x 2 with same in September. Patient came to conclusion it is related to work. Thinks it is related to stress. Works as bus driver. Does not feel safe to drive with headaches. He is sole carer for daughter. Under stress at work as refuse to accommodate his care needs. Says he went through government programme for flexible

> working however says employer refusing to comply with recommendations. OH not involved. Main occurs daily – frontal – mainly on left side.'

59. Some of that information was not true: there were no recommendations with which the Respondent had failed to comply; and the Claimant was not the sole carer for his daughter. Moreover, the Claimant had never raised with the Respondent safety concerns in relation to headaches, which he plainly ought to have done, if they were genuine. I accept Mr Ludlow's submission that the reason the Claimant went to the GP on 4 December 2018 was to cover himself because he had not attended work the previous day.

60. The locum said that she could not sign him off work and that he would have to see his own GP, which he subsequently did. However, the Claimant did not notify his supervisor of his illness on the days of his absence between 3 and 6 December 2018, nor did he submit a self-certification form on 6 December 2018, both of which were requirements under the Respondent's policy.

61. He came into the garage on 7 December 2018, bringing with him a medical certificate. He saw Ms Povey. The Claimant case is that she told him that he would not be paid because his sickness absence was 'premeditated' or 'predetermined'. There was some dispute as to which of those words was used, but it is a distinction without a difference: either way, what was meant was that the Claimant had deliberately decided not to attend work for reasons unconnected with his health. I find that Ms Povey did not say that he 'would not' be paid for his sickness absence; rather, she said that she 'doubted' that he would be paid; that is the language the Claimant himself quotes in his witness statement.

62. Ms Povey told him that he would have to speak to Ms Wagstaff. She also told him that she was concerned that his sickness absence might be 'premeditated'. She told him that she would not formally accept his sickness certificate until an investigation under the Respondent's disciplinary policy had taken place into the circumstances of his absence. The Claimant in his witness statement says that Ms Wagstaff said that 'she won't be paying me for the time I will be off work'. He did not state that she made any express reference to SSP; I find that she did not. I find however that she did say in general terms that, depending on the outcome of the investigation, his absence might impact on his pay.

63. According to the Claimant, Ms Wagstaff told him that a meeting would take place the following Monday, 10 December 2018. It is clear that she did inform him that there would be a disciplinary investigation, although I find that she did not specify a date. In her email of 7 December 2018 to Ms Appadoo of HR and Mr Dean Caddy (Assistant Garage Manager), asking for the matter to be investigated, Ms Wagstaff wrote:

> 'Wayne would like this to be dealt with ASAP and is free any day next week and would like his pack emailed to him [*Claimant's email address inserted*].
>
> Info for you both: Wayne has handed in a sick certificate for stress at work from the 5th Dec for 1 month (this is in your tray Dean as we are not processing it until we know the outcome of the hearing).'

64. I find that Ms Wagstaff did tell the Claimant that the Respondent would not be 'processing' his certificate until the investigation had taken place; that is consistent with the email. That plainly left open the possibility that it would be processed in due course. Ms Wagstaff's evidence before me was that the Claimant was entitled to SSP, presumably because the Claimant had produced a certificate, even though there were doubts as to the genuineness of his sickness absence. It was her evidence that she did not have authority to withhold it and she did not suggest it should be withheld; it ought to have been paid to him in the circumstances. There was a potential entitlement to discretionary contractual sick pay, and it was in respect of that she considered that an issue arose. The sick pay in respect of the period 3 to 10 December 2018, whether SSP or contractual, fell to be paid on 14 December, that is to say after the Claimant's resignation and after the investigation hearing, had it gone ahead.

65. At the same meeting the Claimant told Ms Wagstaff that he had made a complaint. His letter of complaint had not been forwarded to her by HR. There was nothing surprising or unreasonable about that: it was a complaint which was, in part at least, about Ms Wagstaff herself; it had been sent to the wrong person (HR, rather than Ms Wagstaff or her manager); HR would have had to redirect it to the correct person and allow that person time to decide how it should be taken forward; the complaint had only been lodged three days earlier and there had been no unreasonable delay.

66. HR did send the letter to her later in the day, but this was because the Claimant had told her that he intended that she should see the letter and said he was surprised that she had not seen it. Ms Wagstaff asked him to wait outside, contacted HR and the letter was sent over to her. Ms Wagstaff emailed Mr Caddy and asked him to discuss it with her the following Monday. I infer that her intention was to ask him to deal with it, since it was not appropriate for her to do so.

<u>The Claimant's resignation</u>

67. The Claimant's evidence, which I accept, was that he took the decision to resign on Wednesday 12 December 2018. He communicated his resignation on 14 December 2018 by way of the following short letter:

> 'Please accept this letter as notice of my resignation from the position as a bus driver from Stagecoach with immediate effect.
>
> This is due to the refusal of my flexible application.'

68. The Claimant told the Tribunal that, after he decided to resign on 12 December 2018, he contacted an agency in the evening to enquire about possible positions. The following morning the agency called and asked him if he would like to go for an interview that same day, 13 December 2018, with Facilicom (a cleaning company in Kent). 'Miraculously' (the Claimant's word) he was offered a permanent position as an accounts assistant, which started on 17 December 2018. The hours were flexible and, because it was close to home, it was more convenient for the school run. Unfortunately, the new job did not work out and the Claimant's employment was terminated after a month. He then looked for

other positions as an accounts assistant, and found permanent employment with another company on 11 February 2019, again close to home.

69. I find it difficult to believe that a permanent position in the Claimant's chosen field, which he had been trying to break into for years without success, and which matched all his requirements in terms of location, simply fell into his lap immediately after he decided to resign. I note that, when cross-examined on the issue, the Claimant could not remember the name of the agency which put him forward for the role. I think it more likely that the Claimant had been looking for work elsewhere for some time: that is consistent with a text he sent to a colleague in May 2018, in which he wrote: 'I believe this is it for me, just gonna have to face the music and move on.'

70. The Respondent paid the sum of £103.27 (less deductions for tax and NI) to the Claimant on 18 April 2019 in respect of SSP for the period 4 to 14 December 2018.

The law to be applied

Unfair (constructive) dismissal

71. S.94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer. S.95(1) ERA provides that he is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct ('a constructive dismissal').

72. If there is a constructive dismissal, s.98(1) ERA provides that it is for the employer to show that it was for one of the permissible reasons in s.98(2) ERA, or some other substantial reason. If it was, s.98(4) ERA requires the Tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.

73. The employee must show that there has been a repudiatory breach of contract by the employer: a breach so serious that he was entitled to regard himself as discharged from his obligations under the contract. The Claimant relies primarily on a cumulative breach of the implied term of trust and confidence. The applicable principles were reviewed by the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 (at [14] onwards):

> **14. 'The following basic propositions of law can be derived from the authorities:**
>
> **1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.**
>
> **2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".**

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

5. 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. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

> **"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."**

15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

> **"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W. M. Car Services (Peterborough) Ltd.* [1981] ICR 666.) This is the "last straw" situation."**

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general application.'

74. The Court of Appeal gave further guidance in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 (at [55]):

> **'(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**
>
> **(2) Has he or she affirmed the contract since that act?**
>
> **(3) If not, was that act (or omission) by itself a repudiatory breach of contract?**

(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?'

75. In determining whether there has been a breach of the implied term, the question is not whether the employee has subjectively lost confidence in the employer but whether, viewed objectively, the employer's conduct was likely to destroy, or seriously damage, the trust and confidence which an employee is entitled to have in his employer: *Nottinghamshire County Council v Meikle* [2005] 1 ICR 1 (at [29]).

76. It is important to apply both limbs of the test. Conduct which is likely to destroy/seriously damage trust and confidence is not in breach of contract if there is 'reasonable and proper cause' for it: *Hilton v Shiner Ltd Builders Merchants* [2001] IRLR 727 (at [22- 23]).

77. A constructive dismissal may arise where the employee leaves in response to an anticipatory breach, that is a situation where the employer evinces an intention not to perform his part of the contract: *Harrison v Norwest Holst Group Administration Ltd* [1985] IRLR 240 (at [17-18]). Where there is a genuine dispute between the parties about the terms of a contract of employment, it is not an anticipatory breach of the contract for one party to do no more than argue his point of view. The mere fact that an employer is of the opinion, even mistakenly, that there is something to be discussed with his employee about the contract is a very long way from the employer taking up the attitude that he is not under any circumstances at all going to be bound by it: *Financial Techniques (Planning Services) Ltd v Hughes* [1981] IRLR 32 (at [18] and [21]).

78. Where there are mixed motives for the resignation, the Tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation; it need not be the only, or even the predominant, cause: *Meikle* (at [29]).

79. The employee must not delay his resignation too long, or do anything else which indicates affirmation of the contract: *W.E. Cox Toner (International) Ltd. v Crook* [1981] ICR 823 (at 828-829).

<u>The statutory right to request contract variation</u>

80. Although no freestanding claim was pursued under this head, the Respondent's policy in relation to the flexible working requests mirrors the statutory scheme and, to that extent, it forms part of the background to the case.

81. Under s.80F(1) ERA an employee is entitled to apply to his employer for a change in his hours and times of work. He may only make one such application within any period of twelve months (s.80F(4) ERA). The application must comply with the requirements of s.80F(2) ERA, read together with Reg 4, Flexible Working Regulations 2014: for example, it must state the change applied for and the effect he thinks the change would have on his employer.

82. In dealing with the application, the Respondent comply with the requirements set out in s.80G ERA, in particular: to deal with it in a reasonable manner; and to notify the Claimant of the decision within the applicable decision period.

83. The application may only be refused on one or more of the permissible grounds, set out in s.80G(1)(b) ERA. These include 'inability to reorganise work among existing staff'.

Unauthorised deduction from wages

84. S.13 ERA provides:

> **(1) 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, or**
>
> **(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.**
>
> **(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—**
>
> **(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or**
>
> **(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.**
>
> **(3) 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 (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.**

Submissions

85. Both the Claimant and Mr Ludlow made concise oral submissions; their main points are set out below.

86. For the Respondent, Mr Ludlow argued that the Claimant had shown himself to be an unreliable witness: he relied in particular on the Claimant's denial that the signature on the September 2017 application was his, when it plainly was. He argued that the Claimant's June 2017 application was refused on permissible grounds; and that the September 2017 request was a second application, which could not be considered, as twelve months had not passed since the first. At the point at which the Claimant resigned, no breach in respect of pay had occurred, because pay for the relevant period was not yet due; nor was there an anticipatory breach, since Ms Wagstaff was clear that any decision as to sick pay would be dependent on the outcome of the disciplinary procedure. In any event, the absence of any reference in the letter of resignation to the matters on which he now relies, including with regard to sick pay, suggests that those were not the Claimant's reason for resigning; it was more likely that he decided to resign because he had secured alternative employment in his chosen

profession, which was at a more convenient location. As for affirmation, there were long gaps between the earlier acts relied on.

87. As for the claim of unauthorised deduction from wages, Mr Ludlow had no instructions to concede the claim in relation to SSP, he acknowledged that Ms Wagstaff's evidence was that he ought to have been paid it, and it had not been paid as at the date the claim was presented. The Respondent was entitled under the contract not to exercise its discretion to pay contractual sick pay in circumstances where it was not satisfied that the Claimant was genuinely absent through ill-health.

88. The Claimant submitted that he resigned in response to most, if not necessarily all, of the matters alleged in the list of issues. In response to my clarificatory question, he stated that he did not consider the June 2017 refusal in itself to be a repudiatory breach, but that refusal, taken together with the refusal in September to consider his alternative proposal, was repudiatory: Mr Barton acted unreasonably by rejecting his request to work late shifts, in circumstances where on his own evidence most drivers wished to do early shifts. The September application was an appeal, not a fresh request, and should have been considered properly. The Claimant invited me to prefer his account of his interactions with Ms Wagstaff in 2018, in particular that she told him definitively on 7 December 2018 that he would not be paid for his sickness absence because his absence from work was premeditated. Another important part of his decision to resign was Ms Wagstaff's questioning of his ability to do his job in November 2018.

Conclusions

Was there a breach, alternatively an anticipatory breach, of an express term of the contract: failure to pay sick pay (SSP and contractual), to which the Claimant was entitled.

89. The Claimant accepted that, when he took the decision to resign on 12 December 2018, no unauthorised deduction can have taken place, because his pay for the relevant period was not due until 14 December 2018; he accepted that he did not resign in response to an actual breach, rather that he resigned in response to being told on 7 December 2018 by Ms Wagstaff that he would not be paid sick pay.

90. I have already found that Ms Wagstaff did not tell him that. She told him that the question of whether he would be entitled to sick pay would be determined after an investigation had taken place. I conclude that, in those circumstances, there was no anticipatory breach of contract. The Respondent cannot have evinced an intention not to be bound by the terms of the contract in circumstances when it was clear that no decision had been taken.

Was there a breach of the implied term of trust and confidence?

91. I will deal first with the individual elements of the alleged breach which the Claimant relies on.

Refusing his flexible working application dated 6 June 2017

92. I consider that the Claimant's concession that this refusal did not, in itself, amount to a breach of the implied term was a sensible one. Mr Barton gave the Claimant's application due consideration and rejected it on permissible grounds within the terms of the Respondent's own policy and the statutory scheme. He dealt with it in a reasonable manner, after a meeting with the Claimant, at which the application was discussed. The Claimant was not singled out; Mr Barton was reviewing all the shift arrangements. I accept in particular Mr Barton's evidence that this exercise was necessary because of the operational difficulties caused by the multiplicity of individual shift arrangements. There was reasonable and proper cause for his decision.

Refusing his flexible working application/appeal dated 18 September 2017

93. I have already found that the document of 18 September 2017 was not an appeal, it was a fresh request. Mr Barton was entitled to reject it because the Claimant had already made one request within the last twelve months. There was reasonable and proper cause for this decision.

94. If I am wrong about these first two issues, I conclude that the Claimant waived his right to rely on these matters / affirmed the contract by working to the new shift pattern which began in September 2017 without raising any further complaint until May 2018.

Mr Barton failing to follow up on a promise in May 2018 to put an agreement in place as quickly as possible

95. I have already found that Mr Barton did not make a promise to the Claimant in May 2018 to put an agreement in place for flexible working and this allegation fails on its facts. The allegation fails on its facts. Mr Barton did neglect to revert to the Claimant on this issue and he acknowledged that that was regrettable. However, a lapse of that sort cannot reasonably amount to a breach of the implied term, especially having regard to the fact that the Claimant did nothing to chase him.

When the Claimant raised these issues with Ms Wagstaff in November 2018, she questioned his commitment to the Respondent

96. I have already found that Ms Wagstaff did not question the Claimant's commitment to the Respondent; her enquiry was different in nature and quite innocent. This incident did not occur as alleged.

Ms Wagstaff told the Claimant that he was not doing enough to arrange exchanges with other drivers

97. I have found that Ms Wagstaff did criticise the Claimant in November for not using the mutual exchanges board, as well as the WhatsApp group, to arrange swaps with other drivers. I find that she had reasonable and proper cause for doing so: the Claimant wanted to be able to swap shifts but was not using one of the principal methods of doing so. The criticism was valid and the purpose of raising it was to encourage him to take a simple practical step to help resolve his difficulties.

Ms Wagstaff failed reasonably to consider the points raised by the Claimant in the conversation in November 2018

98. Ms Wagstaff did not fail in the way described; she was not in a position to do what the Claimant wanted her to do, which was to agree to a change to his shift pattern there and then. The point of the changes instituted by Mr Barton was that *ad hoc* decisions had been replaced by a more formal process. Ms Wagstafff provided him with the form on which to make a formal application. Had he completed it, his fresh request would have been considered in a detailed and orderly fashion. Ms Wagstaff cannot be blamed to the fact that he did not do so. The allegation fails on its facts.

The Claimant was informed on 2 December 2018 that Ms Wagstaff instructed Mr Keith Moss not to change the Claimant's duties

99. Ms Wagstaff did instruct Mr Moss not change the Claimant's duties, unless a swap could be found in the usual way. For the reasons I have already given, I conclude that there was reasonable and proper cause for her decision.

Ms Povey inform the Claimant on 7 December 2018 that he would not be paid sick pay in respect of his absence

100. Ms Povey did not tell the Claimant that he would not be paid sick pay; she said that she doubted whether he would receive sick pay, given that he had expressly said that he was not attending work because of childcare difficulties, rather than illness. She further qualified this by saying that he would have to speak to Ms Wagstaff about it. This incident did not occur as described.

On 7 December 2018 Ms Wagstaff told the Claimant that he would be paid neither SSP nor contractual sick pay for the period 4 to 14 December 2018

101. Ms Wagstaff did not tell the Claimant that he would not be paid SSP or contractual sick pay. She told him that an investigation would take place which would decide whether he would be paid sick pay. She did not indicate what she thought the outcome would be and she made no express reference to SSP. This incident did not occur as described.

Ms Wagstaff told the Claimant that a disciplinary meeting had been arranged for 10 December 2018 to consider whether his absence was genuine or predetermined

102. Ms Wagstaff did inform the Claimant that there would be a disciplinary meeting, but did not specify the date. Given that the Claimant had himself said that he was not attending work because of childcare responsibilities, rather than because of illness, this was plainly a matter which the Respondent was entitled to investigate. There was reasonable and proper cause for Ms Wagstaff's actions.

In the meantime, Ms Wagstaff told the Claimant that she was unable to accept his medical certificate

103. Ms Wagstaff did not tell the Claimant that 'she was unable to accept his medical certificate'. That suggests a definitive rejection, which she did not make. I have already found that Ms Wagstaff told the Claimant that his sickness certificate would not be processed until an investigation had taken place into the circumstances of his absence from work. Given that one possible outcome of the investigation was a finding that the Claimant was absent from work for reasons unconnected with his health, I consider that there were reasonable

grounds for not formally accepting the certificate until that issue had been determined. I conclude that she had reasonable and proper cause for her actions.

HR failed properly to communicate with Ms Wagstaff and to take forward the concerns raised by the Claimant in his complaints of 3 and 7 December 2018

104. I have already found that there was no unreasonable failure on the part of HR to take forward the concerns raised by the Claimant in his complaint of 3 December 2018. This allegation fails on its facts.

Conclusion: repudiatory breach

105. In respect of all the Claimant's allegations I have found either that they did not occur as alleged or, if they did, that the Respondent had reasonable and proper cause for acting as it did. Accordingly, there was no breach of the implied term of trust and confidence and the Claimant's claim of unfair (constructive) dismissal fails at the first stage.

Unauthorised deduction from wages

106. The Respondent has accepted that the Claimant was entitled to be paid SSP. At the point when proceedings were issued that payment had not been made. Although Mr Ludlow had no instructions to concede the point, I conclude that the Claimant's claim in respect of SSP must succeed. I deal with the position as to remedy below.

107. As for contractual sick pay, the Respondent did not exercise its discretion to award sick pay in the Claimant's favour before he resigned. The decision not to do so was reasonable in the circumstances: the true reason for the Claimant's absence had not been established, the Respondent had grounds for believing that it was not health-related and the Claimant resigned before the Respondent could determine the matter by investigation. No contractual sick pay was due to the Claimant on termination of his employment and, consequently, there was no unauthorised deduction from his wages.

Credibility

108. There is no doubt that the Claimant is a serious-minded, dedicated person, who took his work and family responsibilities equally seriously. There was no criticism at any stage of the quality of his work. Moreover, he approached the task of presenting his case in Tribunal with tenacity, but also with courtesy. However, as will be apparent from my findings and conclusions above, he gave some answers in the course of his evidence which, in my judgment, undermined his credibility as a witness of fact.

109. I do not think that the Claimant was seeking to mislead me, or was deliberately misrepresenting the position. I think it more likely that he was either confused, or had simply convinced himself after the event that something was true when it was not. Nonetheless this did affect the extent to which I felt able to rely on his evidence.

Remedy

110. The Respondent has paid the Claimant the sum of £103.27 in respect of SSP. The question of whether the Claimant accepts that that is the correct sum was not explored at the hearing. The Claimant must write to the Tribunal, marked for my attention and copied to the Respondent, by no later than 14 days from the date this judgment is sent to the parties, stating whether he accepts that was the correct sum. If he agrees, or does not reply, I will issue a further short judgment, making no order as to remedy. If he does not agree, he must give his reasons. The Respondent must write to the Tribunal within 14 days, setting out its position. I will then decide the issue on the papers.

Employment Judge Massarella
Date: 19 May 2020