EMPLOYMENT TRIBUNALS

Claimant: Mr S Moss

Respondent: Isringhausen GB Limited

Heard: by video **On:** 19, 20, 21 & 22 April 2021

Before: Employment Judge S Jenkins

Representation
Claimant: Ms L Halsall (Counsel)
Respondent: Ms C Williams (Counsel)

RESERVED JUDGMENT

The Claimant's claim of unfair dismissal fails and is dismissed

REASONS

Background

1. The hearing was to consider the Claimant's claims of constructive unfair dismissal and constructive wrongful dismissal, following his resignation without notice on 8 January 2019.

2. I heard evidence from the Claimant on his own behalf and from Ms Andrea Teese, HR Manager; and Mrs Frances Trousdale, HR consultant; on behalf of the Respondent. A large bundle of documents, spanning 1487 pages, was produced to me, and I read those pages to which my attention was drawn. I also listened to recorded extracts of a meeting totalling approximately nine minutes in length.

Issues and law

3. The issues to be determined in this case had been set out by Employment Judge Ryan in a summary issued following a preliminary hearing on 3 December 2019. They were as follows.

11. Constructive unfair dismissal & wrongful dismissal

a. Was the claimant constructively dismissed?

i. Did the respondent breach an expressed term (written or oral) of the employment contract and/or did the respondent breach the implied term of mutual trust and confidence, i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?

ii. If so, did the claimant "affirm" the contract of employment before resigning? (To "affirm" means to act in a manner that indicates the claimant remains bound by the terms of the contract.)

iii. If not, did the claimant resign in response to the breach of contract (was the breach a reason for the claimant's resignation — it need not be the only reason for the resignation)?

b. If the claimant was dismissed, they will also have been wrongfully dismissed, it they resigned without notice.

c. The conduct the claimant relies on as breaching trust and confidence is to be listed by the claimant in a document to be sent to the tribunal and the respondent which was, and will be below, referred to as "further and better particulars"; this will be a numbered list of dates and allegations as opposed to a witness statement or narrative account. Where individuals are quoted or referred to they shall be named in that list.[1]

d. If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with Section 98(4) ERA, and, in particular, did the respondent in all respects act within the "band of reasonable responses"?

12. Remedy for unfair dismissal

(i) If the claimant was unfairly dismissed and the remedy is compensation:

a. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed? [See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];

[1] The Claimant subsequently provided such a document on 19 December 2019.

b. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to Section 122(2) ERA; and if so to what extent?

c. Did the claimant, by blameworthy or culpable actions, cause or contribute to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to Section 123(6) ERA?

4. In terms of the underlying legal principles, the concept of constructive dismissal was outlined by Lord Denning in Western Excavating (ECC) Ltd v Sharp [1978] Q.B. 761, where he stated:

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

5. There are three essential questions to be asked in a constructive dismissal claim:

(i) Has there been a significant, i.e. fundamental, breach of contract by the Respondent?
(ii) If so, did the Claimant resign in response to that breach?
(iii) Was there any affirmation of that breach, such that the Claimant should be considered to have waived it?

6. Much more recently, the Court of Appeal has revisited the approach to be undertaken in constructive dismissal cases, in the case of Kaur v Leeds Teaching Hospitals [2018] EWCA Civ 978, particularly in the context of resignations arising from the alleged conduct of the employer over a period of time, and set out five relevant questions as follows.

i. 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?

ii. Has he or she affirmed the contract since that act?

iii. If not, was that act (or omission) by itself a repudiatory breach of contract?

iv. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)

v. Did the employee resign in response (or partly in response) to that breach?

7. In this case, the Claimant is pursuing his claims on the basis that there were breaches of express terms, but also, fundamentally, that there were breaches of the implied term of trust and confidence. The scope of that term was clarified by the House of Lords in Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 as follows:

> "*The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.*"

8. The Claimant asserted that the fundamental breach arose from a course of conduct, culminating in a "last straw" in the form of the Respondent's approach to a meeting on 4 January 2019. In that regard, the Court of Appeal, in Waltham Forest v Omilaju [2004] EWCA Civ 1493, confirmed that the final straw must not be utterly trivial, but does not have to be of the same character as earlier acts complained of. The Court also confirmed that it is not necessary to characterise the final straw as 'unreasonable' or 'blameworthy' conduct in isolation, but that an entirely innocuous act cannot be the last straw.

Findings

9. My findings, on the balance of probabilities where there was any dispute, were as follows.

10. The Claimant was initially employed by the Respondent in 1997 as a Maintenance Operator. There was disagreement between the parties about the period of continuous employment. The Claimant's witness statement confirmed that he was initially employed in 1997 and, after leaving for a period, returned in 2000. In his oral evidence, the Claimant confirmed that he had worked as a sub-contractor during parts of the period from 2000 2002, but produced, just before the hearing, a copy of a pay slip from December 2001 and a copy of a P60 for the tax year 2001/02. That indicated that he had received pay of some £11,500 during that fiscal year.

11. The Respondent's position was that the Claimant had been employed in the 2001/02 year but had left employment in January 2002 and had returned in May 2002. His contract of employment in the hearing bundle recorded 27 May 2000 as his start date and the date on which his continuous employment began.

12. Bearing in mind the fact that the P60 did not suggest earnings in that fiscal year which would have covered its entirety, and the terms of the Claimant's contract, I found that the Claimant's continuous employment went back only to May 2002. The Claimant remained employed from then until he resigned in January 2019.

13. The Respondent is a subsidiary of a German company and is involved in the development and manufacture of seating systems for commercial vehicles, it seems principally for buses.

14. The Claimant was promoted to the role of Integrated Management Systems Manager in December 2011. This initially involved responsibility for health and safety, maintenance, and quality matters, with responsibility for environmental, and energy management matters being added, the latter in 2016. His role was relatively senior, although there were three directors above him, including Mr Geraint Thomas, then Operations Director, who was the Claimant's line manager.

15. The Claimant was based at the Respondent's premises in Wrexham, but he was obliged to travel as part of his duties to visit customers. Although that was a recurring part of his duties, visits were not undertaken with any regularity.

16. The Claimant's contract confirmed that his normal hours of work were 37.5 each week, working between the hours of 7:00am and 5:00pm on Mondays to Thursdays, with a 30 minute unpaid lunch break (I observed that 9.5 hours per day for four days led to total weekly hours of 38 and not 37.5). It appeared, however, that the Claimant was in the habit of working between the hours of 6:00am and 4:15pm, i.e. taking into account a 30 minute unpaid lunchbreak, 9.75 hours per day and 39 per week, and had done so for several years. Indeed, Ms Teese in her evidence indicated that those were habitual hours worked by management employees and suggested that other employees had 39 hours written into their contracts. I also noted that the Claimant's timecard reports recorded 9.75 hours for days when the Claimant was absent due to holidays or sickness.

17. As a salaried employee, the Claimant was not entitled to overtime, but the contract confirmed that there could be occasions when he would be required to work at other times. The contract also confirmed that the Claimant was entitled to a maximum of two weeks full pay in any rolling twelve month period in relation to sickness absence.

18. The Respondent operated a Staff Handbook, which was updated and reissued in April 2018, just at the time that the Claimant commenced the period of sickness absence from which he never returned. The Handbook applicable to him therefore, was an earlier version issued in May 2014, although the bundle also contained extracts from the 2011 version. The Handbook was stated to have contractual effect and contained various provisions regarding sickness absence and also a stress policy.

19. The Respondent's 2011 Handbook required self-certification of absences of up to 7 days, but stated that, for absences of over seven days, a medical certificate would be required. It also indicated that, when due to return, if the Respondent had any doubt about medical fitness, the employee's medical practitioner may be required to confirm fitness for work. It also noted that where there were three or more self-certified absences during a period of six months, it was a condition of employment that the employee would agree to be examined by a healthcare professional of the Respondent's choice. It also noted that, where considered necessary, the Respondent reserved the right to ask the employee to undergo an independent medical examination at company cost and that the employee would be paid pro rata for the time spent undergoing that examination.

20. The 2014 Handbook contained similar provisions regarding certification, and again included a term that, if requested by a manager, the employee would obtain a fit to work note signed by their medical practitioner verifying that they were fit to work when returning from a period of sickness absence. It again included a provision requiring an employee to undergo an independent medical examination where asked, again with the Respondent paying for any costs associated with that, and paying the employee pro rata for the time spent undergoing the examination. The 2018 policy, in all material respects, repeated the 2014 policy.

21. The 2011 stress policy noted that if an employee was feeling the effects of stress, they should inform the Production Manager who would examine the causes of the stress and who, together with the Health and Safety manager, would look at ways in which they could be eliminated or reduced. The policy noted that any necessary changes would be made in accordance with the cause of stress, the nature of work and the resources available. The 2014 policy was worded very similarly, with the requirement to inform the Production Manager being replaced with a requirement to inform the employee's manager. That wording was replicated in the 2018 version.

22. The Claimant's role was a responsible one and was a demanding one. On occasions this involved the Claimant undertaking significant one-off pieces of work, including the conversion of the format of risk assessment documents, and the transition between two quality management standards. In addition, the Claimant had responsibility for undertaking return to work interviews with employees when returning from any sickness absences. This appears to have arisen from the Claimant's responsibility for health and safety matters, but continued following Ms Teese's recruitment as, initially HR Assistant, subsequently promoted to HR Manager, from 2015, although Ms Teese undertook the more straightforward meetings.

23. At the start of 2017, a particular issue arose within the Respondent's business. That involved the recall of pedestals, i.e. the bases for seats, which had been installed on various buses, due to the issues surrounding their quality arising from the quality of the steel supplied to the Respondent. This was a rare occurrence, happening at most twice before over the previous 28 years, and placed significant demands on the Respondent and, as the manager in charge of quality, on the Claimant. Work on the recall then took place throughout 2017.

24. In terms of his workload and his working hours, the Claimant contended that he had spoken to Mr Thomas on three occasions about his workload but had, effectively, been shrugged off. The Claimant was unclear in his oral evidence as to when those three occasions had been, initially suggesting they had taken place in 2016 and then, having reflected overnight following the first day of the hearing, indicating that they had been in March 2017, July 2017 and January 2018. The more specific recollection seemed more likely to be accurate as those dates coincided with the work on the recall when the Claimant's workload was at its highest. The Claimant confirmed in his evidence however, that in those meetings, whilst he raised concerns about his workload and the fact that the additional work impacted on his other duties, he did not indicate to Mr Thomas that he could not cope with

his work.

25. The Claimant also indicated in his evidence that he had raised a concern with Ms Teese about his lack of sleep, although he was not clear as to when that happened. Ms Teese's evidence, which was delivered much more clearly and consistently, and which therefore led me to accept it, was that whilst the Claimant had referenced the fact that he was only sleeping for three or four hours a night in a conversation, that had arisen as part of the general "chit chat" within the office, in a conversation about the use of Fitbits, and that the Claimant did not indicate that his lack of sleep was due to his work.

26. The Claimant also indicated in his evidence that when he attempted to delegate tasks he was not provided with any assistance, referring to requests of Ms Teese to complete the first aid statistics he had to produce as part of his health and safety requirements, and the refusal by one of his reporting inspectors to attend at a client's premises. Miss Teese again gave clear and consistent evidence on the points, which again led me to accept it, indicating that she herself had suggested to the Claimant that she could complete part of his health and safety statistics as she was working on them from her HR perspective, but that her suggestion was rebuffed, and that the inspector did attend at the customer's premises following the confirmation of the instruction by Mr Thomas.

27. Whilst, as I have indicated, the Claimant had a demanding role, and the demands on him had increased in 2017, due to the recall, the work on that had been completed by the end of 2017, and therefore the Claimant's workload had returned to normal levels by 2018.

28. The Claimant's weekly timecard reports, copies of which, covering the period from May 2015 through to April 2018, were in the bundle, indicated that the Claimant seemed to have been working consistently more than this contractual 37.5 hours during the entire period, and indeed appeared to have been regularly working in excess of 40 hours a week and, on occasions, substantially in excess of 40 hours per week. In terms of the recorded hours however, there was in fact no discernible change in the Claimant's weekly hours in 2017, i.e. following the onset of the recall, and the Claimant's hours seemed to regularise in late 2017 and into 2018, with him working slightly under 40 hours per week on a fairly regular basis.

29. The Claimant had not suffered with any material sickness absence during his career with the Respondent but called in sick on the morning of 10 April 2018, and attended his GP on 11 April, reporting that over the previous four months he had been feeling worked up and anxious, and that his vision had become blurred. His blood pressure was high, for which he was prescribed medication. The Claimant's GP notes indicate that medication for his anxiety was discussed, but that the Claimant indicated that he would like to try two weeks off work to see if his symptoms would ease and that his plan would otherwise be to leave his current employment and find something different, as he did not want to take medication. The Claimant was then signed off for two weeks due to anxiety and stress.

30. The Claimant's Fit Note was received by the Respondent on 16 April 2018,

and, on that day, two letters were sent to him by the Respondent. They were sent out in Mr Thomas's name, but Ms Teese confirmed that she had prepared them from template letters on Mr Thomas' instructions. She explained that she had sent two letters because there were two templates, one suggesting a meeting, and the other seeking consent for a medical report. The Claimant indicated that he received these as two separate letters, but Ms Teese's evidence was that both were placed within one envelope and sent by recorded delivery. It seemed to me that it was more likely that the letters had been sent together, as I did not see why the Respondent would wish to incur additional unnecessary expense in sending two letters by recorded delivery when it could just have sent one.

31. The first letter referred to the receipt of the Claimant's Fit Note which covered a two-week period, and asked if the Claimant would be prepared to meet to determine whether there was anything the Respondent could do to assist him in his return. It confirmed that the decision to meet was entirely at the Claimant's discretion, and also stated that any return to work would need to be accompanied by a fit note signed by a medical practitioner verifying that he was fit. It also enclosed a copy of the Respondent's Stress Policy for the Claimant's reference. The second letter sought consent from the Claimant for the Respondent to contact his doctor for a report, although it did make clear that there was no obligation on the Claimant to provide that consent.

32. The Claimant did not respond to the Respondent's letters of 16 April 2018, and he then revisited his GP on 24 April 2018 and was signed off for a further two weeks, with the reason this time being recorded as work-related stress and anxiety. A further, similarly worded, Fit Note was then obtained on 8 May 2018, this time for a four-week period.

33. The 24 April Fit Note was delivered to the Respondent's premises by the Claimant's daughter Kimberly, and she spoke to Ms Teese at that time. Ms Teese's contemporaneous note of the conversation records that the conversation touched on the new handbook, the earlier letter from the Respondent having included the updated stress policy, and Ms Teese invited Ms Moss to take a copy for her father but she declined.

34. That additional Fit Notes led to the Respondent sending two further letters to the Claimant on 9 May 2018, one again relating to the request to attend a meeting, and one again seeking consent for a medical report. The letters, having been drawn from templates, were largely similar to the earlier ones, although reference was made to the fact that as the Claimant had been off for four weeks, he was now classed as long-term sick, and that it was the Respondent's standard procedure to request a report from an employee's GP when they had been absent for that period of time. The letter also confirmed that, in line with the terms and conditions of employment, after receiving three weeks full pay, when the actual entitlement was in fact two weeks, as from 1 May 2018, the Claimant would only be paid statutory sick pay. The Claimant was also reminded of the availability of the Respondent's employee assistance programme.

35. This time the Claimant did reply, by letter dated 15 May 2018. In this letter, he indicated that he was willing to attend a welfare meeting but asked that it

be arranged closer to his time of return when his GP had certified him as fit to return. He also noted the reminder of the availability of the employee assistance programme, but noted that he was currently receiving such services via a GP referral. The Claimant indicated that he was receiving counselling by this stage, via his GP, but the letter subsequently received by the Respondent from the GP, and the GP notes, indicated that, whilst counselling had been discussed and was in the process of being arranged, it had not in fact commenced at that time.

36. Following receipt of the Claimant's consent, the Respondent wrote to his GP on 17 May 2018 with a number of specific questions. A general reply, i.e. not one which answered the specific questions, was sent from the Claimant's GP, dated 25 May 2018, noting the Claimant's presentation on 11 April 2018, that he was not taking any medication for stress and anxiety but had been referred for counselling, and that she was unable to give an indication of the likely length of absence at that stage, but that the prompt access to counselling was likely to benefit the Claimant and enable his return to work.

37. The Claimant provided a further Fit Note dated 5 June 2018, again referring to work-related stress and anxiety as the reason for absence, and this time certifying that the Claimant was unfit to work for six weeks. That led to a further letter being sent to the Claimant dated 7 June 2018, noting the receipt of the GP's report and that, whilst the Claimant's preference to arrange a meeting nearer the time of return was noted, indicating that the Respondent would like the opportunity to explore any reasonable adjustments that could be put in place to support the Claimant's return by having a welfare meeting in which they could learn more about his concerns about being at work and look at what they could do to try to alleviate them. The letter also referred to the possibility of arranging a meeting with occupational health, and again reminded the Claimant of the counselling service available via the employee assistance programme. The Claimant was then further certified as unfit for the period 16 July 2018 to 16 August 2018.

38. On 18 July 2018, the Respondent wrote to the Claimant, noting that they were keen to meet with him to discuss the report from the GP, how the Claimant was generally, and whether there were any reasonable adjustments they should be making at that point. The letter however noted that, in light of the fact that the Respondent had not received a response to the letter of 7 June, and that the Claimant had requested contact to be kept to a minimum, they were writing to request the Claimant's consent to providing occupational health with any relevant information required in order that they could contact him directly to arrange an occupational health assessment. The letter noted that the Claimant had the right to withhold his consent to that process, but that doing so would mean that the Respondent would have to form a view on its next steps without the benefit of up-to-date medical advice and an opinion from occupational health.

39. The letter also asked for the Claimant to return his mobile phone so that it could be provided to the individual who was providing cover during his absence, and would be returned to the Claimant on his return to work. By this time, the Respondent had engaged an interim manager via an agency

to carry out the health and safety aspects of the Claimant's role, with other aspects being undertaken by Mr Thomas.

40. The Claimant replied by letter dated 24 July 2018, noting that he was willing to attend an occupational health assessment and enclosing the signed consent form.

41. In response, the Respondent wrote to the Claimant on 13 August 2018, noting that an appointment had been arranged for an occupational health assessment on 21 August 2018. The letter also requested that the Claimant return his company keys and security fob, stating that both had been renewed, and that the Claimant would be issued with new ones on his return.

42. The Claimant submitted a further Fit Note dated 16 August 2018 for a two-week period, and then attended the occupational health assessment on 21 August 2018. In an email of 22 August 2018 to Ms Teese, he sought reimbursement of his mileage for attending the assessment but made no reference to payment of salary for the time spent in attending. He subsequently reminded Ms Teese about the reimbursement of expenses and again made no reference to payment of salary. Ms Teese confirmed in her evidence that, whilst the contractual obligation to pay the Claimant for his attendance existed, she had simply overlooked it and had simply dealt with the Claimant's reimbursement request.

43. In the referral to occupational health, prepared by Ms Teese, the Respondent had asked additional questions. Most of them focused generally on the Claimant's condition, his potential to return, and his potential to undertake his duties. However, Ms Teese did raise specific additional questions about whether there were any particular aspects of the Claimant's work he felt unable to cope with, whether there were any outside factors impacting on his condition, noting that he had taken steps to become a foster carer in 2017, whether the Claimant had any concerns with individuals rather than with the work itself, and whether the Claimant would consider another role with the Respondent.

44. The occupational health report was produced and dated 21 August 2018, although it was not received by the Respondent until the Claimant sent it to Ms Teese by email on 10 September 2018. The report was quite lengthy, although it dealt with the Claimant and his condition in fairly general terms. The adviser reported that he would regard the Claimant as "*a normal man in a normal job*." He recorded that the Claimant felt confident and comfortable with the demands of each area of his role in terms of their technical nature and his ability, but that he felt that having five discrete areas of responsibility exceeded his personal capacity. The adviser recorded that the Claimant had a different view of the Respondent's position regarding his working hours, the Respondent having indicated that the Claimant had not worked overtime since September 2017, and, with regard to travel, which the Claimant felt was a more substantial requirement than had been indicated by the Respondent. The adviser also reported that he "*could not detect any sign that [the Claimant's] working hours were excessive and therefore putting him under undue strain for that reason*."

45. The adviser noted that the Claimant had been medically certified as absent from April onwards, but that he could not easily see the logical end point at which that strategy would change just as a result of continuing absence, allowing avoidance of the work situation. He noted that, without change, such avoidance strategies risked becoming very long-term or permanent. He noted that distraction and avoidance from problems which need to be resolved could ultimately be a strategy which would fail and could lead to positions becoming entrenched and irreconcilable. He noted the Claimant's current strategy of asking the company to avoid contact with him until he felt better, linked in with the completion of his counselling. He noted that he had explained to the Claimant that, objectively, and in terms of the medical understanding, that was not a strategy which was likely to prove successful.

46. The adviser concluded that the twin arms of addressing the situation would therefore always lie on understanding, discussing and resolving practical issues, if that could be achieved to a point acceptable to both parties, together with personal support for the individual, often through medical support, counselling support, or general advice. He then dealt with the Respondent's specific questions.

47. The Claimant submitted a further Fit Note, with the reason again stated to be work-related stress and anxiety, covering the period 6 September 2018 to 12 October 2018. On 11 September 2018, Ms Teese sent him an email thanking him for the report and his Fit Note which had been received the day before, but also asking the Claimant if he would release the report via the occupational health provider's portal as, by doing that, she would then be able to read the report and view and acknowledge any recommendations made directly by the doctor. The Claimant replied the next day, noting that he had started to recover quite significantly, until Ms Teese's email requesting the exact same information from the occupational health portal as he had himself provided, which had been downloaded from that portal. He also reminded Ms Teese about payment for the mileage incurred in attending the occupational health appointment. He provided a link to the portal together with an access code, and sent a further link and access code to Ms Teese on 21 September 2018. He sent a further email on 11 October 2018, asking if Ms Teese had been able to access the portal.

48. The Respondent sent a letter to the Claimant dated 17 October 2018, noting that his entitlement to statutory sick pay would end on 26 October 2018, that the Respondent would be in touch shortly to consider whether a meeting would be possible, taking into account the recommendations in the occupational health report, and that the employee assistance programme was still available to him, should he wish to use the services. The letter also noted that the Claimant was still required to provide evidence of incapacity to work even after the exhaustion of SSP. A further Fit Note was in fact provided, recording stress and anxiety as the reason for absence, for the period 12 October to 16 November 2018.

49. In response to the Respondent's letter, the Claimant emailed Ms Teese on 21 October 2018, noting that his SSP was coming to an end, but also noting that he had recorded over the years that a number of his colleagues had received full sick pay for the entire duration of their sickness absences. Ms Teese replied the following day, indicating that the Respondent had

exercised discretion to pay three weeks' full pay, before reducing to statutory sick pay, and that no employee had been paid more than statutory sick pay previously. In his oral evidence, the Claimant indicated that he was aware that payment of more than SSP had been made to employees in the past, but provided no further information about that.

50. On 23 October 2018, Ms Teese emailed the Claimant, noting that the Respondent had spent a few weeks digesting the occupational health report and taking on board the recommendations and would "*really like to arrange a welfare meeting at your convenience, an initial get-together to focus on re-engaging contact and re-building relationships*". She noted that the occupational health consultant had suggested that that may be a good way forward, as long as the environment was right for the Claimant. She went on to say that the Respondent wanted the Claimant to feel comfortable and content with the venue and the areas of discussion, and that the meeting would be neutral and non-formal and would be a good starting point, and the Claimant was asked if he would like to bring a companion to the meeting. Ms Teese concluded by saying that as the initial meeting would purely be to focus on rebuilding relationships and exchanges of information on the welfare level, ideally it would be with both herself and Mr Thomas, but that if the Claimant felt that he would rather meet just one of them, or indeed someone else entirely, he was to let her know.

51. The Claimant sent an email response on 24 October 2018, noting that an informal meeting to re-engage contact sounded like a good way forward. He went on to say that, considering his length of service, it was disheartening to experience the lack of any genuine concern for his welfare, only that of formalities following a process, and that, throughout his absence, there had only been formal absence management correspondence. He commented that this had led to him feeling undervalued and disconnected from the company, that when it was requested that he return his keys and work phone that had intensified his feelings of disconnect, and the fact he was still waiting for the updated handbook made him feel as though he had been forgotten about. He concluded by saying that he was happy to meet up for an informal chat and would be bringing his daughter for support and, as his daughter did not finish work until 5:30pm, the meeting would have to take place after that time.

52. The Claimant contended in his Further and Better Particulars document that this email amounted to a grievance, although he did not make reference to that in his resignation letter or in his original Tribunal Claim Form. On considering the email, whilst it clearly indicated elements of dissatisfaction on the part of the Claimant at how he had been treated during his absence, I did not consider that the document could reasonably be concluded to have amounted to any form of grievance. It certainly was not expressed as such, did not request the Respondent do anything in respect of it, and I considered it only to be a document in which the Claimant set out his perspective on the events of the preceding months.

53. Further emails were exchanged between Ms Teese and the Claimant at the end of October and beginning of November 2018 regarding the logistics for the meeting. The Claimant indicated that, as the meeting was only an

informal one, a meeting with just Ms Teese would be enough and that, in order for the Claimant's daughter to attend the meeting it would have to be held at around 6:00pm. Ms Teese indicated, quite frankly, in her evidence that she was not prepared to have a meeting at the Respondent's premises in an industrial estate at 6:00pm, and she herself worked between the hours of 6:00am and 3:00pm. She therefore indicated that, whilst the Respondent was very happy for the Claimant's daughter to attend the meeting, it would have to be held between the hours of 9:00am and 3:00pm between Mondays and Thursdays.

54. In an email on 5 November 2018, Ms Teese introduced the prospect of attendance by an external third party to facilitate the meeting. She commented that someone had been recommended to the Respondent as being very good at dealing with such matters, and had had no prior involvement with the Respondent. Ms Teese asked for the Claimant to confirm whether or not he would like to go ahead with a third party in attendance.

55. The Claimant replied the following day, noting that it had been indicated to him that the meeting would be neutral and non-formal and a good starting point, which did not seem to require an external third party to facilitate. He commented that he was happy for the third party to join them, but would appreciate some information on the person's role beforehand and how they had been recommended. He also indicated that as there had been no flexibility with regard to the times offered to facilitate the Claimant's daughter accompanying him, he would request the meeting be only between the Claimant and Ms Teese as he would be uncomfortable attending without support at a meeting at which both Mr Thomas and Ms Teese were present. In the email he also made a request for payment of his accrued but untaken holidays up to that point in the holiday year, a request which was granted soon after.

56. Ms Teese sent an email to the Claimant on 9 November 2018, confirming that the proposed third party was Mrs Trousdale, and that she had been recommended to them by their solicitors. A link to Mrs Trousdale's website was provided.

57. The Claimant replied by email of 12 November 2018, noting that he did not feel that it was necessary to be discussing his private occupational health report with an HR specialist, and that he did not give consent for the report to be given to, or discussed with, Mrs Trousdale or anyone else. Mrs Trousdale confirmed that at no time did she see the report or was aware of its contents, beyond the recommendation that the parties should meet to discuss the way forward.

58. The Claimant asked Ms Teese to explain what the meeting was for and whether it was an official welfare meeting or an informal meeting, and questioned what Ms Teese's role would be and what Mrs Trousdale would be facilitating. Ms Teese replied by email dated 12 November 2018, confirming that Mrs Trousdale would be willing to support the parties in any capacity the Claimant felt would best serve their needs, which would include; acting as an external objective third party, acting as an honest broker, and/or acting as the Claimant's advocate to support and coach him

in presenting his views to the Respondent for resolution. She concluded by saying that if the Claimant was happy for Mrs Trousdale to be involved, she would like to arrange a meeting with him on an evening that week, so that his daughter could also attend, as an informal get-together with no agenda. The Claimant in response gave permission for his email and telephone contact details to be provided to Mrs Trousdale.

59. The Claimant provided a further Fit Note, recording stress and anxiety as the reason for absence, covering the period from 16 November 2018 to 4 January 2019.

60. That informal meeting took place between Mrs Trousdale, the Claimant and his daughter on 19 November 2018, during which Mrs Trousdale was appraised of the Claimant's perspective on recent events. It was arranged that the Claimant would meet with Mr Thomas and Mrs Trousdale on 21 November 2018 at the Respondent's premises. However, when the Respondent attended on that day, he had a form of panic attack and felt that he could not enter the building. He telephoned Mrs Trousdale to indicate that, and Mrs Trousdale, having explained the situation to Mr Thomas, agreed to meet the Claimant herself, and they met, later that morning, at a nearby hotel. Mrs Trousdale prepared brief notes of that meeting, but also sent an email to Ms Teese and Mr Thomas on 28 November 2018, summarising her discussion with the Claimant. That was consistent with her evidence, and I concluded that it was an accurate contemporaneous record.

61. In this meeting, Mrs Trousdale indicated that the Respondent, specifically Mr Thomas, simply wanted to understand what had gone wrong and to be given an opportunity to fix it. She did also raise an issue that had apparently gone wrong with audits in the Claimant's absence, so that everything could be captured as a means to avoid it happening again.

62. In response to a query from the Claimant as to what would happen if he was not able to engage with the Respondent in meetings, Mrs Trousdale, whilst indicating that it was the Respondent's clear preference to meet with him to resolve matters, indicated that if he really did not wish to engage then he could resign, it might be possible for he and the Respondent to agree a settlement agreement, although she explained that she had already broached this with Mr Thomas, who had confirmed that he did not wish to go down that route as he wished the Claimant to return, or otherwise an impasse would be reached and the Respondent would be obliged to go down a formal disciplinary route which could eventually lead, after escalation through warnings, to his dismissal.

63. After the meeting, the Claimant asked Mrs Trousdale to speak to his daughter as he had been disturbed by the reference to disciplinary action. The Claimant's daughter, Ms Kimberly Moss, give evidence before us about that conversation. I did not consider that there was any material difference between her perspective on the discussion and that of Mrs Trousdale. In it, Mrs Trousdale confirmed that she outlined her three options that would arise if an impasse was reached and the Claimant was not in a position to meet with the Respondent, which included disciplinary action for non-attendance and failure to return. Mrs Trousdale’s evidence, which was

supported by an email she sent to Ms Teese and Mr Thomas, was that that was discussed, along with the other options of resignation and settlement, but only in the context of them being alternatives to the impasse that would arise if the Claimant was not in a position to engage in meetings with the Respondent, but that the Respondent's preference was to go ahead with those meetings to discuss the Claimant's return.

64. Having discussed matters with Mr Thomas, Mrs Trousdale made further contact with the Claimant and arranged an informal meeting, between the Claimant, Mr Thomas and herself, on 14 December 2018 at a local hotel. There were no notes of this meeting, but it appeared to have gone reasonably well, with Mrs Trousdale, in fact, describing it as a “brilliant” meeting in which both Mr Thomas and the Claimant had been respectful of each other and had aired a number of matters. This included, on Mr Thomas's side, an indication that there had been concerns before the Claimant had commenced his sickness absence about his management, certainly of one individual who reported to him. It was agreed that the next meeting between the three would take place on 4 January 2019.

65. In the meantime the Claimant received a letter from Simply Health, who provided a form of private medical scheme to the Respondent's employees, dated 24 December 2018, indicating that they were sorry that the Claimant was leaving them. The Claimant emailed Ms Teese on 31 December, asking why the benefit had been cancelled as he was still an employee, and Ms Teese confirmed by email on 2 January 2019 that the Respondent had simply cancelled the arrangement with Simply Health and had replaced it with an arrangement with Medicash, and that the Claimant should have received a pack through the post from Medicash and was to let Ms Teese know if he had not received anything. The change of provider was also confirmed to the Claimant by Mr Thomas at the meeting on 4 January 2019. Ms Teese confirmed in her evidence that no communication about the changeover was provided to staff, that she herself was unaware about it until it happened, and that it was simply left for both the outgoing and incoming provider to write to the employees who were members of the scheme in respect of the cessation of the old policy and the commencement of the new.

66. On 3 January 2019, Mrs Trousdale emailed Mr Thomas and Ms Teese in advance of the meeting with the Claimant, noting that she had previously discussed the opportunity of doing a stress risk assessment with the Claimant as a starting point to understanding his triggers for going off sick in the first place. She attached a template of that assessment and noted that if it was not possible to get to it during the meeting it was something that the Respondent could go through with the Claimant the following week. Ms Teese replied, confirming that the form was a good way of getting feedback directly from the Claimant, and proposed that the form could be given to the Claimant at the meeting for him to complete at home at his leisure. She commented that, once completed, a meeting could be arranged to discuss it and that would give everyone an opportunity to reflect, enabling honest and transparent feedback. Mrs Trousdale replied to Ms Teese, indicating that she felt it was an excellent idea to give the form to the Claimant to take away and then to meet afterwards, and that ideally that would be a good way to introduce Ms Teese back into the process as well.

67. The meeting between the Claimant, Mr Thomas and Mrs Trousdale took place on 4 January 2019 as scheduled. A transcript of the meeting was in the hearing bundle, and I also listened to two short, recorded extracts. The meeting had been recorded by the Claimant via his mobile telephone in a covert manner, with the telephone being kept in his pocket throughout the meeting. He did not seek permission to do that, commenting in his evidence that the recording was purely for his own benefit, as it sometimes took him time to absorb matters mentioned in a meeting and that he could only fully absorb them when he had had an opportunity to consider them at his leisure at a later point. He did not however, inform Mr Thomas and Mrs Trousdale that he was recording the meeting. Mrs Trousdale confirmed in her evidence that, had the Claimant made such a request, she would have arranged a digital recording herself for the benefit of both parties. Mrs Trousdale also confirmed in her evidence that her approach to the meeting would not have changed had she known that the meeting was being recorded.

68. The meeting lasted for just under two hours, and most of it appeared to be reasonably clearly transcribed, albeit there were a few sections on each page of the transcript which noted that the content of the recording was inaudible at various points. Mrs Trousdale's evidence was that her recollection of the meeting was that it was very amicable and friendly. Certainly, there was a discussion about personal matters at the start and finish of the meeting which suggested that the parties were comfortable with each other. However, I considered that certain of the comments of Mr Thomas were very direct and, notwithstanding the evidence of the Claimant, Ms Teese and Mrs Trousdale, that Mr Thomas was a direct and straight-talking person, could have been phrased more sensitively.

69. There were occasions where Mrs Trousdale had to intervene and suggest that Mr Thomas' comments be moderated. An example, from early on in the transcript is that Mr Thomas said. "*My opening question is, do you want a job of that level, on that salary, but don't really want to do anything?*" This led to Mrs Trousdale, commenting that she would "*probably rephrase that slightly to make it less contentious*", going on to say that what she felt Mr Thomas was asking was whether the Claimant felt he could continue to work at his previous level, in an accountable and responsible role, which carried with it a level of stress? My interpretation is that that was indeed what Mr Thomas was getting at, but he certainly did not express the point sympathetically. My impression of reading the transcript was that Mr Thomas was keen to ensure that his perspective about the Claimant was put across in the meeting, as well as the Claimant's perspective about his own position.

70. The meeting discussed the recall at some length and how that had increased the Claimant's workload as well as the workload of many employees of the Respondent, and that such a process was rare and finite.

71. The Claimant himself raised the question of Mr Thomas having referred in the meeting on 14 December that other people had to be happy for him to start back. Mr Thomas indicated that he had not said that, but had indicated that, within the process they were going through, the point of view

of other people had to be considered as well, and that other people had been affected by the Claimant as well as the Claimant himself being affected by others and/or by his workload. Mr Thomas commented that he felt that a big part of the issue was man management and felt that this was an issue which the Claimant needed to improve. Mr Thomas' point appeared to be that concerns on both sides would need to be dealt with such that the Claimant's return was effective.

72. Mrs Trousdale confirmed that at one point of the transcript, which was recorded as being inaudible, she recalled that Mr Thomas had said that they needed to make sure that when the Claimant came back that the first day was not a "car crash", and that involved airing everyone's differences before.

73. Mr Thomas indicated, and I presumed this related to the period immediately before the commencement of the Claimant sickness absence, that the Claimant's character had changed, and that he had spoken to the Claimant about it, but that the Claimant had indicated that there was no problem. He commented at this point that he felt that the Claimant told him lies at that point, which the Claimant subsequently, as part of his claim, contended amounted to him being accused of being a liar. I did not consider that that was Mr Thomas's intention, but that he was making a forceful point, and in a manner which could certainly have been addressed more sensitively, that there had been issues about the way the Claimant had dealt with others prior to his absence and his general manner, and that the Claimant had indicated that there was no issue, but it had subsequently transpired that the Claimant had been unwell.

74. The Claimant, on several occasions, asked how many individuals had raised issues about him, and Mr Thomas appeared to try to avoid answering the question. At one point he suggested talking to people about the Claimant's return and asking if anybody had got any issues, confirming that he had not actually done that. Mrs Trousdale made it clear that that was not something she would recommend, but that it might be appropriate to develop a 360° feedback process, although it would not be appropriate to go looking for issues to be raised.

75. The discussion moved on to the proposed next step outlined by Mrs Trousdale, which was that the Claimant would work on putting together a job description, which did not appear to exist, which would then enable the Claimant and Mr Thomas to assess the demands on the Claimant in terms of workload, and whether any duties could potentially be reassigned. It was also proposed that the Claimant would work on the stress risk assessment. A discussion ensued about those documents being worked on by the Claimant together with Ms Teese the following week, as part of a phased return. Mr Thomas was resistant to that, indicating that if the Claimant was fit to return on a phased basis then he was fit to do his work, i.e. what I took to be his normal duties, albeit for limited periods, and that he did not feel it would be appropriate to pay the Claimant to prepare a job description and stress risk assessment. Mrs Trousdale commented that, in her view, it would be appropriate for the Claimant to be paid in order to do that, albeit that when she asked the Claimant if he was content to do it in his own time, he confirmed that he was. It was agreed that the Claimant and Ms Teese

would work on that document the following week with a view to a further meeting being held on 14 January 2019.

76. Following the meeting, Mrs Trousdale and the Claimant had a conversation in the car park, during which the Claimant indicated that he was disappointed that he was not going to be paid for completing the job description and stress risk assessment, and Mrs Trousdale indicated to him that he should leave the matter with her as she seemed to feel strongly that the payment would be appropriate and would speak to Mr Thomas about it with a view to changing his mind.

77. Mrs Trousdale summarised the meeting for Ms Teese in an email of 6 January 2019. This seemed to be a fair reflection, albeit a brief reflection, of the meeting, in that Mrs Trousdale did record that Mr Thomas had wanted to know whether the Claimant wished to stay within his current substantial role or work at a different level, although she did not use the blunt words used by Mr Thomas. Mrs Trousdale also recorded that the Claimant had asked Mr Thomas about what he had meant by his comment in the previous meeting as to whether others would be okay with the Claimant returning, noting that Mr Thomas explained that the Claimant's approach to others before he went off sick and been unhelpful and that other team members had been upset. Mrs Trousdale recorded that the identified way forward had been that the Claimant, with Ms Teese's input, would prepare a job description, and that once all the tasks and outputs had been set out, the amount of work involved with them would be assessed, and a decision on which tasks could be delegated and to whom would be reached. She pointed out that the stress risk assessment would also be completed in order to identify which of the stress triggers highlighted were unique to the recall or specific to the Claimant's role. She noted that, once that was done, it had been arranged that the parties would meet again on 14 January 2019, with Ms Teese present, in which next steps would be discussed.

78. Ms Teese sent the stress risk assessment and job description templates to the Claimant by email on 7 January 2018. However, having listened to the recording of the meeting on 6 January 2019, the Claimant reached the conclusion that he should resign, and he communicated that by letter of 8 January 2019 to Mr Thomas. He indicated that he felt he was left with no choice but to resign in light of his recent experiences, the last straw being the meeting on 4 January 2019. He referred to Mr Thomas' conduct in the months leading up to his absence, the way in which his absence was managed, and, more recently, Mr Thomas' behaviour towards him in meetings, as having forced him to resign, with Mr Thomas' conduct having fundamentally breached the mutual duty of trust and confidence such that he felt no longer able to work for him.

79. The Claimant mentioned his excessive workload, which had increased in 2017, and that he had raised the matter with Mr Thomas and Ms Teese. He also commented about the amount of correspondence sent to him very early on in his period of sickness absence and also the most recent meetings, particularly that on 4 January 2019.

80. Ms Teese sent a letter to the Claimant in response, later that day, asking him to give further consideration to his resignation, noting that they had

been working to facilitate the Claimant's return and had felt that they had made positive inroads with Mrs Trousdale's assistance. She noted the steps that had been identified following the meeting on 4 January, with a view to a further meeting on 14 January. She indicated that, instead of meeting to discuss the documents, they would offer the Claimant the opportunity to use the time as a formal grievance meeting, with Ms Teese acting as the grievance officer. She also mentioned that, if the Claimant no longer wished Mrs Trousdale to act on his behalf, then he could identify a new companion, as he saw fit. The Claimant replied by email later that evening, noting that he strongly reaffirmed his resignation on the grounds stated in his letter, and his resignation was therefore processed.

81. Subsequent to the termination of his employment, the Claimant, with the assistance of his local job centre, decided that he would focus on developing his skills as an electrician, and he set up his own business as an electrician, principally working on residential premises. He commenced that business in May 2019 and was continuing with it at the present time.

Conclusions

82. Applying my findings to the issues identified above, my conclusions were as follows.

83. The principal question for me to address was that identified at sub-paragraph (i) of paragraph 11a of the case management summary issued by Employment Judge Ryan following the preliminary hearing on 3 December 2019, set out on page 2 above. The essence of that issue was whether the Respondent had breached an express term of the Claimant's employment contract and/or had breached the implied term of mutual trust and confidence. In assessing that, I considered the terms of the Claimant's resignation letter dated 8 January 2019, his initial Claim Form to the Tribunal, and his Further and Better Particulars document.

84. The breaches of contract that the Claimant asserted took place, whether in terms of an express terms or as part of a claim that the duty of trust and confidence had been breached, fell into three broad areas. The first related to his workload prior to commencing his sickness absence in April 2018, which included difficulties around delegation of his work. The second related to communications with, and requests made of, him by the Respondent following the commencement of that sickness absence. That included the amount and tone of the Respondent's correspondence with him, the requests made by the Respondent of the occupational health adviser, some specific breaches of the Respondent's policies, requests that the Claimant return his office keys and work phone, the lack of contact over the Respondent's new handbook, the change of its health provider, and the Respondent's failure to treat the Claimant’s email of 24 October 2018 as a grievance. The third related to the conduct of meetings with the Claimant relating to his return to work in November 2018, December 2018 and January 2019. This included issues regarding the holding of the meeting in terms of the time of day and who would attend, the involvement of Mrs Trousdale, and in particular her comments to the Claimant on 21 November 2018, and then comments by Mr Thomas to the Claimant in meetings on 14 December 2018 and 4 January 2019. I considered those matters to reach

my conclusions as to whether any breaches of contract had occurred.

85. With regard to the first area, i.e. the Claimant's workload, the Claimant clearly had a demanding role, and clearly worked more than his contractual hours of 37.5 per week. That was perhaps not surprising, bearing in mind that he undertook a salaried role and was a relatively senior member of the Respondent's organisation, with only the three directors at a more senior level.

86. I noted Ms Teese's evidence that, in reality, the Claimant's hours should have been 39 each week as that was the amount of hours worked by senior employees, and was the amount management worked. I noted in that regard that the Claimant's timecard reports in the bundle, when recording days absent due to holiday or sickness, recorded nine hours and 45 minutes, totalling therefore 39 hours over the four-day week that the Claimant worked.

87. The timecard sheets were also instructive in assessing the hours worked by the Claimant going back to May 2015. I noted that the Claimant, in the meeting with Mr Thomas and Mrs Trousdale on 4 January 2019, indicated that it was only the recall in 2017, coupled potentially with the addition of energy management to his portfolio at around the same time, which caused him difficulties and that, prior to that, he had had no difficulty in coping with his workload. However, the timecard reports indicate that the Claimant was working significantly more hours each week, certainly in 2015, than he did in 2017 and 2018. Indeed, in 2017 and 2018, up to the Claimant's sickness absence in April, the hours in only one week exceeded 45, with the mode being between 39 and 40. This was still above the Claimant's express contractual hours of 37.5, and also what appeared to be the Respondent's position of the expected hours of 39, but not to any significant degree.

88. I appreciated that those hours may not have taken account of periods of significantly longer work undertaken by the Claimant where he was required to travel, often long distances, to customers' premises, where the Claimant's start and finish times were not necessarily recorded. However, whilst it was clear that the Claimant did undertake significant travel on occasions, with journeys to Scotland and Ireland being referred to, those occasions were not regular and were relatively infrequent. I considered that they were part and parcel of the Claimant's role, particularly when dealing with the recall in 2017, and I did not consider that the travel requirements made of him were excessive. Indeed, I noted that the occupational health advisor, stated, "*I think he understands and accepts that travel is an inherent part of his job though, and I certainly could not detect any signs of his working hours were excessive and therefore putting him under undue strain for that reason*".

89. I noted the Claimant's evidence, which was not particularly disputed, that he spoke to Mr Thomas on three occasions about his workload. However, the Claimant's own evidence was that he focused on the amount of work he had to undertake across the various elements of his portfolio, and not on his hours. He did not indicate to Mr Thomas that he could not cope with his work, and, bearing in mind that the recall had been concluded, or very largely concluded, by the end of 2017, that workload must have reduced.

90. The Claimant also noted that he had discussed his lack of sleep with Ms Teese, but I concluded that, whilst a discussion had taken place, where the Claimant's lack of sleep had been discussed, it was a general discussion about Fitbit use, and did not involve any indication by the Claimant that his concern about work was the cause of his inability to have a good night's sleep.

91. With regard to the Claimant's concerns about delegation, I was not satisfied that there had been a refusal by Ms Teese to assist the Claimant with some of his health and safety duties, and I also noted that on the occasion when the Claimant complained about not being supported by a member of his team, that was resolved when Mr Thomas intervened. There did not appear to be any more general concern raised by the Claimant in his claim about an inability to delegate, and an element of the discussion with Mr Thomas on 4 January 2019 surrounded the Claimant's reluctance to delegate as he could not fully trust those to whom he wished to delegate to undertake the tasks properly, which echoed Ms Teese's evidence that the Claimant had not taken her up on her offer of support with health and safety statistics.

92. Overall therefore, I did not conclude any the issues the Claimant had over his workload and how that was managed involved any breach of the mutual duty of trust and confidence.

93. Turning to the communications with the Claimant following his sickness absence, the Claimant initially complained about the speed with which the Respondent contacted him following the commencement of the sickness absence, and the frequency of communications with him.

94. The first contact with the Claimant was certainly prompt, after he had been absent for three working days, although not the one working day as he asserted. However, I noted that, by the time the initial letters were sent, the Claimant had provided a Fit Note recording anxiety and stress as the reason for his absence, and certifying him as unfit for work for two weeks. I did not consider it unreasonable for an employer to write to an employee suggesting a meeting and that a medical report might be appropriate in those circumstances, albeit it was, as I have said, a swift communication. In any event, the Respondent did not insist on the meeting or the medical report, and confirmed that those matters were ultimately a question for the Claimant to decide.

95. The Claimant also complained about the number of letters he received whilst absent, noting that seven were sent, although on two occasions two were sent on the same day in the same envelope, and therefore there were five communications in reality in relation to his absence in the period from 16 April 2018 to 13 August 2018. I noted that the Claimant had indicated to the Respondent, by his letter of 15 May 2018, that he wished correspondence to be kept to a minimum. However, I noted that the Respondent's letters followed on from the receipt of Fit Notes from the Claimant confirming further absences. I did not then consider that the Respondent's approach was onerous or inappropriate, such as to breach the duty of trust and confidence in raising the prospect of a meeting or a medical report upon receipt of those Fit Notes.

96. The Claimant also complained of specific breaches of the Respondent's policies surrounding stress and absence, but I did not consider that any had arisen. As I have noted above, the Respondent was not aware that the Claimant had any particular concerns about the impact of his workload on him and could not therefore have known to implement the stress policy at any time.

97. With regard to the absence policy, whilst it contained specific provisions regarding contact with an absent employee and the potential for a medical examination, I did not consider that the inclusion of those provisions prohibited the Respondent from making contact or suggesting a medical examination outside those specific provisions. The Claimant also contended that the Respondent had inappropriately indicated that he would need to provide a fit note confirming his fitness to return when he did so, but I noted that the particular policy catered for the ability for the Respondent to request such a note, and indeed to request an employee to undergo a medical examination.

98. In relation to that medical examination, there was a breach, and this was accepted by the Respondent, of the absence policy, as the Claimant should have been paid salary for the time spent attending the examination. However, I was satisfied that that breach had arisen in error and the Claimant himself was not aware of his entitlement to be paid until he put his Further and Better Particulars document together. Therefore, whilst there was a breach. I did not think that such a breach was in any sense a fundamental one. In any event, I observed that the Claimant was not aware of the breach of the policy until he put his Further and Better Particulars document together, and therefore there is no question of him having resigned in consequence of that breach, whether in isolation or as part of a series of acts.

99. With regard to the requests by the Respondent for the Claimant to return his company phone and his keys after he had been absent for some three months or so, I did not consider there was anything untoward. Ms Teese confirmed in her evidence that, having initially managed the Claimant's workload amongst existing staff, it not having been clear as to whether and when he would return, after about three months the Respondent engaged the support of an agency employee in relation to the Claimant's health and safety work. It was therefore appropriate for the mobile phone to be available for that person to use at that time. With regard to keys, there was a degree of conflicting evidence submitted by the Respondent in this regard. The letter sent to the Claimant noted that the main office key had been changed and therefore all keys were being gathered in in response to that, whilst Ms Teese indicated that the Claimant had quite a large bunch of keys, some relating to areas of the Respondent's premises which were not regularly accessed, and the Respondent wished to have those keys under its control in order to ensure that it had full access to all areas of its premises. Regardless of the ultimate reason, I did not see that the request to return the keys, when it was made perfectly clear that the Claimant would be provided with new keys on his return, as indeed he would be provided with his mobile phone on his return, involved any breach of contract.

100. With regard to the Handbook, it was unfortunate that the Claimant commenced his sickness absence just at the time that the new Handbook was being introduced. Ms Teese's evidence, which was confirmed by a contemporaneous note, was that when she spoke to the Claimant's daughter in April 2018, she invited her to take a copy of the Handbook with her, but that she had not thought to send a copy of the handbook to the Claimant by post. Bearing in mind the Claimant's indication that he wished communication to be kept to a minimum, I did not consider that there was anything to criticise the Respondent for in that regard. I also observed that the relevant elements of the new handbook were not materially different to the old one in any event.

101. With regard to the change of the medical provider, whilst it would no doubt have been preferable for the Claimant to have been notified of the change, such that it would not then have taken him by surprise, I noted Ms Teese's evidence that she herself was unaware of the change until such time as she was contacted by the relevant companies. Ms Teese clarified the position promptly when the Claimant raised it, and Mr Thomas also explained the change at the meeting on 4 January 2019. I did not therefore conclude that there was anything improper in the way the Respondent behaved.

102. With regard to the questions asked of the occupational health provider, I did not consider that the Respondent had asked questions which were inappropriate or improper. One of the questions related to the Claimant's role as a foster carer, enquiring whether that may have had an impact on him in terms of stress and anxiety, but I did not consider that there was anything untoward in asking that question. Other questions related to particular matters within the workplace, and again I did not consider that they were in any sense unreasonable.

103. Having initially complained about the amount of contact made by the Respondent, the Claimant subsequently complained that the Respondent delayed in contacting him following the receipt of the occupational health report. I noted that that was not provided to the Respondent until 10 September, and that Ms Teese wrote to the Claimant on 23 October 2018 to suggest meeting him, having taken what she described as a few weeks to absorb the report. In circumstances where the Claimant remained subject to a Fit Note confirming that he was unfit to attend work, I did not consider that any delay in arranging the meeting, particularly as the Claimant had previously indicated to the Respondent that he wished contact to be kept to a minimum, and had not withdrawn that request, involved any breach of trust and confidence.

104. The Claimant also complained about the failure to pay company sick pay beyond three weeks. He contended that he was aware that the Respondent had paid other employees sick pay throughout the whole of their sickness absences, i.e. for a much longer period, but provided no evidence of that, whether during this hearing or during the course of internal discussions when he was corresponding on the point with Ms Teese. I did not therefore consider that the Respondent was in any sense in breach of contract by only paying the Claimant in respect of some three weeks' sickness absence, which was in itself a week more than catered for by the Claimant's contract.

105. With regard to the meetings with the Claimant at the end of 2018 and beginning of 2019, I considered that it would have been preferable for the Respondent to have raised the involvement of Mrs Trousdale at an earlier stage, rather than spending time discussing who, on both sides, would attend, together with details of the time and venue. However, the occupational health report had gone into some length about the desirability of a dialogue between the Respondent and the Claimant to address the concerns he had about his work. I did not therefore consider that it was in any sense inappropriate for the Respondent to suggest that a third party consultant, with experience of such dialogue, such as Mrs Trousdale, would be of assistance with that, and indeed the Claimant seemed happy for that to happen.

106. With regard to Mrs Trousdale's comment on 21 November 2018, I concluded that the Claimant misinterpreted the comment. Mrs Trousdale was clear that she had indeed referenced the possibility of disciplinary action. In her discussion with the Claimant and, indeed, had repeated that in her discussion with the Claimant's daughter later on the same day. However, I was satisfied, from Mrs Trousdale's evidence, and the contemporary evidence in the form of Mrs Trousdale's email to Ms Teese and Mr Thomas, that the reference had arisen in the context of the Claimant raising with her the question as to what would happen if he did not engage with the Respondent's request to meet with him. It must be remembered that the conversation between Mrs Trousdale and the Claimant arose following the Claimant's inability to attend the meeting at the Respondent's premises with Mr Thomas. Mrs Trousdale could have referenced a point of distinction in what could have happened in those circumstances if it had become clear that the Claimant was not medically fit to participate, in which case a different approach to a disciplinary one would have been applied. However, that could possibly have factored in too many hypotheticals into the discussion at that time and I did not consider that Mrs Trousdale's comments were inappropriate.

107. Turning to Mr Thomas' comments, whilst we did not have a note of the meeting on 14 December 2018, it seemed clear that there had been a discussion about the desire, on the Respondent's side, to resolve other issues with the Claimant, i.e. not just the issues surrounding his health. Those were referred to in Mrs Trousdale's emails at the time, and she confirmed that she herself had mentioned obliquely that other matters would need to be discussed with the Claimant when she spoke to him. I did not however, consider that raising these matters was inappropriate.

108. Clearly, the principal matter to be addressed in the conversations was the Claimant's concerns over his workload, but the Respondent outlined an appropriate method of resolving those concerns through the process of drawing up and agreeing a job description, and possible delegations from the previous duties, and the completion of the stress risk assessment. However, the Claimant had been absent for a significant period with stress and anxiety, and I did not consider it unreasonable, if there were issues within the workplace regarding how the Claimant had undertaken some of his duties, and in particular his relationship with at least one of his reports, to indicate that these needed to be discussed and resolved, on a "clear the

air" basis in order to assist his return. For the avoidance of doubt, I was not satisfied that it was put to the Claimant in any way as a request that other parties had to, in some way, agree to the Claimant's return, it was only the fact that issues regarding those other employees needed to be discussed.

109. Mr Thomas' comments to the Claimant on 4 January 2019 were not ideal, as noted by Mrs Trousdale. I was particularly concerned about what Mr Thomas described as his opening question which was, "*Do you want a job at that level, on that salary, but don't really want to do anything?*". I agreed with Mrs Trousdale's intervention that she would rephrase that slightly to make it less contentious. However, Mrs Trousdale clarified that the comment actually related to the degree of stress and accountability inherent with the Claimant's role, and Mr Thomas made some relatively constructive comments, albeit that it may well be that they were not considered as such by the Claimant, regarding the need to address the Claimant's man management style, which seemed to be a potential cause of his workload concerns, particularly regarding his inability to delegate.

110. Another area of potential concern for the Claimant was Mr Thomas' unwillingness to pay the Claimant for his work on drawing up the job description and stress risk assessment, another matter with which Mrs Trousdale disagreed during the meeting. However, I noted that Mrs Trousdale had confirmed to the Claimant, following the meeting, that she was going to speak to Mr Thomas about payment to the Claimant for that work, and also that the Claimant in the meeting had confirmed his willingness to work on those documents in his own time. I also concluded that drawing up a description of the Claimant's duties and completing a stress risk assessment form would not have been an overly demanding requirement of the Claimant at the time.

111. With regard to the reference within the meeting to the comments of others, i.e. other employees, about issues that needed to be addressed with the Claimant, I noted that these occurred at the Claimant's instigation, and that Mr Thomas attempted to deflect the Claimant from the detail, simply noting that they needed to be addressed in an attempt to clear the air.

112. Another area of concern raised by the Claimant was an assertion that Mr Thomas had called him a liar. However, I noted that Mr Thomas had not said precisely that, but had observed that the Claimant had been telling lies, in the context of him getting a point across that the Claimant had been less than frank in saying to him that there were no issues when, in fact, the Claimant had been feeling unwell, as noted in his GP notes, for several months. Whilst I certainly considered that Mr Thomas could have expressed himself better than saying that the Claimant had "told lies" at that point, I considered that he was simply making the point that the Claimant had been less than frank.

113. Overall, whilst I considered that the meeting certainly could have been handled in a more sensitive way by Mr Thomas, I was conscious that the Claimant himself described Mr Thomas as a straight-talking forceful character, with whom he had worked for over 20 years. I did not consider therefore that the Claimant would have found Mr Thomas' approach in any way surprising. I also noted that the meeting was supervised by Mrs

Trousdale, who directed matters throughout, and that the meeting concluded with what I considered to be a positive way forward to ensure agreement between the parties about the Claimant's duties and how they would be managed going forward. I did not consider that the contents of the meeting, whether in its own right, or as a "last straw", involved a breach of trust and confidence.

114. Overall therefore, I was not satisfied that there had been any breaches of contract, whether express or implied. Consequently, I did not need to consider the other issues identified by Judge Ryan at the preliminary hearing in December 2019, and I concluded that the Claimant's claims should be dismissed.

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Employment Judge S Jenkins

Date: 30 April 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 30 April 2021

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FOR EMPLOYMENT TRIBUNALS Mr N Roche