EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr A Ramos Fernandez	SPL Powerlines UK Ltd

Heard at: **CVP** **On: 11, 12 October 2021**
Before: **Employment Judge Davies**

Appearances
For the Claimant: **In person**
For the Respondent: **Mr N MacDougall (counsel)**

JUDGMENT having been sent to the parties on 12 October 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. These were complaints of unfair dismissal and breach of contract brought by the Claimant, Mr A Ramos Fernandez, against his former employer, SPL Powerlines UK Ltd. The Claimant represented himself and the Respondent was represented by Mr MacDougall, counsel.

2. There was no agreed file of documents. Contrary to the Tribunal's orders, each party had prepared its own file of documents. I referred to those to which the parties drew my attention.

3. I heard evidence from the Claimant. Mr A Jornet had prepared a statement on his behalf. However, at the start of the hearing the Respondent conceded that the Claimant was contractually entitled to the lodge allowance and cost of flights to Spain that were the subject of these proceedings. Mr MacDougall indicated that he did not intend to cross-examine Mr Jornet, whose evidence dealt with that issue, and his statement was taken as read. For the Respondent I heard from Ms T Kirby (HR Manager) and Mr C Hext (Group Safety and Hr Director).

The Claims and Issues

4. The issues to be decided had been identified by EJ Lancaster at a preliminary hearing on 17 February 2021. However, by the conclusion of this hearing the

Respondent had conceded that the Claimant was contractually entitled to the lodgings allowance and the cost of a number of flights to Spain, that his breach of contract claim was well-founded, and that if he was constructively dismissed, there was no potentially fair reason for his dismissal. The remaining issues to be decided were therefore:

Unfair dismissal

4.1 Was the Claimant dismissed?

- 4.1.1 It is accepted that the Respondent discontinued the payment of expenses to cover daily lodgings and reimbursement of 10 flights to Spain per annum on one month's notice and that this was a breach of contract.
- 4.1.2 It is accepted that the Respondent required repayment of a loan during the Claimant's employment: was that in breach of the contractual agreement that the loan was repayable one month after he vacated his rented accommodation?
- 4.1.3 By discontinuing the expenses payments and requiring repayment of the loan did the Respondent breach the implied term of trust and confidence?
  - 4.1.3.1 Did it behave in a way that was calculated or likely to destroy or seriously damage mutual trust and confidence?
  - 4.1.3.2 Did it have reasonable and proper cause for doing so?
- 4.1.4 Was the breach of contract fundamental, i.e. was it so serious that the Claimant was entitled to treat the contract as being at an end?
- 4.1.5 Did the Claimant resign in response to the breach? Was it a reason for his resignation?
- 4.1.6 Did he affirm the contract before resigning?

4.2 If the Claimant was constructively dismissed, the dismissal was unfair.

Remedy

4.3 What financial losses has the dismissal caused the Claimant?

4.4 Has the Claimant taken reasonable steps to replace his lost earnings, by taking a job in Spain that does not pay as much?

4.5 If not, for what period of loss should he be compensated?

4.6 What is the chance, if any, that the Claimant would have been fairly dismissed in any event, e.g. because the Respondent reasonably decided to terminate the contract if the Claimant did not agree to a variation or for misconduct?

4.7 If so, should the Claimant's compensation be reduced? By how much?

4.8 Did the Respondent or Claimant unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

4.9 If so is it just and equitable ton increase or decrease the Claimant's compensation? By how much, up to 25%?

4.10 Does the statutory cap of 52 weeks' pay apply?

4.11 What basic award for unfair dismissal is payable to the Claimant?

The Facts

5. The Respondent is a company whose principal activity is rail and tramway electrification. It is part of an international group. It is a contractor on projects such as the Midland Mainline Electrification projects and the London to Corby

electrification project. For the year ending 31 March 2020 it reported an annual profit of £3.2 million. When its accounts were signed on 13 July 2020 Directors reported that the COVID-19 pandemic had not affected the results and management did not foresee that it would materially affect results going forward. A change of accounting year meant that its next accounts were prepared on 31 December 2020. It reported a 9-month profit of £886,000, which was said to be lower than the previous year because of the stage two projects had reached. The Directors reported that the COVID-19 pandemic had had "no significant impact" in the current or prior year.

6. The Claimant is Spanish. He was "headhunted" to work for the Respondent as a Linesman along with a number of Spanish colleagues in 2014. The move involved a reduction in his basic pay, but other contractual entitlements were agreed to offset that. Those included entitlement to a lodging allowance payment of £42.85 per day for each day that he was living in rented accommodation and entitlement to the cost of 10 flights to Spain per year (of up to £200 each). Those entitlements were not temporary or time limited. It was not until the start of the hearing that the Respondent conceded that these were contractual entitlements, although they clearly were. They were agreed as such verbally at the time the Claimant started work and were paid throughout the subsequent six years or more. Further, correspondence about them pointed to them being contractual in nature: see e.g. the letter of 30 October 2019 explaining changes because of changes to the Working Time Directive.

7. The Claimant started work for the Respondent on 6 October 2014. His contract did not contain give the Respondent any general right or entitlement to vary it. The Respondent was entitled to vary the Claimant's place of work. In November 2014 he moved to rented accommodation in Swindon, to work on the Great Western Electrification Project. He was already living and working in UK.

8. Shortly afterwards, he was given a loan. This was instigated by the then Head of HR, Ms Cawley. His unchallenged evidence was that £1200 was paid into his bank account and that Ms Cawley then wrote to him setting out the conditions of the loan. Her letter referred to it as a loan to assist with the costs of acquiring temporary rented accommodation. The attached terms said that the loan had been issued "to cover the initial outlay of costs for acquiring rented accommodation" and that the Claimant agreed to the full amount being deducted from his pay one month after he vacated his rented accommodation, or from his final pay if his employment ended. The Claimant called Ms Cawley. He told her that he had already covered the initial costs of his rented accommodation. She told him to keep it as his tenancy deposit for that house and any future ones and to return it in his last pay when he left the company. After that conversation, he signed the agreement in mid-January 2015 as did Ms Cawley.

9. The Respondent argued before me that the loan was repayable if and when the Claimant subsequently moved out of one set of rented accommodation into another. I disagree. The agreement itself refers to the initial outlay of costs of acquiring "rented accommodation" generally, not the costs of acquiring the first rental property specifically. It is capable of being interpreted as covering a series of rental agreements and the express verbal agreement at the time with Ms Cawley was that it *could* be rolled over to cover the tenancy deposit for a series

of rented accommodation. That makes sense, given that the loan was repayable in full one month after the rented accommodation was vacated. If the Claimant moved into different rented accommodation, he would need another equivalent deposit and it might well be difficult to repay £1200 within a month. However, if he moved out of rented accommodation altogether, his deposit would be refunded and available to repay the loan. The Respondent's subsequent practice also provides support for the view that this is what was intended at the time the parties entered the agreement. Ms Kirby told me that many people had such loans and the Respondent had never sought to recover them when they moved from one rented property to another (although some people voluntarily repaid them early.) In the own Claimant's case, the Respondent knew that he subsequently moved house twice, but took no steps to recover the loan from him until the events described below. I therefore find that properly construed the term of the contract meant that the loan was repayable in full within one month if the Claimant stopped living in rented accommodation, but not if he moved from one rental property to another.

10. The Claimant's take home pay in 2019 and early 2020 was around £3,800 per month. He received his basic salary, overtime at an enhanced rate, lodging allowance and some travel expenses and time. The lodging allowance, which the Respondent operated as a tax-free allowance, amounted to around £1200 net per month. In April 2020 the Claimant was furloughed. His basic pay was reduced by 20% in accordance with the furlough scheme and he also lost the ability to earn overtime. His net monthly pay reduced to around £3,000 to £3,200.

11. On 1 July 2020 Ms Kirby wrote to the Claimant (and the other Spanish employees who had joined the business with him in 2014). She told him that his work base was being moved to Wellingborough (where he lived) in accordance with his contract. She added that as a result of this contractual change "additional benefits have been reviewed in accordance with guidelines and reasonable timeframes that have elapsed" and that with effect from 3 August 2020 all lodging allowance payments would be ceased. She said that they were "no longer appropriate or sustainable." Further, the Claimant would no longer be able to submit any claims for flights to Spain from the same date. The company would no longer refund this expense because of the time the Claimant had been living and working in the UK. Ms Kirby told the Claimant that this was non-negotiable and represented a permanent variation to his contract.

12. The unilateral removal of these contractual entitlements was plainly in breach of contract. Ms Kirby said in evidence that it was not her decision but Mr Kielmayer's (the Managing Director). He did not give evidence to the Tribunal. Ms Kirby suggested at one time that it was because of the financial situation the company was in because of the pandemic. However, she was not in a position to explain how that could be the case, given the content of the accounts signed in July 2020 and December 2020 referred to above. It appeared from his evidence that Mr Hext was involved in the decision to remove these allowances. He said that the company made a decision to look at all avenues to trim its costs. They found that they were paying lots of subsistence to individuals so they, "Did what we needed to do." The payments were all "outdated." Mr Hext did not say that the company could not afford to make the payments. He said that the company

was “no longer as a business prepared to pay that money”. The agreements were “open-ended” and they decided to “call time on it.” There was no indication in the evidence before me that anybody at the Respondent thought about whether its employees were contractually entitled to these payments or whether it was entitled unilaterally to withdraw them. It is perhaps surprising that the Head of HR did not give advice about the need to consider that.

13. The Claimant replied to Ms Kirby’s email the next day, copying in Mr Kielmayer. He explained that these allowances had been agreed in 2014 as part of the incentive for him to leave his former company and accept a lower basic salary. They were not temporary. He did not agree to the changes and registered his protest. He explained that he was facing a reduction of almost 50% of his salary. He asked about the grievance policy and Ms Kirby sent him a copy. On 4 July 2020 the Claimant and all his Spanish colleagues sent Ms Kirby a joint letter of protest about the imposition of these changes. They said that they were aware the changes might be in breach of contract and asked for a meeting to find a solution.

14. Ms Kirby and Mr Hext decided to instigate formal, individual grievance meetings with each of the affected employees. The Claimant was invited to meet Mr Hext on 14 July 2020. The Claimant wrote a further letter, again reiterating that the lodge allowance and cost of flights were permanent, contractual agreements when he joined the company. The notes of the grievance meeting record the Claimant making the same point. Mr Hext wrote an outcome letter on 23 July 2020. He said that the payments were not noted specifically in the Claimant’s contract of employment and that the company had “considered these as a variation clause which does not require consultation with individuals, and is a non-negotiable change.” He said that he had considered the Claimant’s points but the payments were “no longer appropriate or sustainable.”

15. In his evidence to the Tribunal it was clear that Mr Hext had been involved in the original decision to remove the payments. He then dealt with the grievance. He assumed that the payments were not part of the Claimant’s contract, but he did not check or take advice; he did not have any expertise himself in that area; and he did not investigate the Claimant’s statements that he was contractually entitled to the payments. The position was simply that the Respondent had decided it was not prepared to make the payments anymore and it took that decision. It was clear from Mr Hext’s evidence that that was not going to change as part of the grievance process.

16. The Claimant appealed against the grievance outcome in a letter dated 26 July 2020. Among other things, he said that he was under the impression none of the proposals he made at the grievance hearing had been taken into consideration. He explained that his salary had now reduced by 50% (a combination of furlough, with associated loss of overtime and travel time too, and the removal of the lodging allowance). He said that he felt the company was trying to force him to resign.

17. On 29 July 2020 Ms Kirby emailed the Claimant a letter about his loan. She said that the intention of the loan was to assist with the set-up costs of acquiring temporary rented accommodation when the Claimant first settled in the UK. As

this was no longer temporary "and in line with the company no longer making subsistence allowance payments to you with effect from 3 August 2020, this loan will now also be required to be repaid in full." Ms Kirby said that the company would recover the £1200 from the Claimant's pay on 10 August 2020.

18. The Claimant sent an emailed response the same day. He pointed out that he had been receiving only 80% of his salary with no overtime or travel time since being furloughed and the company was also trying to take away his lodging allowance and flights. He therefore said that he would rather repay the loan £200 per month, otherwise he would have problems paying his bills the next month. Ms Kirby replied to say that the loan would be recovered in two instalments of £600.

19. A grievance appeal meeting took place on 6 August 2020, conducted by Mr Jebson. He did not give evidence to the Tribunal. The Claimant reiterated his position that he was entitled to the lodging allowance and cost of flights. I note at this stage that Mr Jebson wrote to the Claimant on 19 August 2020 rejecting his appeal. Mr Jebson simply did not address the question whether the Claimant was contractually entitled to the payments. He said that the decision to remove them was because they were no longer sustainable, certainly not for the period of time they had been paid, and were not financially viable.

20. The same day as the grievance appeal hearing, 6 August 2020, the Claimant had received his payslip for August 2020 (pay date 10 August 2020). He emailed some queries to Ms Kirby and Mr Bertwistle. He copied in Mr Kielmayer and others. He asked why his subsistence payment was £600 short, and said that he assumed this must be because a loan repayment had been deducted. He asked why it had not been split into smaller amounts, as he had requested on 29 July 2020. He also asked that the payslip actually reflect that he had repaid part of the loan.

21. Ms Kirby replied and said that £600 had been deducted because the payroll had already closed and the company were not entering into any further compromises or alternative repayment solutions. She said that no changes would be made to the payroll system, which was appropriate for the needs of the company. That meant that the payroll would not reflect the repayment of the loan. Ms Kirby said that she would confirm it separately in writing if required. The Claimant responded to say that he was surprised that the payroll process was closed without waiting for a response to the letter about recovering the loan in two instalments. He asked again for his payslip actually to specify that £600 had been deducted as a loan repayment.

22. Mr Kielmayer replied. He said that the Claimant appeared to be very dissatisfied and making negative comments. He asked him to stop and to be "a bit more appreciative because you had an interest free loan for 6 years." He referred repeatedly to the fact that the Claimant was not being appreciative, adding, "I could go on but there is no point as you seem to be not happy with SPL as employer. Do you want to continue like this?"

23. The Claimant replied. He pointed out that he had thanked the company for the loan when it was given and had thanked Ms Kirby for being flexible in an email to

her. He said that he did wish to continue working for the company and had always sent his emails with all respect. His request about showing his loan repayment on his payslip was to make things clearer for him, the company and HMRC.

24. The Claimant's correspondence was indeed polite and respectful throughout. Ms Kirby had approved the Respondent's ET3 response, which said that the Claimant had sent "aggressive" emails. Ms Kirby accepted that he had not done so in her evidence. She said that the emails were "persistent." That is perhaps unsurprising, given that the Claimant was facing a drastic reduction in his salary because the Respondent was breaching his contract by unilaterally removing elements of his pay and suddenly requiring repayment of the loan. He was indeed "persisting" in trying to resolve that situation.

25. The Claimant was on annual leave from 3 to 12 August 2020. He went to Spain. He was on furlough before he went and when he returned. Ms Kirby emailed him on 19 August 2020 to ask if he had left the UK and whether he was looking to take paid or unpaid leave for the period 13 to 26 August 2020. That was because the Respondent had issued a notice informing employees that if they had to self-isolate after travelling abroad, they would be required to take leave. That applied to employees on furlough, even though they were not permitted to work during their self-isolation period. I did not see any reply from the Claimant.

26. The Claimant wrote to Mr Jebson on 25 August 2020 in response to the grievance appeal outcome. He repeated that the payments in question were contractual entitlements. He said that the company's position, along with the fact it had declined ACAS conciliation and had mentioned redundancy, gave the impression the company was giving him adverse conditions to make him resign. He said that his salary after removal of these allowances was not enough to sustain his family. He was seeking legal advice and still working under protest. The Claimant had indeed initiated ACAS early conciliation on 23 July 2020.

27. On 27 August 2020 Ms Kirby called the Claimant. She thought that she obtained an international dialling tone and asked the Claimant if he was in the UK. He said that he was. Ms Kirby hung up the phone and redialled on speaker phone so that Mr Hext could hear. They both believed the Claimant was overseas. Ms Kirby emailed him at 3:15pm requiring him to attend a meeting in Doncaster at 10am the following morning to discuss his "return to work" in more detail. The Claimant described this as an ambush. It clearly was. The Claimant attended the meeting the next day in person. He repeated that he had not been abroad. Ms Kirby told him that because the company had doubts, he would be required to serve an additional 14 days' isolation as paid or unpaid leave.

28. In fact, the Claimant had been in Spain when Ms Kirby called him and had lied about it when asked. When asked about this in his sworn evidence to the Tribunal, he admitted it. He said that because of his treatment by the company he had been moving his wife back to Spain, where they had a house, so that he could look for cheaper accommodation in the UK. He was worried that the borders might close and she would be stuck in the UK. He believed that as a worker in the rail industry he was a key worker and exempt from the requirement to self-isolate. Mr MacDougall submitted that this admission of dishonesty

affected the Claimant's credibility overall. I disagreed. Tribunals are often reminded that people may lie about something for many reasons, and that does not mean that they cannot generally be believed. In fact, I considered the Claimant's evidence overall to be generally reliable. I noted that his witness statement was silent about his whereabouts on 27 August 2020. When he was asked about it on oath he told the truth. That tends to support rather than undermine the credibility of his sworn evidence. It suggests he took his oath seriously.

29. No disciplinary process or investigation was mentioned, considered or instigated at or after the meeting on 28 August 2020. Ms Kirby seemed surprised when the Claimant asked her that when she gave her oral evidence. When invited to say in re-examination whether the Claimant's conduct (i.e. lying about not being abroad and then attending a meeting in person when he had just returned from Spain) would have merited disciplinary action, she said that it could have done if they had known at the time what they knew now and that potentially there would have been an investigation.

30. On 31 August 2020 the Claimant resigned from the Respondent giving one month's notice. In his letter he thanked the Respondent for the opportunity to work in the position, and wrote, "The current sanitary circumstances, the quarantines, and how they will affect my income combined with the change in my contractual conditions have put me in a situation where is impossible to remain in this country."

31. The Claimant's employment ended on 30 September 2020. He started a new job for an employer in Spain on 10 October 2020. His evidence to me was that he approached the company during his notice period, had a brief interview after he returned to Spain and started shortly afterwards. I accept that evidence (although it is not crucial whether he started looking for work during his notice period or before that.)

32. In his evidence to the Tribunal the Claimant said that the reasons for his resignation were based on the change in his lodging allowance, that the company put economic pressure on him and his family to force him to resign, and that he felt betrayed after many loyal years of service. Further, the company reclaimed the loan at the worst possible moment.

33. I have to decide why the Claimant resigned. I have no hesitation in finding that a significant part of the reason was the Respondent's breach of contract in unilaterally removing his lodging allowance and cost of flights. Another part was that the Respondent's conduct had breached trust and confidence, such that he had come to believe they were trying to force him out. In particular:

    33.1 He had consistently and persistently challenged the decision to remove his lodging allowance. When his grievance appeal was rejected, he wrote in terms that he considered the company was trying to force him to resign, that his salary was not enough to sustain his family after removal of those allowances, and that he was seeking legal advice.
    33.2 In the context of a prior reduction in his net monthly pay from about £3,800 to about £3,200 because of furlough, a further reduction of around £1,200

per month was clearly a very substantial reduction. His salary had almost halved.

33.3 In that context, the recovery of £600 from his July and August wages, in the fairly peremptory way that was done, was financially difficult and I could well understand from the tone of Ms Kirby's and Mr Kielmayer's correspondence and the refusal properly to itemise the loan repayment in his payslip, that the Claimant felt that this action was designed to put him under financial stress.

33.4 The meeting on 28 August 2020 may well have been another cause of his resignation, and may explain in part why he chose to resign on 31 August 2020 rather than at some later stage (e.g. after securing new work), but that does not mean the breaches of contract ceased to be an effective cause of it. As the Claimant suggested in his closing submission, it was the sum of what had happened that led to his resignation; the two hour meeting on 28 August 2020 was the last straw that made him realise it was not worth it. There was absolutely no suggestion at the time that he would be subjected to any disciplinary investigation or process. Indeed, the action taken was to require him to undergo a further period of self-isolation, unpaid.

33.5 He wrote his resignation letter to give notice, not with the intention that it would be pored over in a Tribunal. I accept his evidence that he wanted to leave on good terms. That is common and often sensible. Nothing in the resignation letter is inconsistent with his evidence about why he resigned. Indeed, the letter refers in terms to the change in his contractual conditions. The suggestion that because he did not use the word "breach" there was some inconsistency is fanciful, not least because he is not a lawyer and indeed does not have English as a first language. Likewise, the suggestion that because he referred to the situation making it impossible for him to remain in the country, rather than being impossible to remain at the company, is irrelevant. The question is not whether it was impossible for him to remain at the company. The question is whether he was resigning, at least in part, because his pay had been unilaterally reduced or because the Respondent had fundamentally breached mutual trust and confidence. The suggestion that it was impossible for him to remain in the country was entirely consistent with that being part of his reasoning. It was impossible for him to remain in the country because he could not afford to run a home in the UK, nor to travel between the two countries.

33.6 I have accepted his evidence about when he applied for his new job. That was after he had resigned. But even if it had been before he resigned, that would be of relatively little weight. The fact that somebody starts looking for work before they resign, or even that they do not resign until they have a new job, does not necessarily mean that they are not resigning in response to their employer's fundamental breach of contract. It may simply mean that they have bills to pay and cannot afford to resign until they have secured a new role. This is one factor to be weighed in the overall balance.

Legal principles

34. The right not to be unfairly dismissed is set out in s 94 Employment Rights Act 1996. Section 95 of that Act defines what is meant by dismissal. This includes (s 95(1)(c)) what is usually called constructive dismissal, i.e. where the employee

terminates the employment contract, with or without notice, in circumstances where he is entitled to so without notice by reason of the employer's conduct.

35. It is well-established (see *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221) that in considering whether an employee has been constructively dismissed, the issues for a Tribunal are:
    35.1.1 Was there a breach of the contract of employment?
    35.1.2 Was it a fundamental breach going to the root of the contract, i.e. such as to entitle the employee to terminate the contract without notice?
    35.1.3 Did the employee resign in response and without affirming the contract?

36. It is an implied term of the contract of employment that the employer will not, without reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: *Malik v BCCI* [1997] IRLR 462. This is a demanding test. The employer must in essence demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract: see *Frenkel Topping Ltd v King* UKEAT/0106/15/LA at paragraphs 12-15. Individual actions taken by an employer that do not by themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim unfair dismissal.

37. The essence of constructive dismissal is repudiation by the employer, which is accepted by the employee. Once a repudiation of the contract by the employer has been established, the Tribunal must ask whether the employee has accepted that repudiation by treating the contract of employment as being at an end. The employee's resignation must be in response (at least in part) to the repudiation, which must be the effective cause of it: see *Nottinghamshire County Council v Meikle* [2005] ICR 1, CA; *Wright v North Ayrshire Council* UKEATS/0017/13/BI.

38. If an employee is unfairly dismissed, a basic award is payable under s 122 and a compensatory award under s 123 Employment Rights Act. The compensatory award is to be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal, insofar as it is attributable to action taken by the employer.

39. Under s 123(4), the principle that employees must take reasonable steps to mitigate their losses applies. Useful guidance is set out in the case of *Archbold Freightage Ltd v Wilson* [1974] IRLR 10, which suggests that the dismissed employee should act as a reasonable person would act if they had no hope of seeking compensation from their previous employer. The Tribunal should ask what steps should reasonably have been taken; and when, if those steps had been taken, the individual have secured an equivalent alternative income: see e.g. *Savage v Saxena* [1998] ICR 357. The burden of proving that the individual has not taken reasonable steps to mitigate his loss is on the employer.

40. Where the Tribunal considers that there is a chance that the employee would have been fairly dismissed in any event, then the compensation awarded may

be reduced accordingly: *Polkey v A E Dayton Services Ltd* [1987] 3 All ER 974. Guidance on how to approach that issue is set out in the case of *Software 2000 Ltd v Andrews* [2007] IRLR 568.

Application of the Law to the Facts

41. Applying those principles to the findings of fact above, my conclusions are as follows.

42. The Respondent admits that unilateral withdrawal of the Claimant's lodging allowance and flight expenses was a fundamental breach of contract. It plainly was. The first stage in establishing a constructive dismissal is satisfied by virtue of that breach alone.

43. However, for completeness, I find that the recovery of the loan was also in breach of contract. I have explained above why I concluded that on a proper construction, the loan agreement did not entitle the Respondent to recover the full loan when the Claimant moved from one rental property to another. By itself, I do not consider that the recovery of the loan was a fundamental breach of contract. It did not point to an intention overall not to be bound by the terms of the contract. However, it was capable of contributing to a fundamental breach of the implied term of mutual trust and confidence (see below).

44. I also find that the Respondent's actions were in breach of the implied term of mutual trust and confidence. They unilaterally withdrew contractual entitlements in breach of contract. It was obvious that the grievance about that was not being properly investigated or addressed. Nobody grappled with the point that these were contractual entitlements and could not just be stopped because the Respondent decided to. There was no reasonable or proper cause for withdrawing the entitlements. The suggestion that there was some financial imperative was not backed by any evidence at the time, nor by the financial reports produced in July and December. Nor was it consistent with Mr Hext's evidence. The Respondent's conduct was likely to destroy or seriously damage trust and confidence.

45. The sudden decision to recover the loan in breach of contract and the way that was handled was also behaviour without reasonable cause that was likely to destroy or seriously damage trust and confidence. Not only was it in breach of the terms of the loan agreement, it was also done out of the blue, after six years during which the Respondent knew the Claimant had moved twice and had done nothing to recover the payment, and at a time when the Claimant was under financial strain because of furlough and now the unilateral withdrawal of his lodging allowance. There was no financial imperative to recover the money in a one or two month timescale. The tone of correspondence about that, in particular Mr Kielmeyer's email, but also Ms Kirby's, betrayed a total lack of empathy or understanding. The refusal properly to itemise this in his payslip, contrary to the Respondent's obligations under the Employment Rights Act 1996, compounded that.

46. For the reasons explained above, I find that the Claimant did resign in response to the Respondent's fundamental breach(es) of contract. The admitted

fundamental breach, alone, was an effective cause of his resignation. The further fundamental breach of implied trust and confidence was also an effective cause. The Claimant plainly did not affirm the contract. He expressly worked under protest, while challenging the decision to withdraw his entitlements, until his resignation. That means he was constructively dismissed.

47. No potentially fair reason for dismissal (i.e. for the Respondent's fundamental breach(es) of contract) was advanced. It follows that the Claimant was unfairly dismissed.

48. That brings me to the issues relevant to remedy or compensation. I start with the question arising from the *Polkey* case: whether there is a chance that the Claimant would have been fairly dismissed in any event. Although EJ Lancaster identified the possibility at the preliminary hearing that the Respondent would have fairly dismissed the Claimant for some other substantial if he refused to agree to the changes to his contract, the Respondent did not pursue that point or advance any evidence in support of it. In view of the evidence about its financial position, it is difficult to see how it could have done.

49. However, Mr MacDougall submitted that there was a chance that the Respondent would have fairly dismissed the Claimant for misconduct because he lied about being in Spain and then attended the workplace immediately after returning from Spain. The burden of proof is on the Respondent. On the evidence before me I am unable to find on a balance of probabilities that there is a chance the Claimant would have been fairly dismissed. The question is what this employer would have done. No evidence was led to the effect that it would have disciplined or dismissed the Claimant. Perhaps tellingly, no steps were taken to instigate any disciplinary process during the Claimant's one-month notice period. It was not known until the Claimant admitted it in his oral evidence that he had lied. The Respondent only had a suspicion that he had been overseas. Steps were taken to impose a further period of self-isolation, but not to investigate the situation any further. The overwhelming likelihood is that this is where matters would have rested.

50. Even after the Claimant gave evidence admitting what had happened, no attempt was made by the Respondent to lead supplementary evidence from its witnesses about the steps that would have been taken. Those witnesses had not given evidence by that stage. The only evidence about it arose from the Claimant asking Ms Kirby if he had been subjected to any disciplinary process and her rather surprised response that he had not. That led to the eliciting in re-examination of the tentative suggestion that there would potentially have been an investigation. That is not sufficient to demonstrate on a balance of probabilities that there is a chance the Respondent would have fairly dismissed the Claimant for misconduct.

51. The next point of principle relating to compensation is whether the Claimant's compensation should be increased because the Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. This was a point I raised in the light of Mr Hext's evidence indicating that he decided the grievance, having himself been involved in the decision to withdraw the entitlements. Here I was not satisfied that there was an

unreasonable failure to comply with the Code. In particular, it was necessary for a senior manager to deal with the issue, which was being raised by a substantial number of employees. Further, I noted that there was a grievance appeal and there was no evidence that Mr Jebson was involved in the initial decision to withdraw the entitlements. The Respondent's approach was not unreasonable in the circumstances.

52. Having determined those points of principle, I heard evidence from the Claimant about his actual losses, and through discussion the parties agreed the following:

    52.1 The correct damages for breach of contract (failing to pay lodging allowance) were £2528.15.
    52.2 The correct amount of the basic award was £2612.
    52.3 The Claimant should be compensated for loss of pension at the rate of £125 per month.
    52.4 The net monthly difference between the Claimant's earnings in his new employment (taking into account his lower living expenses) and his earnings when he worked for the Respondent is £1571.71.

53. The only remaining issues for me were: for what period the Claimant should be compensated and should he be compensated for loss of statutory employment rights. The following factual findings are relevant: The Claimant started his new job in Spain very shortly after his employment with the Respondent ended. In Spain, there is generally speaking a standard salary for the role. The Claimant was lucky to secure a role that paid more than the standard amount, through various allowances, because his new employer was in urgent need of someone at the time. There are no jobs as a linesman that pay more in Spain. The Claimant wishes to change to a different, government job. That will pay less, but he is happy to earn less because there are other advantages, such as job security. He applied unsuccessfully last year. He has studied, reapplied and taken the relevant test recently. He thought it had gone well. He should hear in two months whether he has got the job. The Claimant told me that after he had worked for his new employer for six months, he had the right to complain about unfair dismissal, redundancy and so on. That meant that he now enjoys the statutory employment rights he lost when he was dismissed. He has not needed to rely on them.

54. The Respondent accepts that by accepting his new job and remaining in the role since, the Claimant has taken reasonable steps to mitigate his losses to date. I agree. The Claimant invited me to award him a further two months' losses. In the absence of any evidence about available higher paid roles that he could have applied for or secured that would have replaced his income for the next two months, I find that he should be compensated for his shortfall in earnings for two further months. That means he is to be compensated for 14.5 months' losses, giving a total of 14.5 x (£1571.71 + £125) = £24,602,30.

55. I do not consider that compensation for loss of statutory employment rights should be awarded, because the Claimant secured those rights again after six months, and did not suffer any loss during those six months by not having the rights.

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Employment Judge Davies
20 October 2021