THE EMPLOYMENT TRIBUNALS

Claimant: **Mr P Panayi**

Respondent: **NHS Property Services Limited**

Heard at: **Newcastle CFCTC** **On:** **15 &16 April 2021**

Before: **Employment Judge Newburn**

Members:

Representation:

Claimant: **In person**
Respondent: **Ms Niaz-Dickinson (Counsel)**

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is not well founded and is dismissed.

REASONS

Issues:

1. The issues as identified were as follows:-

1.1. Did the Respondent without reasonable and proper cause act in a way so as to destroy or seriously damage mutual trust and confidence.

1.2. The Claimant's email of 28 June 2020 provided a list of 18 allegations. The Claimant relies upon the matters set out in that email as collectively giving rise to a cumulative breach of the fundamental term of mutual trust and confidence adopting the last straw doctrine.

1.3. Those allegations are as follows:

a) Allegations 1 and 2: The Respondent provided the Claimant with a company van instead of a company car.

b) Allegation 3: The Claimant was told to “fuck off” by a co-worker during an incident on 2 April 2019.

c) Allegation 4: The Respondent repeatedly failed to make payments to the Claimant correctly or on time.

d) Allegation 5: The Claimant was paid his basic rate of holiday, and no overtime was averaged into the calculation.

e) Allegation 6: The Respondent failed to pay a “quarterly balancing payment”.

f) Allegation 7: During an incident on 25 July 2019, the Claimant was recklessly sent into a known hazardous area resulting in Carbon Monoxide poisoning.

g) Allegation 8: In relation to the 25 July 20219 incident, the Respondent falsely reported to the Health and Safety Executive (“HSE”) that the Claimant had asthma and attempted to hide the RIDDOR report relating to the incident from the Claimant.

h) Allegation 9: The Respondent bullied the Claimant into accepting the reasoning for the inclusion of a reference to the Claimant having asthma in the RIDDOR report.

i) Allegation 10: The Respondent failed to investigate the reference to asthma in the HSE report.

j) Allegation 11: The Claimant’s return to work interview took over 3 hours, staged return to work and Occupational Health (“OH”) were requested and ignored, and the Respondent refused to include the Claimant’s comments on his return-to-work statement.

k) Allegation 12: The Respondent initially refused to supply the Claimant with suitable replacement work trousers and this resulted in an argument.

l) Allegation 13: The Respondent reduced the time estimate of a job to an unreasonably low level.

m) Allegation 14: The Respondent indicated that the Claimant was not entitled to an automatic 2% annual salary increase.

n) Allegation 15: The Respondent’s final payment for overtime was paid late, despite the claimant submitting his documents in time.

o) Allegation 16: The Respondent removed responsibility for the fire alarm runs from Claimant and distributed them to unqualified employees.

p) Allegation 17: The Respondent tasked the Claimant with cleaning the plant room, despite being aware that the Claimant's workload was such that he would be unable to spare the time to carry out the task, thus setting the Claimant up to fail the task.

q) Allegation 18: The Claimant's call out fee was set as £70.50 however, the Claimant was contractually entitled to a call out fee of £105.

2. Was the Respondent the repudiatory breach of contract in respect of the matters alleged above.

3. Did the Claimant resign in response to such a fundamental breach as I find or for some other reason.

4. Did the Claimant act in a way such as to waive such a breach/breaches as I may find and affirm his contract of employment.

Evidence

5. This was a hybrid hearing which took place over two days. All parties gave their witness evidence in person save as for Mr Hutley, who gave evidence via Cloud Video Platform.

6. The Claimant represented himself and gave evidence in support of his claim and called no other witnesses. The Claimant became upset during the hearing whilst evidence was taken surrounding an incident on 25 July 2019, and a break was taken to allow him to collect himself before continuing with evidence on the matter.

7. The Respondent was represented by counsel and called four witnesses; Mr Hewitson, Ms Hamilton, Mr Showler, and Mr Hutley. All witnesses gave evidence in chief by way of written witness statements which had been exchanged and I had read the same prior to hearing oral evidence. I was also provided with a joint bundle of documents running to 298 pages.

8. I made my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I resolved such conflicts of evidence as arose on the balance of probabilities. I took into account my assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts and documents. In addition to the evidence of these witnesses I considered the documents to which I was taken in the agreed bundle and references to page numbers in these Reasons relate to that bundle.

9. Finally, I received oral and written submissions from counsel which I also considered.

10. I have grouped together the related claims made by the Claimant where appropriate and deal with each of the Claimant's allegations in the findings of fact.

Findings of Fact

11. The Claimant was employed as a service engineer by Integral UK Limited ("Integral") from 6 March 2017. On 1 April 2019 he transferred to the Respondent by operation of

law pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006.

12. The Claimant had enjoyed his work with Integral, he had good relationships with his colleagues and had an excellent record. Whilst with Integral the Claimant had worked on many of the contracts with the Respondent sites. The Respondent began to in-source the work on several sites in the North East and as a result the opportunity arose for the Claimant to transfer to the Respondent. The Claimant took this opportunity because he felt working for the NHS would be an honour and it would mean he was working on contracts close to home and would therefore get to spend time with his family. The Claimant could have remained with Integral and some of his former colleagues who had also considered the move ultimately chose to stay. They told the Claimant that they believed he would regret moving to work in the public sector.

13. On 12 March 2019, the Claimant met with Ms Hamilton, a people business partner in the Respondent's HR team, and Mr Showler, a senior faculties service manager, acting as principal operations manager during the period of the Claimant's employment with the Respondent.

14. The Claimant felt it was clear during this meeting that neither Ms Hamilton or Mr Showler were aware of the terms of his Integral contract, as they were not aware of terms like his quarterly balance payment, his callout fee at £105, and that he was entitled to a company car with private use.

15. The Respondent confirmed that whilst Integral had sent Employee Liability Information (ELI) prior to the transfer, it did not provide a copy of the Claimant's contract of employment until a few months later and as a result this was not available during their meeting.

Meeting of 12 March 2019

16. The Claimant had a company car with Integral. Upon joining the Respondent, he was provided with a company van, however he was unhappy about this because he felt he was contractually entitled to receive a car.

17. During his first meeting on 12 March 2019, there was a discussion regarding the Claimant's company vehicle. The Claimant confirmed he previously had a company car, however Mr Showler informed the Claimant that engineers with the Respondent were usually given a company van and if it were to be used privately the Claimant would need to pay for petrol upfront and claim the mileage back thereafter.

18. Mr Showler and Ms Hamilton's evidence was that in this meeting the Claimant had said he previously had a car, however he confirmed that he was happy with a van. Both also explained that the Respondent had not been made aware of the fact that the Claimant was unhappy with receiving a van and had not requested a car in this meeting or thereafter. The Respondent therefore only became aware that the Claimant had not wanted to keep the van and wanted a car instead when the Claimant raised it in his resignation letter.

19. The Claimant stated in his oral evidence that he expressed his discontent about this issue with Mr Rigby, a contracts manager with whom he had worked at Integral and had transferred to the Respondent at the same time as the Claimant. However, the Claimant confirmed that after receiving a van, he had not raised the issue further with the Respondent or asked to exchange the van for a car. His oral evidence was that he did not raise the matter because his right to a company car was set out in his contract and therefore he did not believe he should have had to raise it with the Respondent, he should have simply been provided with a car.

20. The Claimant's contract of employment states the Claimant is entitled to the use of a "Standard Estate" vehicle (page 75). The Claimant's ELI (page 85) included a table of information; under the column "Vehicle" it stated "Yes" and in the next column headed "Type" it stated "car".

21. Ms Hamilton confirmed that there was no financial benefit to the Respondent to supply a van as opposed to a car. She also confirmed that one of the Claimant's colleagues had informed the Respondent that he wanted a car instead of a van and as a result, the Respondent provided his colleague with a car. Ms Hamilton explained that had the Claimant requested a car he would have been provided with one.

22. The Claimant stated in his witness statement that he left that meeting "even more confused about what to do with [his] career". The Claimant began his working relationship with the Respondent in a way that indicated to him that the Respondent did not intend to comply with his contractual entitlements and he was wary of the Respondent.

<u>Incident on 2 April 2019</u>

23. On 2 April 2019, the Claimant drove to Dr Piper House in his company van, where he met another colleague with whom he had transferred from Integral who also arrived in his company van. The Claimant stated in his evidence that he then met Ms Jackson and Mr Wilson, two site managers for the Respondent, who enquired how he liked the company van, to which the Claimant commented that it would be better if it were a car.

24. In his witness statement the Claimant asserted that Ms Jackson shouted at him that if he "*didn't like it* [he] *could fuck off then*". However, in his email to the Respondent of 4 November 2019, the Claimant indicated that it was his colleague who commented on not wanting to drive a van and that Ms Jackson's response was directed at both of them.

25. In cross examination the Claimant accepted these statements were inconsistent however he stated the remark made and the attitude behind it was still directed at him and typified the attitudes of Ms Jackson and Mr Wilson in general. The Claimant felt Ms Jackson and Mr Wilson had an unprofessional attitude, used foul language, and were difficult to work with when faced with any element of conflict or challenged on any issue.

26. The Claimant stated in his witness statement that he had informed Mr Rigby of the 2 April 2019 incident and of Ms Jackson and Mr Wilson's attitude, "*and* [they] *made a joke out of it*." The Claimant stated that he did not raise the incident as a formal grievance

with the Respondent at the time because he had only just started working for the Respondent, however it gave him a poor first impression and a sense of how he felt things would continue.

27. The Respondent stated that until receiving the Claimant's resignation, it had no knowledge of this incident and suggested the Claimant could not have found this to have been a serious issue since he "*made a joke out of it*" and failed to raise it as a formal grievance.

28. Although the Claimant was unclear on the exact details of the event, I found him to be a credible witness and, and find that an altercation did take place on 2 April 2019 in which those words were directed at the Claimant and his colleague.

29. The Claimant did not like Ms Jackson and Mr Wilson's attitude, and the Claimant's evidence indicated that he felt there was a degree of animosity between himself and Ms Jackson and Mr Wilson. This was demonstrated in the Claimant's evidence concerning a change made to the fire run tests.

Fire run tests

30. During the first few months of the Claimant's employment, the responsibility for the fire run tests, which had previously been a job undertaken by the Claimant, was given to Ms Jackson and Mr Wilson.

31. The Claimant did not believe that Ms Jackson and Mr Wilson had the technical training to carry out the tests and as a result he felt this created a health and safety risk and additional work for him as he needed to attend sites and rectify their work.

32. In his witness statement the Claimant stated that this change in the responsibility for the tests created situations resulting in further friction between himself, Ms Jackson and Mr Wilson.

33. Mr Hewitson confirmed in his evidence that moving the responsibility of the fire run tests to the site managers was a change implemented at a national level and he believed that a safety assessment had been carried out before it was implemented. Mr Hewitson explained that he had no control over its implementation, and it was not an action carried out in an effort to undermine or put pressure on the Claimant. Furthermore, the Claimant had not spoken to him or raised a formal grievance about this issue or its effect on him.

Incident with Mr Wilson regarding the plant room

34. In or around June or July 2019 Mr Wilson raised a job for the Claimant to clean a plant room however at the time this job was raised the Claimant was too busy to carry out the task. The Claimant felt Mr Wilson did this knowing the task would not be possible for him to complete at that time and thereafter Mr Wilson reported the Claimant to the local health and safety manager. The Claimant spoke with the Health and Safety Manager who accepted the Claimant's position.

35. The Claimant felt Mr Wilson should have spoken to Mr Hewitson about this incident in the first instance however he had not done this. Mr Hewitson's evidence was that he had no knowledge of the matter.

36. The Claimant did not raise a formal grievance about this issue or any issue he had with Mr Wilson or Ms Jackson.

37. There was an atmosphere of animosity between the Claimant and Ms Jackson and Mr Wilson and the Claimant did not like their attitude towards him at work. However, the Claimant did not find any singular event, or series of events that occurred between them serious enough to report to the Respondent in order to seek a resolution; he was able to make a joke about the situation with other work colleagues.

Relationship with Mr Hewitson

38. The Claimant stated in his witness statement that his line manager was changed from Mr Rigby to Mr Hewitson in his first few months of employment.

39. The Respondent submitted that whilst working with the Respondent, Mr Rigby was never the Claimant's direct line manager. Mr Hewitson's evidence was that prior to him joining the Respondent, someone named Andrew was the Claimant's manager and thereafter he took up that role.

40. I make no finding of fact on this conflict of evidence as it is not directly relevant to the issues in this matter, save that I find the Claimant had believed Mr Rigby was his line manager and that Mr Hewitson became the Claimant's manager.

41. The Claimant did not believe that Mr Hewitson was a capable manager. The Claimant confirmed he continued to speak with Mr Rigby where he had problems as he felt Mr Rigby knew the sites and work involved well, he knew the terms of the Integral contracts, and was a better manager overall. The Claimant felt he could speak openly about any problems with Mr Rigby and they were able to make a joke out of the issues that arose.

42. The Claimant's evidence was that he felt he had to beg Mr Hewitson for overtime, and that Mr Hewitson would cut the time estimate of jobs without having the relevant knowledge of the job or site in question, rendering the new estimate untenable.

43. The Claimant stated that one such incident occurred in the second week of September whereby Mr Hewitson had reduced a 2 man 8 hour job to a 1 man 4 hour job. The Claimant indicated that Mr Hewitson had no knowledge of the work involved in this job and as a result could not comprehend why he would have done this as it placed an excessive and unreachable work target on the Claimant.

44. Mr Hewitson stated that as the Claimant had not provided any specifics it was difficult to comment on this other than to say he did not remember this happening and that he did not believe it was likely that he would have asked the Claimant to carry out a 16 hour job (2 men at 8 hours) on his own in only 4 hours.

45. Mr Hewitson explained that as part of his role he would, however, often review time estimates for jobs and discuss them with an aim to ensuring work was carried out efficiently and without delay, which might result in there being a reduction in the time estimate. Mr Hewitson said these discussions would involve speaking with people at the sites as well as the engineers who would set out the specifics of the task involved and through this discussion, they would then agree the time estimate for the specific job.

46. The Claimant did not provide any other examples of details of his allegation that Mr Hewitson unreasonably reduced job times. During his employment, the Claimant never raised a complaint to Mr Hewitson or a grievance against him regarding changes made to time estimates for the Claimant's jobs. As a result, Mr Hewitson was not aware that the Claimant had any issues regarding time estimates for jobs. Had the claimant raised them with him, I find that it is likely that Mr Hewitson would have discussed them in the same way as he routinely did with other staff.

47. Mr Hewitson stated that the Claimant never raised any grievances or complaints to him save as having not been paid his overtime, and that he believed he had a good working relationship with the Claimant.

48. The relationship between the Claimant and Mr Hewitson was not good. The Claimant did not believe Mr Hewitson was competent and did not seek assistance from him. It may be the case that Mr Hewitson was not aware of the Claimant's feelings given that the Claimant did not raise issues with Mr Hewitson but instead spoke with Mr Rigby.

49. Notwithstanding this the Claimant did not raise a formal grievance to the Respondent about Mr Hewitson.

Pay in April/May/June, Overtime and Callout fees

50. At the end of the Claimant's first month in April 2019, the Claimant and a colleague who had also transferred from Integral had worked overtime, however neither were paid for the same. At this time, the Claimant stated that he was told by another employee that when he started to work with the Respondent, he was placed on an emergency tax code for a number of weeks. The Claimant confirmed in his witness statement that at the end of his first month he was concerned and felt there was already a "catalogue of errors", he felt "bullied, embarrassed, and demoralised", and he had never been paid late or incorrectly with Integral. He confirmed in oral evidence he did appreciate that there would be teething problems with the Respondent further to his transfer.

51. The Claimant raised this matter with Mr Rigby. Mr Rigby looked into the issue and reverted to the Claimant to confirm that there was a problem with the payroll system as it did not recognise the Integral overtime rates because they were not the same as the Respondent employee's contractual overtime rates. As a result, there was no way to input overtime into the app that the employees would use to submit overtime at the correct rate, and the Respondent would need to find a way to work around the issue.

52. The Claimant asserted that in May 2019, his wages were paid incorrectly again. The Claimant did not set out what sums he says were not paid; however, his payslips in the

bundle demonstrated that the Claimant only received his basic rate of pay for April and May 2019 and no sums were paid in respect of overtime or callout fees.

53. In June 2019, the Claimant was paid for some of his missing overtime however he stated that the sums he received were incorrect. The Claimant did not set out what sums he believed were missing or incorrect however in an email from Mr Rigby to various recipients dated 10 September 2019 (page 200c), Mr Rigby was attempting to resolve the Claimant's underpayments. The email confirms that as at September 2019, payments were still due and owing to the Claimant as follows:

    53.1. Call out payments had been made at £70 instead of £105 for the following dates:

        53.1.1. 14/6/2019;
        53.1.2. 28/6/2019;
        53.1.3. 19/7/2019; and,
        53.1.4. 31/8/2019.

    53.2. Overtime payments and callout relating to:

        53.2.1. 28/8/2019 4 hours x 1.5 emergency lighting test;
        53.2.2. 1/9/2019 12 hours x 2 unit 3 hour emergency lighting test;
        53.2.3. 3/9/2019 4 hours x 1.5 call out;
        53.2.4. 5/9/2019 4 hours x 1.5 call out; and,
        53.2.5. 7/9//2019 4 hours x 1.5 emergency lighting repair.

54. On 3 June 2019, Mr Rigby emailed Ms Hamilton confirming that some staff, including the Claimant, had not received their call out allowance, and setting out that the Claimant's call out fee was £105.

55. Ms Hamilton responded to Mr Rigby (page 101a) confirming that it was accepted the Claimant was entitled to a call out fee at £105 and that this had not been paid due to an oversight when they were being set up on the payroll system. The Respondent did not seek to change the Claimant's terms and conditions and acknowledged that the Claimant was entitled to a callout fee of £105.

56. The Claimant accepted in his oral evidence that the Respondent agreed that his callout fee was £105 and that it was putting in place systems to try and work around the issues the Integral staff were facing because the Respondent payroll system was not set up to deal with the contractual sums due to the Integral staff.

57. The Claimant accepted in oral evidence that allegation 18, that callout fees were being paid at £70.50 instead of £105, was not a breach of trust and confidence.

58. The Claimant had asserted that he had incurred bank charges as a result of delayed payments. The Respondent confirmed the Claimant had never provided evidence of this at the time or during these proceedings. The Claimant stated that he was unable to obtain evidence of bank charges being applied to the Tribunal due to covid.

2% annual pay rise

59. In June 2019, the Claimant learned that the Respondent would make annual pay rises dependent upon performance. The Claimant believed that his contractual terms from Integral stated he was entitled to an annual 2% pay rise regardless of performance and he felt the Respondent was attempting to change the terms of his contract. He spoke with Mr Rigby regarding this matter.

60. On 24 June 2019, Mr Rigby contacted Ms Hamilton regarding this issue. In an email of 24 June 2019 (page 107) Ms Hamilton confirmed that all Integral staff received the agreed 2% pay rise in April 2019, however going forward the pay rise would be based upon the new performance system.

61. On 25 June 2019, Mr Rigby emailed a Mr Hanley at Integral asking for confirmation as to the Integral employee's contractual terms regarding annual pay rises and call out allowances.

62. Mr Hanley responded the same day stating:

> "*We can confirm that prior to April 1st each year we have a standard inflationary rise which this year was 2%.*
>
> *This in some instances reduced because of absence management cautions or disciplinary's*
>
> *With regards to standby payments the standard is £105.00 per week when on standby however this is enhanced on bank holiday's to £100.00 on the bank holiday and £15.00 per day for the rest of the week.*
>
> *When on standby during a bank holiday as well as the increased payment you are also entitled to a day off in lieu regardless if you are actually called out*"

63. Mr Rigby forwarded a copy of this email to Ms Hamilton (page 111) and in accordance with that email set out what he believed each Integral employee was entitled to, stating that the Claimant was entitled to "*2% annual increase & Callout*".

64. Ms Hamilton explained in her evidence that the email from Mr Hanley clearly confirmed to her that Integral employees were not automatically entitled to an annual 2% pay rise.

65. The Claimant's contract with Integral states that salaries are "reviewed" on an annual basis (page 76) and did not state the Claimant was entitled to an automatic 2% salary increase each year. Mr Hanley's email also clearly indicated that the Integral's salary review did not automatically result in a 2% annual pay rise and as such the Claimant was not entitled to this.

Holiday pay and Quarterly balancing payment

66. The Claimant stated that he noted in July that he had not received a quarterly balancing payment and he asserted that he was instead paid holiday pay at his basic salary which did not include his full entitlement.

67. During his employment with Integral the Claimant was paid holiday pay at his basic salary rate and thereafter, each quarter he received a "quarterly balancing payment" to account for the remaining holiday pay due. The Respondent did not make a quarterly balancing payment to the Claimant.

68. Integral's holiday pay policy (pages 72 – 74) detailed how Integral calculated and paid an employee's "normal renumeration" for the purposes of making payment of holiday pay. Integral's policy was to make payment of any holiday due to the employee in the month that holiday was taken at the employee's basic contractual pay. Thereafter, every quarter, Integral would calculate all relevant payments made to the employee in addition to the employee's basic salary (e.g. for overtime, standby, and call out payments) for that quarter in order to determine the employee's "normal remuneration" for that period. Integral would then make a "quarterly balancing payment" to reflect the additional sum due to the employee for these additional payments in relation to any holidays the employee had taken throughout that quarter.

69. The Respondent confirmed that it did not use this practice and instead it paid its employees their full holiday entitlement which was calculated by reference to the employee's "normal remuneration" at the date it became due, this included overtime, and callout fees etc. As a result, holiday was paid at the correct rate (not at the Claimant's basic rate) and quarterly balancing payments were not required.

70. Ms Hamilton's statement set out the 13 days holiday taken by the Claimant and confirmed that the Claimant was paid his full holiday pay, and not simply paid holiday based on his basic pay.

71. The Respondent's counter schedule of loss included a calculation showing how much the Claimant received from the Respondent and demonstrated that had the Claimant continued to be paid his holiday using Integral's method, he would have received less pay.

72. The Respondent had not paid the Claimant his holiday at the basic rate. The Respondent did not carry out the same practice of making a quarterly balancing payment as Integral had done and calculated and paid holiday pay at the relevant rate in the month it was taken. Accordingly, the Claimant was not due a quarterly balancing payment from the Respondent.

<u>25 July 2019 Incident</u>

73. On 25 July 2019, the Claimant attended a call out at the Cleveland Health Centre further to a power outage. When the Claimant arrived, he noticed thick black smoke and a strong smell of diesel fumes. This was caused by the diesel generators which had been

placed on site overnight, however there were no extractors to disperse the fumes. The Claimant's manager, Ms Dea, was already in attendance.

74. The Claimant had requested that the generators be turned off as the fumes were dangerous however he was informed a site manager would need to authorise this.

75. The Claimant went upstairs to speak with Ms Dea, who was involved in a meeting regarding the works to be done. Ms Dea had parked her car in front of the lift and was asked if it could be moved as it was blocking access.

76. Ms Dea therefore asked the Claimant if he would move her car. The Claimant did not question this and agreed to do so. The Claimant headed back downstairs towards the car. The Claimant stated that at this point he began to feel disorientated and unwell however he was able to move the car so that it was no longer blocking the access.

77. The Claimant then headed back upstairs towards the meeting; he confirmed he had jogged up some of the stairs. Once upstairs in the meeting room he began to feel unwell and disorientated again. As a result, he stopped what he had been doing and he spoke with a doctor, further to which the Claimant attended hospital and was diagnosed with Carbon Monoxide poisoning. He left hospital that day however returned the following day as he still did not feel well.

78. In oral evidence the Claimant was asked why he had not refused to move Ms Dea's car if he believed it clearly presented a danger to his health for him to move it. The Claimant confirmed that Ms Dea was not someone you would say no to, and that an employee should carry out a task if set by a superior.

79. I do not doubt that the Claimant's health suffered as a result of the incident that occurred, however I find that the threat to health and safety could not have been as blatantly apparent to Ms Dea as the Claimant suggests because had the risk been as clear as this, the Claimant would not have simply acquiesced to Ms Dea's request without any question.

80. The Claimant obtained a medical note from his GP and was away from work due to illness for 25.5 days.

81. The Respondent submitted that until his resignation letter, the Claimant had not alleged that Ms Dea had breached her duty of care to him by recklessly sending him into a dangerous area. The Claimant stated that he had mentioned it in his return-to-work interview however I discuss this below at paragraphs 120 – 125 below.

82. The Claimant did not raise a formal grievance or resign in response to this incident.

<u>RIDDOR Report reference to asthma and bullying by Mr Hutley</u>

83. During the Claimant's absence due to illness further to the 25 July incident, he received calls from Ms Jackson and Ms Dea to which he did not respond. He also received a text message asking him if he had asthma and if that had caused his illness further to the

incident. The Claimant did not respond to this text message to confirm he did not have asthma.

84. The Claimant stated that throughout this period of absence he chose to speak with Mr Rigby. Mr Rigby informed the Claimant that the Respondent was suggesting he should not have been present at the site and that he suffered from asthma which caused the injury.

85. The Claimant stated that he felt the Respondent's attitude towards the incident was that they wished to "sweep the incident under the rug" and to negate liability by finding ways to blame him, suggesting he should not have been there, or that an underlying medical condition (asthma) was the real cause of the injury. He described feeling that this was as a "witch hunt" going on in his absence.

86. The Respondent submitted this was incorrect, they had not sought to cover anything up, and had complied with its relevant Health and Safety reporting obligations and completed and filed a RIDDOR report.

87. Ms Butler, the "zone health and safety specialist" for the Respondent, carried out an initial investigation into the incident. She completed part 1 of the RIDDOR report, this being the short initial report that requires submission to the Health and Safety Executive (HSE) as soon as possible after the incident. Ms Butler then provided part 1 of the report to Mr Hutley, the National Health and Safety Manager (Risk and Performance) for the Respondent. Mr Hutley had worked for the HSE from 2001 and joined the Respondent in 2014. His role with the Respondent was to manage an audit team dealing with all RIDDOR reporting for the Respondent.

88. Part 1 of the report produced by Ms Butler did not include a reference to the Claimant having asthma.

89. Further to receiving this from Ms Butler, but before submitting it to the HSE, Mr Hutley and Ms Butler had a telephone conversation during which Ms Butler informed Mr Hutley that she had been told the Claimant had asthma.

90. Mr Hutley felt that if the Claimant did have asthma this was a potentially relevant health condition in the circumstances of this incident which related to the inhalation of fumes and as a result it was something the HSE would expect to be included in the report. As such, when he submitted the report on 5 August 2019 he stated: "*We are aware the IP [injured person] has previous asthma problems*".

91. The Respondent submitted the reference to the Claimant having asthma was based on a mistaken belief. Ms Butler's email of 26 July 2019 (page 149) was brought to my attention which indicated that Ms Butler had been told the Claimant had asthma. The Respondent submitted that Ms Butler was simply transmitting information she had heard to Mr Hutley which could be potentially relevant.

92. The Respondent highlighted that it had attempted to clarify whether the Claimant had asthma by asking the Claimant directly via text message however the Claimant did not

respond to the text message. This lead to Mr Hutley including this potentially relevant issue with the report.

93. Further to submitting part 1 of the report, a full investigation of the incident had to be carried out and part 2 of the report would then be completed in order to provide more detailed information to the HSE. Ms Butler carried out this investigation however it took longer than anticipated due to delays in information being provided from Northern Powergrid.

94. The Claimant stated that he had requested to see a copy of the report via John Rigby and it was not provided to him.

95. The bundle contained emails between Ms Butler and Mr Rigby between 3 August 2019 and 10 September 2019 discussing the report and the reason for the delays. On 14 August 2019, Mr Rigby asks Ms Butler if the report has been completed and Ms Butler replied the same day to explain that she was still waiting for Northern Powergrid to provide her with its investigation before she could complete her report and confirms she will provide a copy when she has it.

96. The Claimant believed the Respondent was deliberately hiding the report from him and as a result contacted the HSE directly to obtain a copy.

97. On 10 September 2019, Mr Rigby emailed Ms Butler (page 181) to confirm that the Claimant had contacted HSE directly regarding the report and had informed the HSE it contained a number of inaccuracies and had requested a new investigation be opened.

98. Ms Butler responded to Mr Rigby by email that same day to confirm she was aware of this, and that she believed it had been "*mistakenly added onto the form that* [the Claimant] *may have asthma (but during our investigation it was found out that he does not)*."

99. On 13 September 2019 Ms Butler emailed Mr Rigby to confirm the report had been signed off and she would therefore be sending a copy. Mr Rigby informed Ms Butler that the Clamant was on holiday for 2 weeks. On 16 September 2019, Mr Rigby asked Ms Butler if she would be providing a copy to the Claimant and Ms Butler responded to say she had tried to call the Claimant but had no response but that she could send him a copy when he got back from his holiday and that she would be "*happy to go through it with him*".

100. The evidence does not support the Claimant's position that the Respondent sought to hide the report from the Claimant. The evidence indicates that attempts were made to contact the Claimant to discuss the position with regards to the mistaken belief he had asthma and to discuss the report itself.

101. Further to contacting the HSE the Claimant had a telephone conversation with Mr Hutley. The Claimant asserted that during this conversation Mr Hutley bullied him into accepting his explanation as to the importance/relevance of the incorrect reference to the Claimant having asthma in the HSE report.

102. Mr Hutley denied the allegation of bullying. Mr Hutley's evidence was that Ms Butler had informed him that the Claimant was not happy and had contacted HSE about the incident and as a result he felt it might assist the Claimant if he contacted him so he could answer any queries the Claimant had.

103. During this call the Claimant informed Mr Hutley that he was not sure who to report the incident to, and Mr Hutley informed him that it was the Employer's responsibility to report and explained the RIDDOR process. They then discussed the reference to asthma in the report. Mr Hutley stated that he understood the reference was incorrect further to Ms Butler's investigation and the Claimant asked if this meant part 1 of the report would need to be updated.

104. Mr Hutley explained that he did not feel this would be necessary because the reference to asthma would not impact on whether the HSE chose to investigate the report or not. Furthermore, Mr Hutley explained that in his experience the reference to asthma did not affect the seriousness of the situation as far as the HSE was concerned and that he believed, if anything, the reference to asthma made it more likely that the HSE would investigate.

105. Mr Hutley felt the conversation was a good and productive one and he had answered the queries raised by the Claimant. He did not feel there was any indication that the Claimant felt bullied during this call or was unhappy with the discussion.

106. In late September 2019, as a result of the Claimant's contact, HSE sent a Visiting Officer. The Visiting Officer informed Mr Hutley she was following up on the RIDDOR report. Mr Hutley confirmed that he could provide a copy of the report for her and in an email to the Visiting officer on 1 October 2019 Mr Hutley provided a copy of the report and also stated:

> *"On this occasion the information provided initially indicated that the* [Claimant] *suffered from asthma. However the more detailed investigation identified this fact was incorrect. I decided not to update or resubmit the RIDDOR notification as this fact didn't alter the circumstances of the incident itself, it would have just been another contributing factor.*

107. Further to this, save for asking for Northern Powergrid's contact details HSE did not contact the Respondent about the incident again.

108. The Claimant suggested in his oral evidence that Mr Hutley shouted at him during this call. Mr Hutley denied this and stated the call was calm and sensible, he was not angry or upset during the call.

109. The Claimant did not report Mr Hutley shouting or being angry during this call prior to his oral evidence. I found Mr Hutley to be credible in his evidence. On the balance of probabilities, it is not likely Mr Hutley shouted at the Claimant during the call. The Claimant was distressed about the incident itself and he was upset about what he felt was an attempted "cover up" by the Respondent. As a result, it may simply be that the Claimant viewed this call under a lens of suspicion and distress which distorted his take

on the call. I did not find that Mr Hutley bullied the Claimant into accepting his position regarding the reference to asthma. Mr Hutley had no reason to do this as it would not have prevented the Claimant from contacted HSE himself if he did not agree with the reasoning.

110. The evidence does not support the Claimant's assertion that the Respondent's reference to the Claimant having asthma was part of a "cover up" to negate liability. The evidence demonstrates that Ms Butler had been told that information, and reasonably the Respondent sought to clarify the veracity of that statement by contacting the Claimant. When the Claimant failed to respond to confirm this was incorrect, Mr Hutley reasonably drew from his experience in his job role and determined that if the Claimant did have asthma, this was a relevant issue to be included within the report.

111. The Claimant did not resign or raise a formal grievance relating to the 25 July 2019 incident or how it was reported, and he did not report a grievance relating to bullying by Mr Hutley. The Claimant returned to work on 19 August 2019.

Return to work interview with Mr Hewitson

112. On 19 August 2019, the Claimant met with Mr Hewitson for a return-to-work interview during which they completed a return-to-work form. Mr Rigby was present in the same office when this interview was taking place, and Mr Chisolm was called into the interview to assist Mr Hewitson with completing the forms.

113. The Claimant complained that this interview lasted in excess of 3 hours.

114. Mr Hewitson agreed that the interview was lengthy, it was the first time he had conducted a return-to-work interview, he had problems with his laptop and the return-to-work form, and as a result, he had to seek assistance from Mr Chisolm. This increased the length of the interview however this was not done with any intent on causing distress the Claimant. Mr Hewitson's evidence was that during the meeting the Claimant did not raise a concern regarding the time taken to complete the form.

115. The Claimant complained that his requests for a staged return to work and OH were ignored. He confirmed that Mr Hewitson told him to "take it easy" in getting back to work.

116. Mr Hewitson's evidence was that he did not recall the Claimant making a request for a staged return to work or reduced hours, and that when he discussed OH, the Claimant told him there was now no point as he had already returned.

117. The return-to-work form (pages 186-187) was not signed by the Claimant but Mr Hewitson did note on it that an appointment with OH needed to be made to follow up on any further treatment or assistance required.

118. In his resignation letter, the Claimant stated that he was told to arrange OH himself and was provided with a telephone number, however upon contacting OH he was told they could not assist as a manager or supervisor would need to report the matter.

119. Mr Hewitson confirmed that after the return to work interview the Claimant did not speak to him again about OH. Furthermore, he did not recollect there being any mention of a request for a staged return to work.

120. The Claimant did not make either of these requests in writing or chase them up. I do not think it is likely that in the circumstances where the Claimant had returned to work following a serious accident which occurred in the workplace, Mr Hewitson would have deliberately ignored a request for a staged return to work or OH if the Claimant had requested this or followed it up. Mr Hewitson would have nothing to gain from doing this, and presumably would potentially face serious action if the Claimant had made these requests and he had ignored them.

121. The Claimant complained that in his interview, Mr Hewitson refused to include a reference to Ms Dea's breach of duty of care towards him on the return-to-work form.

122. In oral evidence the Claimant stated he had refused to sign the return-to-work form because Mr Hewitson had signed it as his line manager, but he did not agree that Mr Hewitson was his line manager. Later in evidence he stated that he had refused to sign the form because he had requested Mr Hewitson include within the form confirmation that he had been away from work as a result of Ms Dea knowingly sending him into a hazardous area, and when Mr Hewitson refused, he refused to sign the report.

123. The Respondent highlighted the Claimant had not mentioned any reference to Mr Hewitson refusing to include these details in his resignation letter where he had simply stated that his supervisor "*did not know how to proceed with* [the return-to-work interview] *and another manager had to finish it off without* [the Claimant] *signing the document or a copy given to* [the Claimant]". The Claimant then contradicted himself in oral evidence when explaining why he refused to sign the form.

124. Mr Hewitson stated that he did not remember the Claimant requesting that he made a note on his return-to-work form suggesting that Ms Dea had knowingly sent him into a dangerous location resulting in his injury and therefore he had not refused to include this information on the return-to-work form.

125. On balance of probabilities, I prefer the evidence of the Respondent on this issue and I do not find that Mr Hewitson refused the Claimant's request to include a reference to Ms Dea having failed in her duty of care on his return-to-work form. The return-to-work form is not signed by the Claimant and in his resignation letter, which was closer in time to the events in question, the Claimant stated it was not signed because another manager had to complete the form, not because Mr Hewitson had refused to include information on the form. It was not until he was questioned in his oral evidence as to why he had not raised his allegation that Ms Dea had breached her duty of care towards him with the Respondent before his resignation that the Claimant suggested this had been discussed in the return-to-work interview.

126. Moreover, it does not seem that the return-to-work form would be an appropriate forum to include an allegation of this gravity against another member of staff; had Mr Hewitson refused to include such an allegation, I do not believe that this would have been

unreasonable. If the Claimant had wished to raise such a serious complaint about Ms Dea's actions, it ought to have been done by way of a formal complaint. The Claimant however never raised such a complaint.

127. The Claimant did not raise a formal grievance about his return-to-work interview or specifically the length of this meeting, any failure on Mr Hewitson's part to follow up with OH or provide a staged return to work, or any refusal on Mr Hewitson's part to include details relating to Ms Dea on the return-to-work form.

128. I do not find that Mr Hewitson acted unreasonably or in a way that was designed to cause the Claimant distress during the return-to-work meeting. Whilst Mr Hewitson accepted the meeting took a long time, he explained this was because he had not completed the return-to-work form before and needed to seek assistance. Mr Hewitson did not refuse a staged return or to assist with OH, and he did not refuse to include an allegation about Ms Dea on the return-to-work form.

Disagreement with Mr Hewitson regarding work trousers

129. Upon the Claimant's return to work, the Claimant requested a pair of new work trousers from Mr Hewitson. Mr Hewitson asked why, and the Claimant informed him that his trousers had been destroyed by the diesel stains and fumes from the 25 July 2019 incident. The Claimant suggested that in asking this question, Mr Hewitson was belittling him. Mr Hewitson explained that he was simply asking what had happened to his previous work trousers before he ordered new ones.

130. Mr Hewitson informed the Claimant he would provide him with some trousers from the stores which were part of the uniform for the Respondent employees. The Claimant told Mr Hewitson that he required a different pair of trousers as the standard work uniform trousers would not fit.

131. The Claimant stated in his oral evidence that during this meeting he obtained a pair of trousers from the stores and tried them in order to demonstrate to Mr Hewitson that they did not fit. This resulted in a heated discussion, culminating in the Claimant telling Mr Hewitson he was causing him so much stress that he would need to go back on the sick if this continued. At this point, Mr Rigby told Mr Hewitson to order the Claimant the trousers he wanted, which was then done.

132. Mr Hewitson's evidence was that he did not agree that the conversation was heated or culminated in an argument. Furthermore, he stated that he did not remember the Claimant trying on a pair of trousers from the stores in front of him in order to demonstrate that they would not fit.

133. Mr Hewitson stated he found the Claimant's suggestion that the standard trousers would not fit him strange since nothing of the Claimant's stature indicated to him that a specialist size would be required and other employees, larger than the Claimant, wore them. As a result, Mr Hewitson said that he had felt the Claimant did not need a special pair of trousers and should wear the uniform provided, especially since there was an additional cost to ordering alternative trousers.

134. The Claimant stated that he was forced to attend work in shorts for the three weeks it took for him to get his trousers further to them having been ordered and as a result the Respondent left him working without suitable work attire.

135. Mr Hewitson explained he had not realised that the Claimant did not have any alternative work trousers as he would not have considered an employee would have only one pair of work trousers.

136. The Claimant felt it should have been obvious to Mr Hewitson that he had no other pairs as he was wearing shorts when he returned.

137. Mr Hewitson stated that had the Claimant explained that he had no alternative work trousers and had he noticed the Claimant was wearing shorts because of this, he would not have permitted the Claimant to work, as this would not have been appropriate.

138. Mr Hewitson did not accept that the Claimant expressed any discontent at this interview, nor that there was any element of conflict between himself and the Claimant. The Claimant's evidence wholly contradicts this and suggests he clearly informed Mr Hewitson that he was aggrieved by Ms Dea's actions, and there was a disagreement regarding the trousers, escalating to the point where the Claimant informed Mr Hewitson that his actions would send him back home with stress.

139. I make no finding as to the conflict of evidence regarding whether the Claimant did or did not try on a pair of trousers to demonstrate that they would fit as it is not relevant to determining the issues.

140. I find that the truth as to what happened in this meeting lies somewhere between the two versions of events. This meeting was not as calm as Mr Hewitson suggests. However, if the Claimant was as upset as he suggests, he did not clearly express how upset he was to Mr Hewitson.

141. I do not find that Mr Hewitson was aware that the Claimant only had one pair of work trousers or that Mr Hewitson made the Claimant attend work in shorts until his trousers arrived. The Claimant did not assert that he had informed Mr Hewitson that he only had one pair of trousers he merely suggested it should have been apparent to Mr Hewitson because at that meeting he was wearing shorts. Without being told directly Mr Hewitson could not have been aware that the Claimant did not have more than one pair of work trousers, not least because one would have expected him to ask for two when his had been destroyed.

142. It was not unreasonable for Mr Hewitson to ask the Claimant why he could not wear trousers available from the stores, as purchasing an alternative non-uniformed pair would be at an additional cost and this cost should therefore be justified.

<u>September to October 2019</u>

143. In mid-September 2019, the Claimant had two weeks annual leave to visit family in Cyprus. In his witness statement he stated that he returned feeling refreshed and "*once back* [he] *knew* [he] *had to get another job so* [he] *started looking*". As such, on his return to the Country he began to look for other work and obtained 4 job offers within just a few weeks.

144. In his oral evidence he intimated that he had not been looking for other work but that instead he was offered other work and suggested that other people had approached him further to finding out he was unhappy with the Respondent.

145. The Claimant received his payslip at the end of September. The Claimant stated he had been paid incorrectly every month and the Claimant's September payslip (page 255) similarly demonstrated callout fees were paid at £70.50 instead of £105. The Claimant did not resign in response to this.

146. On 18 October 2019, the Claimant received a letter from a company, Spie, stating "*further to recent discussions*" he had been offered employment as a compliance electrician (page 260) and enclosed a statement of terms and conditions of employment.

147. Thereafter, on 21 October he received an email from Spie saying "congratulations on your new appointment" (page 257).

148. On 22 October 2019, the Claimant received a letter (page 279) from another company, ECG Facilities Services ("ECG"), offering him a position "*further to* [his] *recent interview*", with a basic salary of £32,000 per annum.

149. On 31 October 2019, the Claimant received an email from Integral the wording of which suggests the Claimant had been discussing a job advertisement with the sender (page 285).

150. The Claimant took up the role with ECG. He confirmed in oral evidence he was able to confirm to ECG his preferred start date and arrange it accordingly. As such, further to his resignation on Tuesday 29 October 2019, he confirmed that he chose to take the following three days off, plus the weekend, to spend with his family, and then he began work for ECG on the following Monday 4 November 2019.

151. The Respondent submitted that the Claimant had resigned because he had secured a higher paid job and his allegations against the Respondent did not play a material part in the reason for his resignation.

152. The Claimant rejected this argument and said that he did not have a new job on the day he resigned. In his witness statement the Claimant indicated that further to handing in his resignation "*the only problem* [he] *had was to which company did* [he] *want to start for.*" Furthermore, the Claimant's evidence was that although the salary at ECG was higher this benefit was negated because the position gave him fewer days holiday and sick pay was not as generous.

153. I find that the Claimant was actively seeking alternative employment further to his return from annual leave in September. This is supported by the Claimant's witness statement, and the letters to the Claimant from Spie and ECG on 18 and 22 October 2019 respectively, which indicate that the Claimant must have been attending interviews in or around early October 2019.

154. On the balance of probabilities, I find that upon his return from annual leave, the Claimant decided to resign and began to seek alternative work. It is likely that the Claimant reflected on his position with the Respondent whilst away with his family on annual leave and decided he would resign, this opinion crystalised on his return to the Country and he acted upon that decision with his immediate, and successful, search for a new job. This is supported by the Claimant's witness statement in which he says he was refreshed from his holiday and upon his return he knew he "had to get another job", and the subsequent chronology of events evidenced by the letters from Spie and ECG demonstrating he began to speak to alternative employers and to arrange and attend interviews.

Overtime

155. The Claimant's allegation 15, was that overtime was not paid to the Claimant. The breach of trust and confidence relates to the fact that the Claimant felt his overtime was not paid due to incompetence on Mr Hewitson's part. This is reflected in the wording used by the Claimant in the allegation, in which the Claimant describes having asked Mr Hewitson why his pay was late and Mr Hewitson responding that he did not have time, thereafter, resulting in the Claimant approaching another manager who did sort the matter for him.

156. On 29 October 2019, the Claimant received his payslip from the Respondent. The payslip confirmed that he had been paid incorrectly again and he had not been paid for his overtime despite having completed the relevant paperwork and submitting it to Mr Hewitson by the 11 October 2019, this being before the required deadline of 14 October 2019.

157. The issue relating to payment of overtime had been an ongoing problem which in part related to the way in which the Respondent's payroll was set up. Transferred Integral employees such as the Claimant were entitled to double time at the weekend, whereas the Respondent's existing employees were only contractually entitled to time and a half for weekend work. As a result, the Claimant was not able to record his overtime hours using the phone app, like other employees and he therefore had to complete time sheets and work with Mr Hewitson directly to input his overtime.

158. To submit a claim for overtime the Claimant therefore had to complete overtime authorisation forms and submit them to Mr Hewitson by the 14th of each month. Mr Hewitson then needed to submit those claims to accounts in time for the monthly pay run to ensure the Claimant would be paid his overtime within that month.

159. Mr Hewitson accepted that on at least 2 occasions, despite the Claimant having submitted his claims on time, he had failed to submit the same to accounts resulting in

the Claimant's overtime being paid late. Mr Hewitson stated this was a mistake due to his workload and was not done deliberately.

160. The Claimant had previously brought this issue to the attention of Mr Colby and Mr Rigby, and he stated that they had managed to sort his overtime out.

161. Ms Hamilton confirmed that where it was clear the payment issue was not a problem caused by the employee, accounts would ensure a faster payment was made to the employee, so that they would receive the underpayment within the month in question, however if the underpayment was caused by the employee's failure to carry out a task, the payment would simply be paid in the next month's pay run. As such, where the failure to pay the Claimant was caused by Mr Hewitson, a faster payment transfer was made to the Claimant.

162. The Respondent submits that all payments due to the Claimant were paid. The Claimant accepted that, save as for the quarterly balance payment relating to holiday, all payments due to him were paid to him "*eventually*". The Claimant accepted there were teething problems, although his evidence was that in his opinion teething problems should only last for 2 months.

Resignation

163. On 29 October 2019, the Claimant handed in a letter of resignation to take immediate effect, which listed 8 bullet points confirming the reasons for his resignation, although noting this was not an exhaustive list of reasons.

164. In a letter to the Claimant of 31 October 2019, Mr Showler invited the Claimant to discuss the issues raised. However, the Claimant responded by email on 4 November 2019 confirming he would not attend. Later that evening he wrote another email with further information regarding his reasons for resigning.

165. The Claimant confirmed that he chose to take 3 days off to spend time with his family and thereafter on 4 November 2019 the Claimant began a new role with another company (ECG).

166. On 30 March 2020, the Respondent published a post on LinkedIn indicating it was hiring engineers. The Claimant responded to this post with a comment stating, "*Dust my van off, I'll help out*" (page 241).

167. The Claimant was asked in oral evidence what he meant by this statement and he confirmed this was a genuine offer to help, as the post stated "the NHS needs you more than ever".

168. The Respondent submitted that this took place only 6 months after the Claimant had resigned, and as such demonstrated the Claimant had no animosity towards the Respondent.

Relevant Law

169. Section 95 of the Employment Rights Act 1996 (ERA) states:

"(1) For the purposes of this Part of an employee is dismissed by his employer if (and, subject to subsection (2)…. Only if):

…

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

170. An employee is "entitled" to terminate the contract only if the employer has committed a fundamental breach of contract, i.e. a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract (Western Excavating (ECC) Ltd v Sharpe 1978 ICR 221, CA). The conduct of the employer must be more than just unreasonable to constitute a fundamental breach.

171. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in Malik v BCCI; Mahmud v BCCI 1997 1 IRLR 462 where Lord Steyn said that an employer shall not:

"*…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*."

172. In essence, the employee must show that there has been a repudiatory breach on the part of the employer; the employee must elect to accept the breach and treat the contract at an end. The employee must resign in response to the breach and the employee must not waive the breach by delaying too long and affirming the contract.

173. It is apparent from the decision of the House of Lords in Malik that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

"*The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances*."

174. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

175. In Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in Malik.

176. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in Malik recognises that the conduct must be likely to destroy or seriously damage the

relationship of confidence and trust. In Frenkel Topping Limited v King UKEAT/0106/15/LA 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-14):

> "*12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being: "… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."*
>
> *13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.*
>
> *14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term*."

177. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract — Lewis v Motorworld Garages Ltd 1986 ICR 157, CA.

178. In Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA, the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test.

179. The Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA, held that, in last straw cases, if the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign.

180. The Court of Appeal in Kaur (above) offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

    a. 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?

    b. has he or she affirmed the contract since that act?

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

    d. 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 trust and confidence?

    e. did the employee resign in response (or partly in response) to that breach?

181. In terms of causation, that is the reason for the resignation, I must determine whether the employer's repudiatory breach was 'an' effective cause of the resignation. However, the breach need not be 'the' effective cause — Wright v North Ayrshire Council 2014 ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in Abbycars (West Horndon) Ltd v Ford EAT 0472/07, "*the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon*". If however, there is a different reason causing the employee to resign there may be no constructive dismissal. Where there are mixed motives it is necessary to consider whether the employee has accepted the repudiatory breach by treating the contract of employment as at an end. Acceptance of the repudiatory breach need not be the only, or even, the principle reason for the resignation, but it must be part of it and the breach must be accepted (see Logan v Celyn House UKEAT/069/12 and in particular paragraphs 11 and 12).

182. A failure to pay salary on the due date will generally be a fundamental breach of contract. If an employer deliberately withholds or reduces an employee's pay or diminishes the value of the employee's salary package, that is a fundamental and repudiatory breach of the contract of employment, regardless of the amount involved. It is only where the employer's default relates to an inadvertent failure to pay or a delay in payment that the question of whether the breach of contract is fundamental arises: Cantor Fitzgerald International v Callaghan and ors[1999] ICR 639. Lord Justice Judge held:

> *"In my Judgement the question whether non-payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment, depends on the critical distinction to be drawn between an employer's failure to pay, or delay in paying,*

agreed remuneration, and his deliberate refusal to do so. Where the failure or delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events (see eg Adams v Charles Zub Associates Ltd [1978] IRLR 551). If so it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the court might be driven to conclude that the breach or breaches were indeed repudiatory."

Conclusions

183. Applying the case law principles identified above, I have carefully considered the allegations that the Claimant makes about the Respondent in support of his claim that he was entitled to resign and consider himself constructively dismissed.

184. I first dealt with identifying the last straw. The Claimant stated the last straw was receiving his payslip in October demonstrating he had been paid incorrectly again. The Respondent had failed to pay his overtime, and he was informed that this was caused by Mr Hewitson's failure to submit his paperwork in time. The Claimant referenced his October wages being incorrect in his resignation letter and therefore indicates it was 'an' effective cause of his resignation.

185. The Respondent submitted that the Claimant had conceded the last straw incident was not a breach of the implied term of mutual trust and confidence, that was not accurate. The Claimant had conceded his last allegation (allegation 18) was not a breach, however the Claimant's allegations were not in chronological order and allegation 18 related to the Respondent's payment of his callout fee at £70 and not £105. The Claimant asserted his last straw was that his payslip was incorrect, which included the fact that Mr Hewitson had failed to submit his request for overtime, resulting in the Claimant's overtime not having been paid.

186. The Respondent further submitted however that the Claimant resigned because he had secured a higher paid job and the allegations he cited as the reasons for his resignation did not materially influence his decision to resign. The Claimant suggested he had not secured the position when he resigned, he simply had job opportunities available to him.

187. The evidence confirms that upon his return from holiday, the Claimant had decided he had to leave his employment and needed to find another job in order to do so. The Claimant's witness evidence was clear on this point, "*once back* [from annual leave] *I knew I had to get another job so I started looking.*" I found it was likely that the Claimant had considered the issue whilst away on annual leave and decided to resign, and that on his return to the country this decision was crystallised, resulting in the Claimant's search for alternative employment.

188. On the balance of probabilities, the Claimant's resignation at the end of October was an issue of timing so that he could prepare for beginning his new role at the start of November. I do not find that the Claimant's resignation related to receipt of his payslip demonstrating the non-payment of his overtime as I find it very unlikely that had the

Claimant been paid his overtime correctly, he would have remained working with the Respondent; this was because at this stage, he had already made up his mind he was leaving. Whilst the Claimant suggests he had not arranged his next employment at the end of October, he confirmed in his own evidence all that was required for him to do was to confirm to his chosen employer his preferred start date. I do not accept any inference that this would suggest the Claimant was undecided at this stage, the evidence demonstrates the Claimant had already made his decision.

189. As such, I do not find that being paid incorrectly at the end of October was in fact the "last straw" incident. The Claimant simply reflected on his employment whilst away and had decided at that stage to resign. The Respondent's actions thereafter did not alter the Claimant's position.

190. There was therefore no "last straw incident" that occurred which resulted in the Claimant's resignation. Whilst it is noted that a final straw does not have to be a breach itself, so long as the act or omission is not trivial, there still must be a last straw, an act or omission that occurs further to which the Claimant resigns in order for the Claimant to succeed in showing there has been a breach of the implied term of trust and confidence through the cumulative effect of the Respondent's actions or omission. Here, the Claimant made his mind up further to a period of reflection whilst away from his employment for 2 weeks on annual leave. As a result, there was no last straw and therefore nothing in law that enabled the Claimant to rely upon and revive the previous allegations. Accordingly, the Claimant's claim therefore must fail.

191. If however I was wrong in my analysis of the last straw, I looked at the allegations raised by the Claimant to consider whether individually or taken cumulatively they amounted to a repudiatory breach of trust and confidence.

192. The relevant test to be applied is found in the Malik decision of the House of Lords. It is that the conduct of the employer must be without reasonable and proper cause and must, when viewed objectively, be calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee. It is a demanding test. It is not enough to establish that an employer has acted unreasonably. It must be conduct which shows that the employer is effectively abandoning the contract and altogether refusing to perform it.

193. Against that background I turned to the individual allegations raised by the Claimant in the Issues (above) grouping those allegations together where appropriate. I address the cumulative effect of matters at the end.

Allegations 1 & 2; The Car

194. The Claimant was provided with a van as opposed to a car. Having received the van, the Claimant did not thereafter request a car or even inform the Respondent he was not happy with the van.

195. The Claimant's colleague raised this as an issue with the Respondent and was provided with a car. Had the Claimant done so he also would have received car. It was not

reasonable for the Claimant to expect the Respondent to change his vehicle when he had not requested this.

196. This incident cannot have reasonably amounted to or contributed to a breach of the implied term of trust and confidence.

Allegations 3, 16 & 17; Incidents relating to Ms Jackson and Mr Wilson:

197. Allegation 3: The Claimant did not raise a grievance about the 2 April 2019 incident and was able to make a joke out of it with his colleagues. This did not amount to a breach of mutual trust and confidence.

198. Allegation 16: Moving responsibility for the fire alarm runs the site managers was a decision made a national level and was not enacted to cause distress to the Claimant. I accept that the Claimant felt unhappy with this change because he did not get on with Ms Jackson or Mr Wilson and this created additional friction, however, this did not amount to a breach of mutual trust and confidence.

199. Allegation 17: The Claimant did not raise a grievance about Mr Wilson's actions in raising the plant room job. This did not amount to a breach of mutual trust and confidence.

200. Whilst the Claimant did not have a good relationship with Ms Jackson and Mr Wilson, the Claimant was able to make a joke of some of these issues with his colleagues. The Claimant did not consider the issues serious enough to raise a formal grievance. These were not incidents in and of themselves that amounted to a breach of the implied term of trust and confidence. However, taken together with other things, these acts could cumulatively have contributed to a breach of the implied term of trust and confidence.

Allegations 5, 6, & 14; Holiday pay, quarterly balancing payment, pay rise

201. The Claimant incorrectly believed he was entitled to a quarterly balancing payment, and that he had been paid his holiday pay at the basic rate. The Claimant was not paid his holiday at his basic rate, he was paid his holiday at a rate that included his overtime and call out payments. No quarterly balancing payment was due.

202. The Claimant incorrectly believed he was automatically entitled to an 2% annual pay rise. He was not, and the Respondent correctly challenged this.

203. None of these allegations can have reasonably amounted to or contributed to a breach of the implied term of trust and confidence.

Allegations 7, 8, 9 & 10; The 25 July incident and RIDDOR report

204. I have no doubt that the Claimant was genuinely distressed by the 25 July 2019 incident and found it difficult to re-visit the matter during questioning in the hearing.

205. Whilst I accept that the Claimant believed the Respondent was attempting to cover the incident up, or seek to negate liability, the evidence does not support this assertion.

206. I found that; the Respondent did not knowingly or recklessly send the Claimant into a hazardous area, the Respondent acted reasonably in its investigation and reporting of

the incident, the reference to the Claimant suffering from asthma was simply a mistake which the Respondent identified during its investigation, the Respondent did not seek the keep the report from the Claimant, and that Mr Hutley did not bully the Claimant into accepting his position regarding the reference to asthma in the report.

207. Reviewing the Respondent's actions in relation to these allegations objectively, they did not amount to a breach of the implied term of trust and confidence. However, taken together with other things, these acts could cumulatively have contributed to a breach of the implied term of trust and confidence.

Allegations 11, 12 and 13; Relationship with Mr Hewitson

208. The Claimant and Mr Hewitson did not have a good working relationship. The Claimant felt undermined by the way in which Mr Hewitson challenged him regarding his trousers and job times, he felt he had to beg Mr Hewitson for overtime, and he felt Mr Hewitson was not a capable manager. It may well have been the case that the move from Integral was a culture shock for the Claimant. He moved from working in the private sector with someone he had developed a good working relationship with, and for whom he had a great degree of trust and respect, to working in the public sector with someone he was not familiar, who had a different approach to work and a different method of working.

209. The Claimant did not speak with Mr Hewitson that often, and chose not to raise issues with him, preferring instead to discuss his problems with Mr Rigby, his previous manager, with whom he had already built up a good working relationship.

210. This preference for speaking with Mr Rigby instead of Mr Hewitson, coupled with the fact that the Claimant did not raise any formal grievances or complaints about any of the allegations he raised in these proceedings meant that Mr Hewitson was not aware of the degree of discontent the Claimant felt. As a result, the relationship between the Claimant and Mr Hewitson could not improve as Mr Hewitson could not address the Claimant's issues or alleviate any problems he had. Had there been a better line of communication between them, they may have developed a better relationship and understanding. This would have resulted in fewer issues arising, or at least a method for resolving them, leading to a greater level of trust and confidence. As an example of this, it is clear from his evidence that Mr Hewitson's practice was to make challenges to time estimates for jobs and that he expected this would generate a discussion with the relevant employees in order to ensure those estimates were correct. The Claimant accepted that he never raised his allegation that Mr Hewitson reduced job times unreasonably with Mr Hewitson, however had he done so, the Claimant would have had a discussion with Mr Hewitson about the time estimate and would have better understood Mr Hewitson's management style.

211. I found that; Mr Hewitson did not act unreasonably in his conduct during the return-to-work interview, he was not unreasonable in his discussion regarding the Claimant's trousers, he did not force the Claimant to attend work in shorts and he did not unreasonably reduce the time estimates for jobs the Claimant was working on.

212. Furthermore, I found that Mr Hewitson was not aware the Claimant had such significant issues with him or his management style, since the Claimant did not raise these issues with Mr Hewitson and seek to resolve them. As a result, Mr Hewitson could not address the concerns. I accept that had the Claimant have spoken with Mr Hewitson regarding any changes to job estimates, Mr Hewitson would have discussed this with him as he did with other members of staff. It is likely this would have been the case with other issues.

213. As a result, the allegations raised against Mr Hewitson were not enough in and of themselves to cause a breach of the implied term of trust and confidence. However, taken together with other things, these acts could cumulatively have contributed to a breach of the implied term of trust and confidence.

Allegations 4, 15, & 18; Callout fee and Overtime

214. The Claimant accepted that the Respondent was aware of his contractual callout entitlement and was trying to implement a way to work around the payroll system which did not recognise the correct sum.

215. The Claimant conceded allegation 18 was not a breach of the implied term of mutual trust and confidence.

216. With respect to payment of overtime I find that it was not the failure to pay overtime itself that caused the alleged breach of trust and confidence as, similar to allegation 18 above, the Claimant was aware his overtime rate was not contested by the Respondent and a workaround was being put in place to accommodate this. The Claimant felt it was Mr Hewitson's failure to submit his forms in time resulting in the late payment that caused the breach of trust and confidence.

217. Mr Hewitson's failure to submit the Claimant's paperwork was because he was struggling with the volume of work that he had at that time. The Respondent admitted the payment had not been made due to a fault by the Claimant's manager and confirmed that whenever this happened a faster payment was made to the Claimant resulting in his overtime payment being paid soon thereafter.

218. This was not a deliberate attempt to underpay the Claimant and it was rectified as soon as it was discovered. The Claimant knew he would receive his pay. The Claimant recognised that there was a difficulty overall with the payroll system that did not permit him to directly use the app to submit his overtime and he was aware that the Respondent to put together a work-around to help achieve his contractual rate of overtime.

219. This did nothing to improve the relationship between the Claimant and Mr Hewitson, however the late payment of overtime was not deliberate and the Claimant accepted that the Respondent was trying to work on a way to ensure his contractual overtime rate was correctly paid.

220. The Claimant accepted that payments were always paid to him "eventually", and that he was aware the Respondent was trying to find a work around to deal with the issue it had

with payroll. Failure to pay was not deliberate, and whilst it occurred on a number of occasions it was not unexplained.

221. Objectively viewed, each individual failure to pay the Claimant alone could not be considered as conduct likely to seriously destroy or damage the trust and confidence between the Claimant and the Respondent and is not a fundamental breach of contract. However, these acts, taken together with other things, could add cumulatively to the breakdown of trust and confidence.

Cumulative effect of the allegations

222. I concluded that none of the allegations relied upon were individually a breach of the implied duty of mutual trust and confidence and moved on to consider their cumulative effect. As set out above, I did not find allegations 1,2,5,6, and14 could have contributed to the breach of trust and confidence, and the Claimant had conceded in proceedings that allegation 18 did not contribute to the breach of trust and confidence.

223. I therefore considered the cumulative effect of the remaining allegations and whether by these actions the Respondent demonstrated an intention to abandon or altogether refuse to perform the contract and whether these actions destroyed or seriously undermined the trusts and confidence between the Respondent and Claimant.

224. The test I had to apply is whether viewed objectively, the conduct of the Respondent was such as to be calculated or likely to destroy or seriously damage the relationship of trust between the respondent and the Claimant, and the Respondent acted without proper cause.

225. There were essentially two types of payments that were paid incorrectly and/or late, callout fees and overtime. I have found that allegations relating to non-payments of other types (such as quarterly balance payments etc) were not capable of contributing to the breach of trust and confidence.

226. The issues surrounding payment were not trivial, however non-payment was not deliberate or unexplained, and the Claimant was aware that the Respondent was having teething issues and was attempting to put in place systems to work around the problems. The Claimant accepted teething problems were inevitable however he suggested this could only be used by the Respondent as an explanation for 2 months and not for a longer period. There is inevitably some period of time, surpassing which, it would be difficult to excuse continued failure to pay wages correctly due to teething issues; surpassing this would result in serious damage to the relationship of trust and confidence between the parties, however there is no set deadline beyond which point trust and confidence is automatically broken. The issue must be considered in light of the circumstances. The Respondent did not seek to deliberately underpay the Claimant and affirmed his contractual rates. The Respondent is a large organisation operating with a payroll system which was not designed to accommodate the Claimant's rates. The Respondent kept the Claimant updated on the situation whilst attempting to resolve the

issues and the Claimant accepted he was aware of the workaround and that his payment was always received eventually.

227. The relationship with Mr Wilson and Ms Jackson was not good, however their conduct did not appear to go beyond a clash of personalities and the Claimant appeared to view it as such, laughing at their behaviour with other like-minded colleagues. Furthermore, the Respondent could not investigate and resolve the issues between the Claimant and Mr Wilson and Ms Jackson because the Claimant did not raise it as an issue that required the Respondent to carry out such action.

228. Similarly, where the Claimant did not have a good relationship with Mr Hewitson, he had not raised his concerns with Mr Hewitson. Mr Hewitson was not then aware of the severity of the issues as the Claimant saw them, and he could not attempt to resolve them. Objectively, I did not find that Mr Hewitson had behaved in an unreasonable manner. He admitted he had made errors relating to payment of overtime and that the return-to-work interview took him a long time to complete, however I accepted that these issues were simply errors, and even the Claimant did not go so far as to suggest they were designed to cause the Claimant distress, he simply asserted he felt Mr Hewitson was incompetent. Whilst I appreciate the Respondent's intention is not relevant, objectively, Mr Hewitson's actions were could not be viewed as likely to destroy to seriously damage trust and confidence.

229. The Claimant's interpretation of the 25 July incident and subsequent issues relating to the RIDDOR report were skewed by his consideration that there was an attempted cover up by the Respondent, a belief which was not well founded. It is hard to see how the Respondent could have prevented or resolved the Claimant's belief in a cover up given that the Claimant confirmed he ignored calls from various people who attempted to contact him whilst he was absent.

230. Even if I had found that the inclusion of the incorrect reference to asthma was an action that caused serious damage to the relationship between the parties, this would not have been an act carried out without proper cause, since efforts to determine the veracity of the information had been carried out and thereafter in Mr Hutley's professional opinion the reference was relevant and ought properly to have been included in the HSE report.

231. Overall, I am not satisfied that the objectively considered, from the perspective of a reasonable person in the position of the Claimant, the cumulative effect of these allegations could constitute a course of conduct calculated or likely to destroy or seriously damage the relationship of confidence and trust between the Claimant and the Respondent. This is a demanding test, and the Claimant does not meet it.

232. By this, I do not suggest that the events that occurred did not have a significant impact on the Claimant. However, the Claimant's subjective view as to whether the Respondent breached the implied term of confidence is not determinative of the matter and my focus must be on the conduct of the Respondent viewed objectively.

233. The Claimant had a good work record and was proud of his work and experience. It is clear he had enjoyed his previous work environment, and as he had been working mainly

with the Respondent while at Integral, it is fair to say he probably had not expected the move from Integral to result in as many changes as he encountered. It seems the change in environment from working in a place in which he was established as an experienced and hard-working engineer, to working in a new team in the public sector with different practices was a difficult transition. The culture was not what he had experienced in his prior role, despite having worked mainly on contracts for the Respondent during his time with Integral.

234. The Claimant did not begin his employment with a great degree of confidence in the Respondent further to comments made by his former colleagues and his feelings further to his initial meeting with the Respondent and the poor first impressions made from his immediate encounters thereafter.

235. Unfortunately, a number of the Claimant's concerns were based on the incorrect beliefs he held regarding his contractual entitlements, resulting in his view that the Respondent was either seeking to remove or reduce his contractual entitlements. This began in his very first meeting during which he believed the Respondent was seeking to remove his entitlement to a car.

236. Overall, this created a foundation of discontent with the Respondent which rapidly developed and grew into suspicion.

237. As the Claimant did not feel he was able to speak with new manager, he continued to speak to Mr Rigby where he had issues. The Claimant did not elevate his concerns to an appropriate level or raise them with the relevant people in order for them to be resolved and his discontent grew further as the Respondent could not address the issues where he had not raised them formally.

238. The overall result was that the Claimant became wholly discontent with his new working environment and the Respondent was not able to resolve the issues.

239. As detailed however, the law requires an objective test to be applied in addressing the question of whether the Respondent's actions amount to a repudiatory breach of contract. This is a high threshold to meet and having considered the actions cumulatively and individually I conclude that the Respondent's conduct could not be objectively categorised as breaching the implied term of trust and confidence.

240. Accordingly, the Claimant was not constructively dismissed and his claim of unfair dismissal does not succeed.

EMPLOYMENT JUDGE NEWBURN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 5 July 2021