EMPLOYMENT TRIBUNALS

Claimant: **Mr T Holloway**

Respondent: **Aura Gas Ltd**

Heard at: **In Chambers** **On: Monday 10 and Tuesday 11 August 2020**

Before: **Employment Judge Matthews**

Representation:
Claimant: **In Person**

Respondent: **Miss J Price of Counsel**

RESERVED JUDGMENT

1. Mr Holloway's complaint under section 23 of the Employment Rights Act 1996 is well founded.

2. The Company is ordered to pay Mr Holloway £6,373.60 in this respect. Any amount which the Company lawfully deducts from this sum by way of income tax, national insurance contributions or otherwise shall be treated to that extent as in payment of this order. In the absence of evidence (such as a pay slip) to substantiate the lawfulness and amount of any such deduction, the gross amount shall be due under this Judgment to Mr Holloway.

3. Mr Holloway was unfairly constructively dismissed by the Company.

4. The Company is ordered to pay Mr Holloway unfair dismissal compensation totalling £3,502.60, comprising a basic award of £1,837.50 and a compensatory award of £1,665.10.

5. The Recoupment Regulations do not apply.

6. Mr Holloway was wrongfully dismissed.

7 The Company is ordered to pay Mr Holloway £2,058.48 in this respect.

REASONS

INTRODUCTION

1. Mr Thomas Holloway claims that the Company owes him wages, being overtime for travelling. Mr Holloway also claims that he was unfairly constructively dismissed by the Company. Mr Holloway says that conduct of the Company amounted to a fundamental breach of the implied term of trust and confidence in the employment contract entitling him to resign and treat himself as unfairly constructively dismissed. The conduct relied on has been the subject of some debate because of discrepancies between the pleadings, the evidence and the reasons for resignation given in Mr Holloway's letter of resignation. This is dealt with below. For summary purposes it suffices to say that the alleged conduct Mr Holloway says he relies on was the aforementioned failure to pay wages, breaches of the Working Time Regulations 1998 in relation to the 48 hour week and rest breaks, bullying, health and safety breaches, failure to take a grievance he lodged seriously and a vindictive disciplinary investigation. Within the claim of unfair constructive dismissal is a claim for notice pay. Mr Holloway confirmed that, if his claim of unfair constructive dismissal were to be successful, he did not seek reinstatement or re-engagement.

2. The Company defends the claim. The Company says that no wages for travelling time are owing. Furthermore, there was no fundamental breach of contract and if there was, it was not why Mr Holloway resigned. If it was, Mr Holloway delayed too long before resigning and thereby affirmed the contract.

3. Mr Holloway gave evidence supported by a written statement. Mr Jason Eayrs (formerly a Heating Engineer with the Company) and Mr Callum Iheanacho (formerly an Apprentice Heating Engineer with the Company) both gave evidence by reference to a written statement, in support of Mr Holloway. Mr Holloway produced signed statements from Mr David Bulbeck (formerly a Technical Manager with the Company), Mr Bradley Curwen (formerly an Apprentice with the Company) and Mr Jamie Chapman (formerly a Service Engineer with the Company). None of these three appeared at the Hearing. Accordingly, the Tribunal read the statements but gave them little evidential weight. Mr Ian Morgan (the Company's General Manager), Ms Johanna Rivers (HR Consultant) and Mr Steve Mullins (Independent Business Coach) gave evidence on behalf of the Company. Each produced a written statement.

4. There were two agreed bundles of documentation (Bundles A and B). All references to pages are to pages of Bundle A unless otherwise specified. Mr Holloway produced a "Draft Statement of issues". The Company produced a chronology and cast list. Miss Price produced a comprehensive and cogent skeleton argument and spoke to it.

5. The Hearing was a remote hearing using the Common Video Platform consented to by the parties. A face to face hearing was not held because of the constraints placed on such hearings by precautions against the spread of Covid-19. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way. The Tribunal reserved judgment to better consider, in particular, the evidence.

6. In deciding this case it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal's findings are on the balance of probability taking account of the evidence as a whole.

FACTS

7. The Company specialises in the installation, servicing and repair of oil and gas boilers. It is a small business employing around twenty people and is based in Portsmouth.

8. Mr Holloway was employed by the Company, initially as an apprentice and later as a qualified Heating Engineer, from 15 January 2015 until he left on 13 September 2019. Mr Holloway reported to Mr Gary Robinson (Managing Director of the Company and its owner), at least in the early part of his time with the Company. As would be expected in a business of this size, Mr Robinson was the guiding hand.

9. It seems that Mr Holloway had a statement of terms and conditions of employment when he joined the Company. The Tribunal has not seen that. The Tribunal has been shown the "Statement of Terms and Conditions of Employment" bearing an issue date of 1 September 2018 with an employment commencement date of 5 January 2015 (the "Contract") (34-43). There is no dispute between the parties that, although unsigned, these were Mr Holloway's terms and conditions of employment from on or around 1 September 2015 until he left (subject to pay rises to £34,000 per annum).

10. The Contract can be referred to for its full content but included the following:

> *"Work location/base*

Your normal place of work is"….

"but you may need to travel to other locations as reasonably required in the performance of your duties."….

"Basic salary

Your basic salary will be £32,500 per annum"….

"Hours of work

Your normal hours of work will be 45 hours per week worked between 7.30am to 6.30pm Monday-Saturday with an unpaid ½ hour for lunch daily.

You are required to work in accordance with the working pattern from time to time notified to you by the Company.

However, because of business needs, you may be required to work such additional hours outside these hours to attend events etc. as may reasonably be required for the proper performance of your duties.

The Company reserves the right to change your start times or the length of your working day in line with the needs of the business by mutual agreement.

In accordance with the Working Time Regulations 1998, you will not be required to work in excess of, on average, a maximum of 48 hours per week."….

"Overtime

Overtime rate is as follows and are paid for all hours worked in excess of 45 per week. All overtime payments are paid one month in arrears.

Over Time = 1.5 Times your hourly rate."

11. The Contract mentions a Staff Handbook. The Tribunal has not been shown that.

12. The Company has a "Travel Allowance Policy" (160). It provides that some employees *"may"* be paid their hourly rate for *"each hour travelled in excess of their standard contractual hours and after the first hour of each journey made. Journey is defined as the time travelled from the employee's home to the first job and from the last job home. The first hour of each journey will be unpaid."* Whilst this is

not crystal clear, the intention was that employees would not be paid for up to an hour's travel at the beginning and up to an hour's travel at the end of a working day. In any event, this policy was not put in place until sometime after June 2019 and it is not the Company's case that it ever formed an express term of Mr Holloway's Contract.

13. Typically, Mr Holloway did not attend his specific *"normal place of work".* Rather, supplied with a van and tools, he would travel to customers' premises to do the work allocated to him and to suppliers to pick up parts. Usually Mr Holloway would attend several sites a day (see Morgan WS 9). Mr Holloway says (WS 2):

> *"Initially, my jobs were fairly local, it was expected to have approximately 30 minutes of travel time, which was often incorporated into contractual hours. It wasn't uncommon during summer months to have slightly earlier finishes."*

14. The Tribunal takes from this that, when Mr Holloway started with the Company, he was relaxed about being paid for a half hour of travel time each way at the start and end of a working day because it often fell within his contracted 45 hours or was made up for by early finishes in the Summer months.

15. Mr Eayrs' evidence was that, when he started with the Company (around 2014), he had a discussion at initial interview with Mr Robinson during which he had understood that the *"unofficial"* travel rule was that *"30 minutes travel each side of the day would be unpaid."* (WS 8).

16. In March and April of 2018 Mr Holloway was appraised (44-46). The appraisal was critical on a number of fronts. In a follow up letter to Mr Holloway on 3 April 2018, in the context of Mr Holloway's attitude, Mr Jez Smith (Technical Manager at the time) wrote (the letter included what appears to be Mr Robinson's reference):

> *"You're expected to usually be at the work place from 8.00am until 5.30pm, but flexibility is expected to suit the needs of the customers and the business. Travelling time is not included in this period and excessive travel is paid at over time rate."….*
>
> *"Whilst making these comments to you in your appraisal meeting your attitude and behaviour were rude and arrogant to say the least. At one point you actually crossed your arms just shrugged your shoulders. Constructively it would have been better for everyone involved for you to use a more mature approach."*

17. Mr Holloway says (WS 5 and 6):

> *"5. Progressively over time, the distance of travel to work increased. It was known for me to travel up to 5-6 hours per day additionally to my contracted hours. We no longer had earlier finishes to counteract this. Initially, I did not check my payslips thoroughly enough to realise I wasn't being paid anything additional to my salary.*
>
> *6. In October 2018 Michael Rees, my colleague, informally notified me that Gary had changed our unofficial travel rules which resulted in the first and last hour of travel for work to be carried out unpaid. He also informed me that this had been in place for approximately 1 year already by this point."*

18. Mr Holloway asked the Company's Administrator, Ms Angela Orme, about this. Ms Orme told him that it had always been the case that the Company did not pay the first and last hour of travelling time in a working day.

19. Mr Holloway took this up with Mr Robinson. There was an e-mail exchange on 15 October 2018 (46B). Mr Robinson wrote:

> *"As had always been the case you give an up to an hour each day for travelling above the working day. Above this time is counted towards your weekly hours. When you work over 45 for the week this is overtime paid.*
>
> *Travel is definitely not included in your working day and we do not pay you to travel unless over the hour."*

20. Around a fortnight later, on 7 November 2018, following a meeting between them on 30 October 2018, Mr Robinson sent a further e-mail to Mr Holloway (and others) (46A). It referred to his earlier e-mail and included this:

> *"It appears that my email below has a typo and it says days rather than way."….*
>
> *"The terms are standard and inline with other businesses in our industry and for this reason I would not look to revisit the structure. In fact, I am aware of some businesses that actually make no allowance irrespective of the job location."….*

21. Whilst matters appear to have rested at that for six months or so, there is an indication that they continued to bubble in the background. In a May 2019 Appraisal Mr Holloway listed payment for travel as

something that could be improved (52). The Appraisal generally reflects Mr Robinson's lack of satisfaction with Mr Holloway's performance (54).

22. In early June 2019, shortly after the May appraisal, Mr Morgan was asked by Mr Robinson (see Morgan WS 4) to investigate a number of concerns about Mr Holloway. These were set out in a letter (including Mr Robinson's reference) Mr Morgan wrote to Mr Holloway on 10 June 2019 (56). They were Mr Holloway's refusal to work his contractual hours, falsifying time sheets, dragging out jobs and not completing *"reasonable requests of work tasks".* Mr Holloway was required to attend an investigatory meeting on 18 June 2018.

23. The next day, 11 June 2019, Mr Holloway wrote to Mr Martin Cornell (Technical Manager with the Company) setting out a number of formal grievances (57-59). Mr Holloway writes:

> *"I drafted this letter some time ago but due to the shocking letter I received today with false claims, I feel compelled to send this to you immediately."*

24. In summary, the grievances were these. First, pay for travel time. Mr Holloway writes:

> *"When I first began working for the company I was told that one hour would be deducted from my working hours for travel."*
>
> Mr Holloway goes on to relate what happened after October 2018 when Mr Rees told him about the two hours of unpaid travel and then adds:
>
> *"The contract does not allow for the deduction of 2 hours travel time and clearly states that once I have worked 45 hours I am entitled to be paid overtime. I would like to be paid all of the overtime that I am owed."*

25. Second, that the Company had unilaterally reduced Mr Holloway's overtime rate from double time to time and a half. (Subsequently clarified at a meeting on 20 June 2018 with Mr Morgan as a grievance about double time on Sundays and Bank Holidays (69)). Third, Mr Holloway writes:

> *"3, Unfair distribution of work*
>
> *Almost all of the jobs that are located near to the office are given to other people and generally I am always given the job that involves the furthest distance. This has hugely*

> *increased since I dared to challenge Gary Robinson on the hours that I was working in early May of this year. This considerably increases the strain on me and exacerbates the travel time issue as outlined above."*

26. Fourth, Mr Robinson was undermining Mr Holloway by turning up to check on his work and an apprentice had been stopped from accompanying Mr Holloway on jobs. Fifth, an over allocation of jobs to all the engineers given the time available. Sixth and last, Mr Holloway complained of the way Mr Robinson treated him in face to face meetings.

27. The disciplinary investigation meeting duly took place on 18 June 2018. Ms Orme took a note (61-65). It was agreed that Mr Holloway's grievances would be addressed separately.

28. On 19 June 2018, Mr Morgan wrote to Mr Holloway concerning how Mr Holloway's grievances would be addressed (66). This and other such letters appear to have included Mr Robinson's reference.

29. On 20 June 2018 Mr Morgan and Mr Holloway had an exploratory meeting concerning the grievance. Ms Orme was present to take the note at 67-74. During the course of the meeting the following exchange between Mr Morgan and Mr Holloway regarding pay for travelling time is recorded (68):

> *"IM: Can you just confirm when you found out about the change.*
>
> *TH: October 2018 by Mike Rees, Mike had said it had been that way for around a year. I had not been informed of any changes and use to be one hour then changed to two hours."*

30. The note records that the outcome Mr Holloway wanted in respect of his grievance about pay for travel was to be paid what was owed to date and in the future.

31. The meeting moved on to explore the other grievances.

32. Mr Morgan now produced a report on the disciplinary investigation (76-80). Time sheet discrepancies were found. There was no evidence of a refusal to work contracted hours. Mr Holloway had refused jobs on the ground that he had completed his working hours. Mr Holloway had had job overruns at a level in excess of that attributable to other heating engineers. The report concluded *"Formal action written warning".* That is surprising, given that no formal disciplinary hearing had yet been held. In any event, the report ended

by noting that there should be a formal disciplinary meeting conducted by an external individual.

33. On 14 July 2019 Mr Morgan produced a report on the grievance process (81-85). The pay for travel time issue had been referred to the Company's solicitors for advice. Mr Holloway had signed a replacement contract of employment in August 2018 which clearly laid out the overtime rate. Work distribution was not in Mr Robinson's hands, but those of Mr Ashley Hillman and, by implication, was fair. Mr Robinson had only visited Mr Holloway on site once in six months and there was nothing undermining about that. There was no undue pressure to complete jobs in an unreasonable time frame. There was no evidence that Mr Robinson's treatment of Mr Holloway was intimidatory. Mr Morgan ended by recommending that the Company put in place a formal policy on pay for travel. Mr Holloway's working hours were to be monitored to ensure that he did not exceed the 48 hour week unless he signed an opt-out. Again, these conclusions are somewhat surprising given that there had been no formal grievance hearing.

34. Mr Morgan wrote to Mr Holloway on 11 July 2019 (86). Mr Holloway was invited to a grievance hearing. The hearing was to be taken by Ms Rivers with Mr Morgan and Ms Orme in attendance. Mr Morgan enclosed a copy of his report.

35. The grievance hearing took place on 25 July 2019. Ms Orme's note is at 90-94. Mr Holloway was accompanied by Mr Chapman. Although Mr Morgan's report had already drawn conclusions on the grievances, there is no reason to suppose that Ms Rivers approached them with anything other than an open mind. As far as the core issue of pay for travel time was concerned, Ms Rivers drew the distinction between travel time counting towards working time for the purposes of the Working Time Regulations (although not necessarily counting as paid time under the National Minimum Wage Regulations 2015) and entitlement to contractual pay for that time.

36. On 29 July 2019 Ms Rivers wrote to Mr Holloway rejecting his grievances and giving clear and comprehensive reasons for doing so (95-99). There had been some further investigation (for example a limited staff survey concerning Mr Holloway's allegations about Mr Robinson's intimidatory behaviour) but, in essence, Ms Rivers' reasons were those Mr Morgan had set out in his report. Ms Rivers did find, however, that Mr Holloway's working hours had exceeded 48 a week over a 17 week reference period without an opt out (WS 12). This was to be addressed in a meeting between Mr Morgan and Mr Holloway. That meeting never took place although Mr Morgan says that Mr Holloway's hours were thereafter managed to ensure they did

not exceed 48. Mr Mullins confirmed this to be the case and that the hours had not exceeded 48 in his later grievance appeal outcome letter. Mr Holloway for the record, does not agree.

37. The upshot of this was something of a stalemate. Mr Holloway's position was that, if the Company resolved the pay for travel time grievance in his favour, then he would choose to sign an opt out from the 48 hour week.

38. As he had been invited to do, Mr Holloway appealed against this outcome in a letter dated 1 August 2019 (100). There were two main grounds to the appeal. The first was on the findings about pay for travel. Mr Holloway disagreed with the findings and pointed out that 10 hours unpaid travel a week would mean he was working outside the 48 hour working week (that is, 45 contractual hours and 10 hours travelling). Second, Mr Holloway did not feel that the issue of Mr Robinson's behaviour had been adequately investigated. Mr Morgan responded on 15 August 2019 setting up an appeal hearing to be chaired by Mr Mullins (103).

39. The appeal hearing took place on 21 August 2019. Mr Holloway was accompanied by Mr Terry Abbott and Ms Orme's note is at 107-111. Again, despite the conclusions in Mr Morgan's report on the grievances, there is no reason to suppose that Mr Mullins did not approach matters with an open mind. More or less the same ground was gone over as had previously been covered with Ms Rivers as far as pay for travel was concerned. The following is recorded:

> *"SM: Do you accept the first hour from home to the job and the first hour from the job to home are for working purposes and are not paid.*
>
> *TH: Yes, need to be included in working week and accepted not paid."*

40. At first sight this might be read as Mr Holloway agreeing to the proposition that two hours travelling time a day would be unpaid. What he is in fact saying is that, if those two hours fall within the 45 contractual hours, no further payment is due. If that had not been the case Mr Mullins, no doubt, would have capitalised on it.

41. Mr Mullins went on to probe, in more detail than had been the case earlier in the process, Mr Holloway's grievance concerning Mr Robinson's behaviour.

42. On 11 September 2019 Mr Mullins wrote to Mr Holloway rejecting his appeal (118-121). Mr Mullins' findings on the issue of travel time are set out verbatim below because they appear to the Tribunal to be the

clearest contemporaneous written explanation of the Company's stance on the issue.

> *"As you are already aware, there is no legal requirement to pay mobile workers for the time spent travelling from their home address to the first job and from their last job home.*
>
> *At the hearing you understood that Aura Gas had a duty to record the time that you spend traveling and whilst this does form part of the hours worked, in accordance with the Working Time Regulations, this time does not need to be paid.*
>
> *The Company has a policy regarding travel time which has been in force for a number of years and applies to all mobile workers. In essence, for each day worked, the first hour spent travelling from home to the first job and the first hour spent travelling from the last job home will not form part of the employees weekly contracted working hours and is not paid. Additional time spent travelling, above the two hours on any given day, will form part of the employee's contractual hours and will be paid either as part of your salary or overtime, if it exceeds the weekly 45 hours.*
>
> *You did not agree that this had been in force for a number of years, however, you did explain that it had been brought to your attention approximately a year and a half ago (February 2018)."* [Note: Mr Mullins appears to have calculated this from a comment by Mr Holloway that he had found out about the change *"1-1½ years ago"*. Other evidence now available to the Tribunal points to this having been in October 2018]. *"You raised this as an issue in October 2018 and at the hearing you helpfully provided me with the email correspondence between yourself and Gary Robinson. Whilst I concede that Gary's e-mail dated 15th October 2018 did state that the first hour spent travelling each day would not be paid, this was clearly a clerical error which was quickly rectified in the further email that was sent to you on 7th November 2018. This email did not change the fact that in practice, all mobile workers pay was being calculated in accordance with the Company's travel time policy, which had already been in force for a considerable amount of time by the time you had raised this matter with Gary.*
>
> *We also considered your current contract of employment which was signed and dated in August 2018. Your*

companion expressed his view that your contract states that if you work in excess of 45 hours, you will be paid.

To identify whether a mobile worker has worked above their contracted 45 hours per week, the Company must first apply the travel time formula, (as outlined above). That time is discounted and does not form part of your contracted hours for pay purposes. Whilst this may not be explicitly stated in the contract, it is how pay has been calculated for a number of years. In the event that you have worked more than 45 hours, after the travel time formula has been applied, then those hours would of course be classified as overtime and would be paid.".

43. Mr Mullins dealt with the matter of Mr Holloway's working time exceeding the 48 hour week as a separate issue. There is a somewhat unsatisfactory suggestion that past overruns in Mr Holloway's working week were covered by an implied term. That, of course, cannot be right or there would be frequent arguments about the need for specific opt outs. In any event, on the Company's calculations, Mr Holloway's working time had not exceeded 48 hours a week over a 17 week reference period. Going forward, Mr Holloway was assured that he would not be required to work in excess of a 48 hour week without an opt out.

44. Mr Mullins' letter concluded by explaining his reasons for rejecting Mr Holloway's appeal concerning Mr Robinson's behaviour towards him.

45. In the meantime, probably with foreknowledge of the outcome of the grievance appeal and prompted by Mr Robinson, Mr Morgan pursued the disciplinary issues. Mr Morgan conducted a further investigatory meeting with Mr Holloway on 10 September 2019 (the day before the date of Mr Mullins' grievance appeal outcome letter). Ms Orme's note is at 112-117.

46. The purpose of the meeting was to investigate further instances that might support the original headings of investigation. The process was already flawed by the interim conclusions drawn by Mr Morgan in his report of 4 July 2018 and on the balance of probabilities, this new step was the continuation of a directed campaign to either make Mr Holloway give in on the back pay and working time issues he was pursuing or to find grounds to dismiss him because he was making a nuisance of himself. It was probably a mixture of all of these. Mr Mullins appears to have been alive to the issues this might raise in his appeal outcome letter when he wrote *"It is of course your right not to work more than an average of 48 hours a week. If this is your position then the Company will ensure that this is adhered to moving forward*

and by way of reassurance, you will not be subjected to any detriment as a result." The Tribunal thinks it unlikely that the mention in Mr Mullins' letter was directly linked to the disciplinary investigatory meeting the day before. The appeal outcome letter had probably existed in draft form for some time. However, Mr Mullins presumably had the possibility of a claim against the Company under section 101A of the Employment Rights Act 1996 in mind. (No such distinct claim is, of course, before this Tribunal.) It seems that Mr Robinson and Mr Morgan on the one hand may not have been entirely in tune with Mr Mullins on the other.

47. Further developments on the disciplinary front were pre-empted by Mr Holloway's letter of resignation dated 13 September 2019 (123). It should be referred to for its full effect but it included this:

> *"It is with great regret that I feel that you have forced me to resign my position as Gas & OFTEC Oil Engineer with Aura Gas Ltd.*
>
> *Your actions in refusing to take my grievance serious or reduce the excessive hours (including travel time) you have been forcing me to work. Which has been putting mine and others health and safety at risk coupled with this latest vindictive disciplinary investigation has made my position untenable.*
>
> *This latest investigation into my work has no justifications as you know and I believe has been done just to harass and victimise me for standing up for my rights. This has put me under extreme stress and I have now lost all trust and confidence in being treated in a fair and equitable way by yourself.*
>
> *This is the final straw in a long running issue and you have forced me to hand in my notice with immediate effect as off today Friday the 13th September 2019."*

48. The following Monday, 16 September, Mr Robinson wrote to Mr Holloway accepting his resignation (124-125). Mr Holloway was obliged to account to the Company for £2,697.10 in accordance with an undisputed contractual obligation to repay 100% of two course fees, should Mr Holloway leave within a certain time span. This was eventually dealt with as set out in a letter from Mr Morgan to Mr Holloway on 27 September 2019 (132).

49. The Tribunal understands that Mr Holloway started work elsewhere almost immediately. Mr Holloway's new rate of pay was comparable with or better than that he had enjoyed with the Company.

50. It was Mr Morgan's evidence that the Company's practice of not paying for up to an hour of travel at each of the beginning and end of the day was (WS 14) *"fair, applied uniformly and an industry standard."* In his oral evidence to the Tribunal Mr Morgan said that he had come across this practice elsewhere in the sector. In contrast, in his oral evidence to the Tribunal, Mr Eayrs, an experienced and senior heating engineer with working experience in similar businesses, said that the Company was the only employer he had come across that did not treat travel time as paid time.

APPLICABLE LAW

51. Section 13 of the Employment Rights Act 1996 (the "ERA"), so far as it is relevant, provides:

> *"**13 Right not to suffer unauthorised deductions***
>
> *(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."

52. Section 23 of the ERA, so far as it is relevant provides:

*"**23 Complaints to employment tribunals***

(1) A worker may present a complaint to an employment tribunal –

(a) that his employer has made a deduction from his wages in contravention of section 13"….

"(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint."

53. Section 24 of the ERA, so far as it is relevant, provides:

*"**Determination of complaints***

"(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer –

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13"

54. Section 27 of the ERA, so far as it is relevant, provides:

*"**27 Meaning of "wages" etc***

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including-

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,"

55. Section 94 of the Employment Rights Act 1996 (the "ERA") provides an employee with a right not to be unfairly dismissed by his employer. For this right to arise there must be a dismissal.

56. Section 95(1) of the ERA, so far as it is relevant, provides:

> ***"95 Circumstances in which an employee is dismissed***
>
> *(1) For the purposes of this Part an employee is dismissed by his employer if"….*
>
> *"(c) the employee terminates the contract under which he is employed (whether with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

57. The general principles relating to unfair constructive dismissal are well understood. An employee is entitled to treat himself or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The breach may be actual or anticipatory. The employee in these circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him or her to leave at once. The employee must act promptly in response to the employer's actions (and not for some other reason, although the employer's actions need not be the sole cause) or he risks waiving the breach and affirming the contract.

58. It is clearly established that there is implied in contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. Where a claim is founded on a breach of this implied term, the tribunal's function is to look at the employer's conduct as a whole and determine, objectively, if it is such that the employee cannot be expected to put up with it.

59. The burden of proving a breach of contract sufficient to support a finding of unfair constructive dismissal is on the claimant.

60. The Tribunal was referred to Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 and Chandhok v Tirkey [2015] IRLR 195.

CONCLUSIONS

61. **The claim for wages**

62. Mr Holloway's claim is to be paid for time he spent travelling outside his contractual 45 hour working week.

63. As a preliminary point, Mr Holloway's contractual working week included, on the face of the Contract, an unpaid half hour break for lunch each day. That means that Mr Holloway's contractual working week was 47.5 hours.

64. On the face of the Contract, Mr Holloway was required to work the 47.5 hours a week, for which he received his salary. Beyond that the Contract made provision for overtime at the rate of time and a half.

65. So far, these conclusions are common ground between the parties (save that Mr Holloway may not agree that lunch breaks should be taken into account in this way).

66. The Company, however, says that there was an implied term that Mr Holloway would not be paid for *"the first hour spent travelling from home to the first job and the first hour spent travelling from the last job home"* (Mr Mullins' words).

67. If that is right, Mr Holloway's core contractual working week could have amounted to a maximum of 55 hours (or 57.5 hours if the lunch break is counted).

68. The issue of understanding what, if any, wages were due for travel time has been complicated by the interaction of the contractual position and the 48 hour week provided for by the Working Time Regulations. The Working Time Regulations do not have a bearing on the issue of wages in this context. It is a contractual matter of what wages were due under the Contract. The only bearing the 48 hour week has on this issue is that the contractual provision that Mr Holloway would not be required to work, on average, more than 48 hours a week, does not sit well with the Company's case that Mr Holloway was contractually obliged to work up to a maximum of 55 (or 57.5) hours a week by virtue of up to 10 hours unpaid travel time. (The Company concedes that any such travel time was working time under the Working Time Regulations.)

69. A term will only be implied if the Tribunal can presume that it would have been the intention of the parties to include it in the agreement. The Tribunal must be satisfied that the term is necessary in order to give the contract business efficacy, or it is the normal custom and practice to include such a term in contracts of that particular kind, or an intention to include the term is demonstrated by the way in which

the contract has been performed or the term is so obvious that the parties must have intended it.

70. Business efficacy

71. There is a general presumption that the parties to a contract intended to create a workable agreement. A term may only be implied on this basis if it is necessary to make the agreement workable as a whole. That cannot be said of this case. The Contract was perfectly workable without unpaid travel time. When travel time fell within the contracted hours it was covered by Mr Holloway's salary. Where it did not there was provision for overtime.

72. Custom and practice

73. Terms may be implied into employment contracts if they are regularly adopted in a particular trade or by a particular employer. The traditional test is that the custom must be reasonable, notorious and certain. It must be fair and not arbitrary or capricious, it must be generally established and well known and it must be clear cut.

74. As far as the implied term asserted by the Company being custom and practice in its trade is concerned, the evidence is mixed. Mr Eayrs says he has never come across it outside the Company. Mr Morgan says it operated when he worked for a previous employer. The point is this. The term cannot be custom and practice unless it is, at least, regularly adopted in businesses like the Company's. The Tribunal has no reason to question Mr Eayrs or Mr Morgan's evidence on the point and the only conclusion open to it on that basis is that the Company (which seeks to rely on the implied term) has not made out its case that it is custom and practice in like businesses. Even if it had, what is the term? Is it two hours unpaid travel time or some other period of travel time? The Tribunal will return to this below.

75. Conduct of the parties

76. A term may be implied if the conduct of the parties is such that it suggests that it exists even though it has not been expressly agreed. This, to some extent, overlaps with the custom and practice considerations above in that there may be a custom and practice within the Company itself. Strictly speaking, it is the intention of the parties when the contract was first made that matters. However, in this case we know that a fresh statement of terms and conditions was agreed in or around September 2018.

77. The Company's position on this, in essence, is that the term had operated consistently since Mr Holloway joined the Company. An

obvious difficulty with that, however is what term? The evidence presents a confusing picture.

78. At the outset of the employment relationship, Mr Holloway had proceeded on the basis that travelling time was covered by pay for his basic working week. There might have been times when it was not but they were made up for by early finishes on other occasions (paragraph 13 above). Mr Eayrs says that he was initially told there was a half hour at each of the start and end of a working day that was unpaid (paragraph 15 above). Mr Smith's letter of 3 April 2018 is not specific (paragraph 16 above). There is no evidence that it was explained to Mr Holloway, either at the outset of his employment or prior to him signing the Contract around September 2018 that he was expected to travel for up to two hours in each working day on an unpaid basis. Mr Holloway found out about that from a work colleague in or around October 2018 (paragraph 17 above). Mr Holloway immediately took it up with Ms Orme and Mr Robinson. Mr Robinson at first indicated that the practice was one hour of unpaid travel a day and shortly afterwards corrected this to two hours. In his grievance on 11 June 2019 Mr Holloway wrote that *"When I first began working for the company I was told that one hour would be deducted from my working hours for travel."* (paragraph 24). Later, the notes of the grievance meeting record that Mr Holloway, when asked about when he had heard about a change from one to two hours of unpaid travel, said: "*October 2018 by Mike Rees, Mike had said it had been that way for around a year. I had not been informed of any changes and use to be one hour then changed to two hours."* (paragraph 29).

79. It is the Company that seeks to rely on an implied term and it is for the Company to show the Tribunal what that was. Putting the Company's case at its highest, there is evidence that there may have been some understanding about unpaid travel but the Tribunal cannot pin down what it was. In the absence of certainty as to what it was, there can be no implied term.

80. A difficulty for Mr Holloway in this regard is that it seems that he was always paid on the basis that up to two hours travel time a day (up to an hour at each end) was unpaid. Notwithstanding, the Company says, Mr Holloway did nothing until he heard about it from a colleague in October 2018. Mr Holloway's answer is that he thought his overtime payments were low but did not question them. Also, Mr Holloway's evidence was that, certainly to start with, travel time fell within his contracted hours. The Tribunal is aware that it is not uncommon for employees to accept their payslips at face value and it appears this is what happened here until Mr Holloway was put on express notice of the practice by Mr Rees in October 2018.

81. We know that thereafter, up until the time Mr Holloway left the Company, the Company operated that practice. The Company therefore argues that, even if it had not been an implied term originally, Mr Holloway affirmed it by continuing to work and accept pay. That, however, cannot be the case in circumstances where it had continued to be an issue. Mr Holloway raised it as such (in his appraisal in May 2019 and subsequently in his written grievance on 11 June 2019, which had been in draft for a while). In effect, Mr Holloway had worked under protest in respect of the practice.

82. The Tribunal's conclusion is that the term cannot be implied by the conduct of the parties. It was uncertain until it was finally clarified by Mr Robinson in his email of 7 November 2018 and, thereafter, Mr Holloway did not affirm it by his conduct.

83. Obvious term

84. Can the term be implied because it is so obvious that it goes without saying? There is no basis on which it can be said that is the case. On the evidence it would not have seemed obvious to the parties either at the time Mr Holloway started with the Company or in or around September 2018 when the Contract came into effect.

85. Conclusion

86. Mr Morgan allowed that the terms of an employee's remuneration are key in a contract of employment. The onus is on the Company to be clear on this. In this case there is no implied term that assists in interpreting how travel time should be paid. In the absence of that, the parties must resort to the express terms of the Contract. They are that Mr Holloway was paid a salary for a 45 hour working week. There was an unpaid half hour lunch break each working day. Beyond that, any work was to be paid for at overtime rates including travel to and from jobs and suppliers. Because that work (travel time) was not paid for, there was a deduction from wages and no authority in the form of an implied term to regularise that.

87. Mr Holloway is owed £6,373.60 (gross) in this respect. That sum was agreed between the parties as the sum owing on the basis that Mr Hollaway is owed for travel time above his contractual hours of 47.5 a week calculated for the period of two years ending with the date of presentation of the claim. That is the basis on which the Tribunal finds that Mr Holloway should be paid in respect of his claim for wages for travel time.

88. **The unfair constructive dismissal claim**

89. Why did Mr Holloway resign?

90. When, as in this case, an employee resigns and goes seamlessly to another job the question arises: "Was the principal reason for the employee's resignation that the employee had found another job?" In this case the long dispute over pay for travel, coupled with the grievance lead the Tribunal to the conclusion that the new job was a result of the decision to resign and not its cause.

91. Mr Holloway's letter of resignation gave his reasons for leaving as the Company not taking his grievance seriously, not reducing his working hours to 48 a week and a vindictive disciplinary investigation. By referring to his grievance, Mr Holloway brought most of the issues between the parties into play as reasons for his resignation. Each will be dealt with below.

92. <u>The Company's assertion that Mr Holloway could be required to work up to two hours unpaid travel time in a working day (the "travel pay issue")</u>

93. On the facts, this was a significant issue between the parties from at least October 2018. It was never addressed to Mr Holloway's satisfaction and was clearly one of, if not the main, reason for his resignation.

94. <u>Alleged breaches by the Company of Mr Holloway's right under the Working Time Regulations to work no more than a 48 hour week (the "working time issue")</u>

95. At the time Mr Holloway resigned his view was that the Company was still forcing him to work more than a 48 hour week over a 17 week reference period. Whilst this overlapped with the travel pay issue it did contribute to Mr Holloway's decision to resign.

96. <u>Bullying by Mr Robinson (the "bullying issue")</u>

97. Again, the evidence is that a factor in Mr Holloway's decision to resign was his view that he had been bullied by Mr Robinson.

98. <u>Health and safety breaches by the Company</u>

99. The Company was rightly sensitive about this issue during the hearing. The health and safety of employees is a paramount consideration for employers. On the facts, however, there is nothing that would lead the Tribunal to conclude that Mr Holloway resigned because of breaches of health and safety regulations in the workplace by the Company. Passing mention of health and safety in Mr Holloway's letter of resignation and to some incidents in the course of the grievance process does not get there. Mr Holloway's

claim during the hearing that this was an issue is not supported by the evidence and does him no credit.

100. Failure to take Mr Holloway's grievance seriously

101. If Mr Holloway meant by this that the Company did not give serious consideration to his grievances, then that is demonstrably wrong. It seems plain that what Mr Holloway was getting at was that the outcomes to the grievances were not what he wanted. That is a subset of the issues themselves, dealt with under the other headings of why Mr Holloway resigned.

102. The allegation that the disciplinary issue was vindictive (the "vindictive disciplinary investigation issue")

103. The evidence is that this was one of the reasons that Mr Holloway resigned. Certainly, the disciplinary investigation launched on 10 June 2019 had prompted Mr Holloway to put in his grievances on the following day and he described the disciplinary allegations as *"shocking".*

104. Did the travel pay issue, the working time issue, the bullying issue and/or the vindictive disciplinary investigation issue individually or cumulatively, amount to a breach or breaches of the contract of employment by the Company going to the root of the contract of employment? In other words, was there a fundamental breach of contract entitling Mr Holloway to resign and treat himself as constructively dismissed?

105. The travel pay issue

106. The Tribunal has found that the Company failed to pay Mr Holloway in accordance with his Contract. A significant failure to pay wages due under a contract of employment may be, of itself, a fundamental breach of contract without reference to its effect on trust and confidence. That is what happened here, but it can equally be seen as going to trust and confidence.

107. The working time issue

108. Here, the Tribunal accepts Mr Mullins' finding that Mr Holloway had not, latterly, worked in excess of a 48 hour week. This issue was not of itself nor did it contribute to any fundamental breach of the implied term of trust and confidence.

109. The bullying issue

110. There is evidence in both directions on this issue. In short, however, there is nothing on which the Tribunal could conclude, on a balance of probabilities, that Mr Holloway was bullied by Mr Robinson as such. The Tribunal cannot conclude that there was a fundamental breach of contract here.

111. <u>The "vindictive disciplinary investigation issue"</u>

112. On the balance of probability on the evidence, the Tribunal finds that the instigation and control of the disciplinary investigation was under the overall direction of Mr Robinson. In a Company of this size with a proprietor/managing director it would be surprising if it were otherwise. Mr Holloway had had critical appraisals in the past and was making a stand on the travel pay issue, no doubt of some financial consequence to the Company. On the balance of probability, Mr Robinson wanted to make life uncomfortable for Mr Holloway, if not to dismiss him. The Tribunal does not know if the disciplinary investigations were justified. They may have been. Notwithstanding, the coincidences and pointers are such that the Tribunal concludes that the investigation was, at least in part, prompted by Mr Holloway's stance on travel pay and the perception (right or wrong) that his attitude was not what the Company wanted. To that extent, the investigation was "vindictive". Behaviour of this sort does go to the issue of trust and confidence.

113. On the evidence, the principal reason for Mr Holloway's resignation was the travel pay issue. That, in itself, amounted to a fundamental breach of contract and to a fundamental breach of the implied term of trust and confidence in Mr Holloway's contract of employment with the Company. The other issues figured less in Mr Holloway's decision to resign. The Tribunal has found no breach of the implied term of trust and confidence in the working time and bullying issues. However, if it is needed, the vindictive disciplinary investigation issue was also a breach of the implied term of trust and confidence.

114. The timescales are such that it cannot be said that Mr Holloway delayed too long in resigning, thus affirming the contract of employment. Mr Holloway had more or less consistently pursued the issue of travel pay and resigned almost immediately he received the Company's final decision on that subject in Mr Mullins grievance appeal outcome letter.

115. Mr Holloway was unfairly constructively dismissed by the Company.

116. As far as remedy for the unfair constructive dismissal is concerned, Mr Holloway does not claim continuing loss. Mr Holloway claims a basic award (agreed between the parties at £1,837.50). Mr Holloway

also claims notice pay as a result of his wrongful dismissal in breach of contract. Mr Holloway was wrongfully dismissed. The quantum of this is agreed as £2,058.48. The Company says this is subject to mitigation. However, since the Company was in clear breach of contract, Mr Holloway is entitled to that sum as compensation for the pay he would have received had he been lawfully dismissed.

117. Mr Holloway also claims a sum equal to the course fees he repaid on leaving the Company. The quantum of this is agreed between the parties as £2,697.10. £1,665.10 of this was in respect of a course where Mr Holloway's obligation to repay would have expired within a few weeks of his resignation. The Tribunal finds that, but for the unfair constructive dismissal, that obligation to repay would have expired. Mr Holloway is, therefore entitled to recover that sum from the Company. The obligation to repay the balance of £1,032 had well over a year to run. This employment relationship was in trouble and the Tribunal concludes that it would probably have ended in any event before the expiry of the obligation to repay. That second sum, is not, therefore recoverable by Mr Holloway.

Employment Judge Matthews

Date: 18 August 2020

Judgment sent to parties: 21 August 2020

FOR THE TRIBUNAL OFFICE