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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109642/2021

Held on 28, 29 and 30 September and 14 and 15 October 2021

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Employment Judge: L Doherty

15
Mr G Leitch

**Claimant
Represented by:
Ms L Strain –
Solicitor**

20
**Countrywide Estate Agents
Trading as Slater Hogg & Howison**

**First Respondent
Represented by:
Mr S Brockwicz-Lewinski -
Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed, and the claim is dismissed.

REASONS

1. The claimant brings a complaint of unfair dismissal under section 94 (1) (c) of the Employment Rights Act 1996 (the ERA). He relies upon a breach of the implied term of mutual trust and confidence in his contract of employment, and a breach of the implied term that the respondents would provide a safe working environment.

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2. The matters which are said to amount to a breach of the implied term of mutual trust and confidence are the respondent's refusal to allow the claimant to work

from home in January 2021; what he says was the threatening behaviour of his manager, Ms Meighan when she advised him he would have to return to the office to work, and the consequences of his not doing so; and the refusal to uphold his grievance or appeal against the outcome of his grievance
5 against the decision that he was not permitted to work from home. It is said that the refusal to uphold the appeal is the last straw. The claimant relied on the decisions, and not on the procedure adopted at the grievance or appeal.

3. The respondents deny any breach of contract.

4. The issue for the Tribunal is whether the respondents were in material breach
10 of the claimant's contract of employment, in response to which he resigned.

5. The claimant gave evidence on his own behalf.

6. For the respondents' evidence was given by Ms Meighan, the Regional
Director with management responsibility for the claimant, and Ms Michaela
Brooks, the Office Manager in the Livingstone Branch where the claimant
15 worked.

7. The parties produced a joint bundle of documents.

Findings in Fact

8. The respondents are a large estate agency with the branches throughout
Scotland. They work in a competitive environment and are a sales driven
20 business.

9. The claimant, who is in date of birth is 14/11/67, commenced working for
respondents on 6 January 2006 as a Property Valuer. His salary from that
employment was on average £2,507 per month and he benefited from a 3.6%
25 contributory pension.

10. The claimant worked in respondents Livingstone branch. This is a small office, where he worked alongside two other members of staff who were also employed by the respondents, the branch manager, Michaela Brooks and a sales representative, Taylor. A Mortgage Adviser, employed by a different company, also worked in the office.
- 5
11. The claimant lives in Edinburgh, approximately 22 miles away from Livingstone branch. The average drivetime from his home to the office is around 25/30 minutes.
12. The claimant was issued with a company launchpad, which had the software necessary to launch property to the market for sale, and mobile phone. He could access the majority of information which is required for the conduct of his work from the launch pad.
- 10
13. In the claimant's duties comprised, a number of elements. He terms he carried out Market Valuations or Appraisals of property with a view to persuading clients to place the property for sale with respondents. The office generally tried to arrange his appointments for the afternoon so that he was office based in the morning and would then travel back and forth to appointments in the afternoon. Appointments were generally fairly local to the office.
- 15
14. The number of market valuations which the claimant carried out could vary, but during the three month period prior to his employment terminating, on average he conducted about five per week. The length of time a market valuation took to conduct could also vary but the average time was around 30/40 minutes.
- 20
15. The claimant's practice was to conduct some research before meeting clients. With the advent of the Covid restrictions there was generally a delay of 2/3 days between an instruction to carry out a market valuation and that being
- 25

done, as information had to be sent out to prospective clients about Covid protocols.

16. The claimant sometimes had follow up visits with sellers in order to get terms of business signed. If the property came to the market the claimant spent
5 some time in making up a brochure for the property.
17. The claimant also spent some time trying to generate business with local Builders, however visiting new build sites was not possible due to the Covid restrictions. He also carried out Commercial property inspections if they were required.
- 10 18. The claimant conducted property viewings. This was a task which was also carried out by Taylor. Because of insurance requirements, the keys to property had to be returned to the respondent's office when the viewing was completed.
- 15 19. An element of the claimant's job, and that of his colleagues in Livingstone branch, was to generate business. This was done in a variety of ways. The business is fast paced and sales driven and staff are incentivised with the financial reward for completing sales based activity, or achieving the sale of property, or property related services. Staff are incentivised with a bonus payment of £40 per referral, to achieve mortgage consultant referrals. This
20 was not a significant source of income for the claimant, but he did earn commission from properties which he brought to the market for sale.
20. Staff are targeted with making telephone calls out to prospective clients The claimant was targeted with making 20 such telephone calls per day, and Michaela and Taylor were targeted with making 40 such calls each day.
- 25 21. There was a morning meeting every morning at which there was discussion, and planning of the day's activity. This was overseen by Michaela.

22. The Branch Manager also regularly organised what were referred to as Activity Days, when there was a drive on achieving a particular type of business. This was generally done by each member of the team making telephone calls out to prospective clients.

5 23. The respondent's telephone system could accommodate having three lines. The first port of call for telephone queries was generally Taylor, as the sales representative, however if she was on the phone or unable to take the call then it would be dealt with by Michaela, or the claimant. While Taylor fielded considerably more telephone calls than the claimant, he also took a small
10 number of telephone calls.

24. The claimant was a very experienced and knowledgeable member of staff. Michaela and Taylor regularly referred questions to the claimant about telephone queries which came in, including queries about fees. There was a
15 general flow of information between the claimant and the other members of the team. Ms Brooks regularly relied on the claimant for information he had obtained about prospective sellers and properties in his role as Valuer in order to make the client contract which was required of her.

25. In the event the claimant was not in the office, the other team members could email him or leave a message with their queries, and this occurred on the
20 occasions when the claimant was out of the office on appointments.

26. The three members of staff covered for each other by taking telephone during lunch breaks. There were no fixed lunch breaks but the expectation was that staff would manage staggered breaks so that cover was in place, and to avoid where possible one member of staff being left alone in the office.

25 **The First Lockdown/ Covid Measures**

27. As a result of the lockdown in response to the Pandemic in March 2020 the respondents offices closed. The claimant was placed on Furlough on 27

March; he came off Furlough and returned to work on in the office on 27 June 2020.

28. By June 2020 the respondents had taken steps to comply with the Scottish Governments Covid safety guidelines. The office was small and a Risk Assessment of the office premises was carried out by Michaela Brooks (page 52 of the bundle).
29. Michaela and Taylor's desks were moved so that they sat 2 meters apart. From some point after August 2020 the mortgage adviser worked at home, and the claimant moved into what had previously been his small office at the back of the office premises. The claimant's workspace was therefore more than 2 m apart from that of his colleagues. Staff had to wear face masks when walking about the office. Hand sanitiser and wet wipes were available, and staff had to wipe down their work areas.
30. The office did not have windows, but it did have air conditioning.
31. Filing cabinets which held documents that staff occasionally had to access, sat behind one of the workstations and could only be accessed when the person sitting at that work station moved.
32. Only one person was allowed in the small kitchen area of the office at a time. The toilet facilities were set off the kitchen, and therefore staff were not allowed in the kitchen if the toilet facilities were being used.
33. The office had a locked door policy. If a member of the public wanted to visit the office they had to book an appointment. Members of the public were in fact seen outside the office.
34. Customers, and prospective customers were advised of Covid protocols in advance of market appraisals, or viewings taking place.

35. There was generally good compliance with the safety measures, although on occasion staff members, including the claimant, forgot to put on a mask when leaving their desk, and oddly staff would be in the kitchen when the toilet was in use.

5 36. The claimant worked in this office environment without complaint until January 2021.

The Second Lockdown

37. In January 2021 a second lockdown was implemented across the UK in response to rising Covid cases.

10 38. The Scottish government issued Coronavirus (Covid19) Guidance on working from home(page 168 /172) (the Guidance). The Guidance provided *inter alia*;

The guidance can be applied across any sector where homeworking is a feasible option for both workers and businesses.

15 *Organisations should make every reasonable effort to make working from home the default position. Where a worker can perform their work from home, they should continue to do so.*

20 *The guide is underpinned by a spirit of collaborative working between the companies and their workforce recognising that organisations have a legal responsibility to maintain workplace health and safety(including for those working from home)....*

.....

25 *Homeworking as a public health measure in response to the pandemic has been a crucial factor in mitigating the transmission of the virus amongst the general population. Homeworking has not been the choice for the organisations that have implemented it nor was it the choice for the workers*

who are practising it. Those who are working from home are contributing to the public health effort, and making it safer for those workers who cannot work from home – it is an effort we must continue.

5 *As such, remote working should remain the default position for those who can do so. Where that is not possible businesses and organisations are encouraged to manage travel demand through staggered start times and flexible working patterns.*

Under the Definitions section the Guidance provides;

....

10 *Home working may require worker to work almost entirely at home, occasionally or splitting their time between their home and the office.*

The respondents had a Covid 19 People Policy (page 142/158). It contained a section headed; *What if I don't feel safe returning to work?* It provided;

15 *If you have any concern please raise these in the first instance with your line manager, who will discuss the risk assessment carried out in your workplace and if necessary make reasonable adjustments to enable you to return. If the following that you still feel unable to return to work any time of will be agreed as one of the following options;*

20 *Accessing the CRJS furlough scheme if possible*

Annual leave

Unpaid leave

39. On 13 January 2021, the Group Managing director emailed the staff stating that remote working capability had improved and where staff could work from home they were doing so.
40. The Property Sector was permitted to remain open during the second lockdown. The respondents took the view that some staff could work from home (for example a number of Head office functions), but that as others, including those working in branch offices which remained open, could not work from home. The respondents did not consider that Property Valuers could work from home.
41. After the announcement by the First Minister of the second lockdown, and the increasingly rapid spread of the coronavirus, the claimant became concerned about his health and safety. The claimant was worried about the effect of Covid, particularly as he had previously been a smoker. He was concerned about who would look after his children if he became ill. The claimant did not think the office was Covid secure.
42. The claimant did not feel comfortable going into the office on the 4 January and he did not return to the office that day. He texted Ms Meighan stating that after the First Minister's announcement he was surprised that Michaela had texted him earlier that she would advise that it was 'business as usual'. He stated that the First Minister had said we should all be working from home and that he could carry out office tasks from home just as if he was in the office. The claimant stated he would not be having any face-to-face contact with clients and he would certainly not be visiting anybody's home. He said he did not feel it was appropriate to visit the office given what the first Minister has said and he expected the company to fully support him working from home until such time as the government advice changed.
43. Ms Meighan telephoned the claimant in response to that text message, and explained that he was needed to work in the office along with the rest of the workforce and that the property market remained open.

44. The claimant reflected on his and decided that he was able to carry out Market Appraisals and meet with prospective clients at their property, where they were seriously considering a move in the weeks ahead, and to do this alongside any required viewings and property inspections which were needed

5 45. The claimant emailed Ms Meighan the following day stating this. He also stated that he could work from home, going to his appointments and back, thereby reducing the risk of him catching or potentially spreading Covid to his colleagues. The claimant stated;

10 *I do feel that coming to the office, when I can do pretty much everything from all my laptop is an unnecessary risk to my health and that of my colleagues. If I have to visit the office then I would propose to do this between the hours of 6:30 AM and 8:45 AM, as I am doing this morning, again stay safe and reduce any risk to all concerned.*

15 *I would hope that as a senior member of staff that the company will support me for the next few weeks until such times as I have been vaccinated. Given that I will be carrying out all of my duties, just not being in the office as much, I would expect to be paid as normal.*

20 46. Ms Meighan telephoned the claimant in response to this email. She did not consider that what was proposed by the claimant was workable. She again reiterated that the claimant was required to attend the office and she advised him that unless he returned to the office he would be placed on unpaid leave. Ms Meighan had taken advice from HR about the position in the event the claimant refused to return to the office, and her conversation with him reflected that advise. She was also aware of the Guidance

25 47. The conversations between the claimant and Ms Meighan were direct and but Ms Meighan did not adopt a hostile tone or display a hostile manner towards the claimant.

Elements of the Claimant's Job capable of being performed at home

48. There were a number of aspects of the claimants job which he could perform remotely. He had access to a company launch pad and mobile phone which allowed him to access the majority of information which he required. He could
5 prepare property brochures. He had access to email. He could make and take telephone calls (but not take telephone calls made directly to the office) on his company mobile, including telephone calls out to prospective new clients. He could speak to the other two team members on the phone and could email them if they contacted him with queries. He could take part in
10 telephone conference calls. He could attend market appraisals and viewings (subject to the requirement to return the keys to the office and potentially additional traveling time).

49. The factors requiring the claimant to work in the office

50. It was important to the success of the team in a busy and competitive sales
15 environment that they all 'mucked in' and worked together. Given the small number of staff, that the claimant made up a third of the workforce and they all had to work together to generate business and support each other.

51. When the claimant was in the office telephone calls from prospective clients, which was appropriate for him to deal with, could be passed directly to him, and he was not infrequently able to convert these calls into business. The
20 opportunity for this would have been diminished in that had the claimant been working remotely, as such calls could not have been passed directly to him; instead a message would need to be relayed to him by the other staff members, with the request for a call back to the prospective customer. The
25 passing on of this information would also have added to the workload of the other team members.

52. In the fast paced and competitive environment in which the respondents operate the speed with which telephone enquiries from prospective clients

were dealt with could be adversely affected if members of the team had to email or telephone the claimant to ask for a response to questions which arose for him from telephone enquiries, or for a call back to a client, or prospective client.

5 53. The claimant was an experienced and knowledgeable member of staff and that other staff members, particularly Taylor, who was relatively inexperienced, referred to him not infrequently for information in order to deal with customer queries, including free quotes. A delay in responding to customer queries might impact adversely on persuading prospective clients to use the respondents services in a competitive environment, where
10 customers were also likely to look elsewhere.

54. In addition to queries dealt with by the claimant arising arising from specific telephone calls, there was a general flow of information between the claimant and the other two members of staff, which significantly contributed to the smooth running of the business. Ms Brooks regularly relied on this for
15 information which she used in the client contact she made, so as to avoid duplication of queries, or errors and to present in a professional manner and it greatly assisted her in the conduct of her duties. This flow of information did not always deal with individually significant matters which might have
20 justified writing an email or making a telephone call, but it was embedded into the day's work of the claimant and the other two members of the team.

55. The workload of the other two members of staff would be increased in the event they had to make written or telephone enquiries of the claimant, as this was more time consuming, as opposed to the claimant being in the office and
25 able to respond in real time.

56. The added workload on the claimant's colleagues, as a result of the claimant not working from the office, potentially impacted on their ability to meet their own targets.

57. The claimant was able to field telephone enquiries, albeit he was not the first port of call to deal with income telephone calls and did not do so with a great deal of frequency. He could however provide cover for telephone calls over the lunch break, when one member of the team was not available at all to do so.

58. The respondent's telephone system was such that calls could not be diverted away from the office to the claimant's mobile, or to any external line. Had the claimant not been there to take telephone calls when required this would have added to the workload of the other two members of staff, who would have had to take more time to phone the claimant and ask him to call back clients, who had telephoned the office looking for him, or whom he required to speak to. There would also have been an increase in messages left on the answering machine which they would have had to deal with,

59. The claimant not being in the office also meant that one member of staff was left in the office alone at lunch time.

60. Had the claimant worked from home this would potentially have impacted adversely on the time which he had available for other work. In the main the properties which the claimant visited for market appraisals or viewings were local to the office, and further away from where he lived in Edinburgh, and therefore working from home was likely to involve more travelling time in the day. In addition if he were to continue conducting viewings of properties he would have had to return to the office on each occasion after the viewing, in order to return the keys.

61. Albeit it did not occur regularly, in the event a last minute viewing or valuation was required it was likely to be easier for the claimant to conduct this at short notice from the office rather than home, if this was required, because of the travel time involved from Edinburgh and the fact that most properties were local to the Livingstone branch.

62. The ability to manage Activity Days, and to get the best result from these, would have been made more difficult by the claimant working remotely, as it was important for the branch manager to manage the activity by observing what was going as it was happening on and having an ongoing discussion about it in the course of the day in order to potentially achieve the best results.

63. After the claimant stopped working on the 8 January, Valuers from other officers provided services to the Livingstone branch. There were a bank of three or four Valuers who provided this cover, none of whom were permitted to attend the office because of Covid Restrictions. This arrangement proved to be very difficult for the remaining members of staff and their workload increased. Part of the reason for this was that Taylor had to conduct all the property Viewings. However, in addition to this Ms Brooks had to make telephone calls to the Valuers on a very regular basis to obtain the information upon which much of her client contact was based, which was time-consuming and added to her workload. Further all the telephone calls and queries had to be dealt with by two members of staff as opposed to three which increased their workload. There was no cover for holidays or sick leave. Ms Brooks considered that it was unsustainable to have just two members of staff working in the office; she felt her health affected by the pressure she was put under as a result of this working arrangement to the extent that she has to consult her GP.

Further Email Correspondence/ telephone calls between the claimant and Ms Meighan from 5 to 8 January

64. Further to their telephone conversation on 5 January the claimant emailed Ms Meighan on 6 January as follows;

I referred to a telephone conversation yesterday afternoon.

I am sorry you felt unable to confirm your response to my queries in writing. I am also sorry that you are requiring me to return to the office to work and have threatened to place me on unpaid leave if I don't do so.

5 *Let me make my position clear again. We are in the middle of a lockdown. The advice from the Scottish Government is to work from home wherever possible. The pandemic is spreading and is currently very serious indeed, with a new strain of the virus threatening to overwhelm the NHS. The infection rate and death toll is rising.*

10 *I am perfectly able to carry out the majority of my duties from home. Indeed yesterday I had a really busy day for me and today (6th January) I am out all day attending appointments as I confirmed I would continue to do, and is provided for under one of the exemptions to working from home ie 'for the activities in connection with moving all (including viewing a property).'*

15 *As for the threat of putting me on unpaid leave, I find this astonishing in the circumstances. The law protects me from suffering a (detriment which would include not being paid) and on grounds relating to health and safety, which include taking a protective step to avert serious and imminent danger. I regard being forced to work in the office during a national lockdown imposed as a result of a pandemic, as a serious and imminent danger. So, in order to avoid what I reasonably consider to be serious and*
20 *imminent danger I will not work in the office until lockdown is lifted.*

Ms Meighan responded to that email on the same day as follows;

25 *As discussed with you in detail yesterday, it's business as usual as per the latest government outline. We will continue trading, however behind closed doors meaning any meetings with clients is by appointment only.*

There are several reasons why we require you still to work from the branch these are;

Supporting branch colleagues

Availability to cover MA's and viewings at short notice

5 *To provide cover for lunch breaks*

To work with the team to generate new business

10 *I can assure you that we are following all health and safety regulations in accordance with the government guidance. These include employees regularly cleaning the desks, regularly washing hands, maintaining social distancing and wearing a mask when not sat at their desk. You can find full details of this on Our Place or in the regular updates sent out to the business. If you wish to discuss this further with the health and safety adviser please let me know and I will pass on their details to make contact.*

15 *At stands if you do not attend work that will be marked as unauthorised absence and you will be placed on unpaid leave.*

65. The Claimant and Ms Meighan had a further telephone conversation on 6 January when the claimant reiterated his position that he would not return to work in the office, and Ms Meighan reiterated her position that he was required to do so.

20 66. After taking advice from HR Ms Meighan emailed the claimant on the 7 of January stating;

25 *Further to my email below and our telephone conversation this afternoon, you have confirmed that you are not prepared to attend the office to carry out your contractual role despite the fact you have not been given the authority to work from home.*

The reason this has not been approved is a detailed in the email below .

Should you not return to the branch tomorrow morning, I will be removing all access to rights to your launchpad and your absence will be marked as an authorised and you will be placed on unpaid leave.

5 67. The claimant responded to the effect that he was left with no choice but to return to work in the office, and he did so the following day. He stated that he did so reluctantly due to the appalling financial threat of not been paid.

68. The claimant did return to the office on the 8 of January but he became unwell and left at around lunchtime. He was subsequently certified by his GP as
10 being unfit for work due to work-related stress and did not return to work prior to his resignation.

Grievance and Grievance Appeal

69. The claimant lodged a grievance 7 January. In his grievance the claimant complained that he had requested to work from home as per the Scottish
15 government advise, but had been told that he must return to the office or he would be treated as being absent without leave, and would not be paid, and he was advised that he if he did not return to work he would be in breach of his contract of employment. The claimant stated that he was shocked at the threatening nature of Ms Meighan's response to his request, which he
20 considered to be in direct opposition to government advice and which put his and other members of staff health at risk.

70. The claimant's grievance was dealt with by Graham Hilley the Regional Sales Manager. The grievance hearing took place over the telephone, and the claimant was assisted by his trade union representative. In the course of the
25 grievance hearing the claimant stated that he could carry out his core function. He also stated there had been some teething problems, and he could not

carry out hundred percent of this work, but could carry out 90% or even 95% of his work from home.

71. Further to the grievance hearing Mr Hilley investigated matters by speaking to Ms Meighan, who explained the reasons for her decision to him.

5 72. Mr Hilley concluded that the grievance should not be upheld. He wrote to the claimant on 20 January 2010 confirming his decision, and advising the claimant of his right to appeal against that outcome.

73. The claimant lodged an appeal on 26 January. The grievance appeal was dealt with by Scott McDonald, the Financial Services Director and a meeting
10 took place on 9 February, again, by telephone. The claimant was again assisted by his trade union representative.

74. Further to the appeal hearing, Mr MacDonald investigated matters by speaking to Ms Meighan and Mr Hilley. He also investigated whether any other Valuers were working from home and established that they were not.

15 75. Mr McDonald did not uphold the claimant's appeal against the grievance outcome, and he wrote to him confirming this on 16 February.

Resignation

76. After he received the outcome of the appeal, the claimant decided to resign
20 on 26 February. There was an error in the claimant's pay at the end of February, and while this occasioned him stress it was quickly remedied. In his letter of resignation stated;

I writing to notify the Company of my resignation with immediate effect.

The disappointing outcome of the grievance process that left me with no choice.

The Company has fundamentally and irretrievably breached trust and confidence in its response to my health and safety concerns.

5 *In refusing to work in the office in Livingstone in the middle of a pandemic when the Government's clear guidance was, and is, to work from home wherever possible, I was threatened with having my pay stopped-which I believe to be clear detriment under Section 44 of the Employment Rights Act 1996. I was simply seeking to protect my health and safety.*

10 *I stated quite clearly that I could work from home and could carry out at least 95% of my duties working from home. Notwithstanding this, the bullying threat of having no income with which to support my family caused me untoward stress and anxiety, resulting in me being absent from work through ill health for the first time in 15 years of service with the Company.*

Post Termination Employment

15 77. After his employment came to an end the claimant remained certified as unfit for work until the 7 March.

78. The claimant secured alternative employment as a property valuer on a consultancy basis with Gibson Estate Agency (Gibson) , commencing on the 1 of April 2021. The claimant did not make any formal applications for employment, but he did speak to 4 companies known to him.

20 79. At the point when the claimant resigned there were no Valuers jobs advertised. The claimant has not looked for other work since commencing his consultancy position with Gibson.

25 80. The claimant received a consultancy fee of £1,000 for three months (April to June) from Gibson. He began earning commission in July 2021. The month of July commission of £1,488. For the month of August he the commission of

£1,384. The claimant estimates that he will continue to earn commission and the £1,500 per month.

Note on Evidence

5 81. The Tribunal did not form the impression that any of the witnesses sought to deliberately mislead. It's impression was in the main all the witnesses gave evidence which reflected what they genuinely understood the position to be, even if their perceptions were not at one on a particular matter.

10 82. An example of this is in relation to the extent to which the claimant answered the telephone in the office. It was the claimant's evidence that he very rarely took telephone calls, but he accepted in cross-examination he did take some telephone calls, that he could deal with queries arising from them, and he provided cover and lunchtimes in the office. Ms Meighan' evidence suggested that she believed the claimant took telephone calls to a greater degree than he accepted. Ms Brooks, quite candidly in the Tribunal's opinion, said she
15 could not say how many telephone queries the claimant took, but he was on the phone regularly, although she readily accepted that he may have been making telephone calls out.

20 83. On balance the Tribunal was persuaded that the claimant did take some telephone calls, and that he provided telephone cover at lunchtime when required, but, as he suggested this was not a significant element of his job and in the main incoming telephone calls were fielded by Taylor.

25 84. In reality it did not appear there as much between the witnesses in terms of their evidence as to what the claimants job involved, however there was a difference of emphasis on the importance attached to elements of it, and how things worked, or might work in practice. It was the claimant's view that he could work effectively from home and he should have been supported in this in light of Government Guidance and the respondents own policy; and it was a respondents view that he could not work effectively home and they were

entitled in terms of that Guidance and their own policy to insist that he work in the office.

5 85. Ms Meighan and Ms Brookes accepted that there were elements of his job which the claimant could have performed remotely. Notwithstanding this, their position was that his working in this way would impact the performance of the team, increase the workload of the others in the team, and impact on his ability to perform his job effectively. Ms Brooks gave convincing evidence about how difficult it would have been for the other two team members, had the claimant worked from home. She confirmed the evidence given by Ms
10 Meighan about the fast-paced environment in which the business operated, and the need for a speedy response to queries and the ability to pass on telephone calls directly to the claimant when he was in the office, from which he could often generate business. Moreover she gave convincing evidence about the need to interact with the claimant over a wide variety of issues,
15 some of which may have been small and apparently significant, and would not have justified the time taken to make a telephone call or write an email about, but which overall made a quantitate difference to her ability to do her job, and to the smooth and effective running of the office. She explained that the loss of this was significant. Her evidence, which the Tribunal found
20 convincing, was that even if the claimant spent time out of the office, primarily in the afternoon, he was available for a significant part of the day to deal with telephone calls, queries from other members of staff, and generally to interact with his colleagues so that there was a flow of information between them necessary to the smooth conduct of business.

25 86. Ms Brooks explained that during February and March the claimant's role was covered by Valuers from other offices, who could not attend the Livingstone Branch because of Covid restrictions and this proved very difficult to cope with. Even allowing for the fact that these Valuers did not cover Viewings, the Tribunal was satisfied on the basis of Ms Brooke's evidence about the impact
30 their absence from the office had. This supported her evidence about the importance of the flow of information between the claimant and other team

members in real time; the degree to which she and Taylor relied on that; the cover which the claimant was able to provide as one of a team of three; that her work, and Taylor's work, was likely to have become much more difficult had the claimant worked from home.

5 87. Ms Brookes gave convincing examples of this, in particular the need for her to make numerous phone calls to the Valuers to obtain necessary information. She also gave evidence about the impact of all the telephone calls and queries into the office being dealt with by her and Taylor, and the fact that if one person was off ill or on holiday, the other had to cope alone in
10 a busy office.

88. Ms Strain in her submission listed a number of individual elements of the claimants role which she said could be performed remotely, and to a significant degree the Tribunal, (and the respondents witness)accepted these (as reflected in the findings in fact), however her submission ignored
15 the elements of the claimant's role which were embedded into his day's work, in terms of working together as part of the team, which the Tribunal considered to be significant, particularly in light of the impact of this support , or the lack of it, on the other team members.

89. There is one point in relation to the claimants position on working in the office
20 which the Tribunal consider worth commenting on in this section. That is that the claimant was cast by Ms Strain as his being flexible and showing a willingness to negotiate, in the face of complete and unreasonable intransigence on the part of the respondents. On this matter the correspondence and content of the emails telephone calls, set out in the
25 findings in fact, largely speaks for itself.

90. What the Tribunal took from this and from the tenor of the claimant's evidence was that the claimant did compromise to a degree particularly at the beginning of his interactions with Ms Meighan, departing from his original position that he would not visit clients. While he offered to go into the office

he did so at times when the other team members were not present, and therefore this was a proposal which could not reasonably have met the respondents concerns about his working remotely. Furthermore in his final email to Ms Meighan his position was stated to be clear, and suggested very strongly that he would not prepared to go into the office. It did not appears to the Tribunal that this was not suggestive of flexibility or a willingness to significantly compromise on the main point in issue; the claimant did not want to work in the office with his colleagues and the respondents wanted him to do that. There was therefore an impasse between the parties.

10 91. There is also a matter of credibility in issue related to the claimant's position that Mr Meighan behaved towards him in a threatening manner.

15 92. Ms Strain criticised Ms Meighan for her use of the expression 'business as usual'. However the Tribunal did not consider anything could be taken from this. It was satisfied that it was, as Ms Brooks said, it was business as usual subject to Covid restrictions. Such a conclusion is supported by the Covid safety measures which were put in place in the office, including the locked door policy, the Covid protocols put in place for client visits, and the fact that some staff worked remotely.

20 93. Ms Strain also submitted that Ms Meighan laughed during her evidence when the claimant's concerns were put to her about keeping 2 m distance, and this highlighted the respondents lack of compassion or willingness to appropriately properly consider the claimant's health and safety concerns. She submitted that the Tribunal was entitled to find that the attitude and manner displayed by Ms Meighan in her evidence was reflective of attitude towards the claimant January 2021.

25 94. The Tribunal considered that there was no merit in this submission. The Tribunal did not form the impression that Ms Meighan laughed when giving her evidence in a way which demonstrated a lack of compassion or willingness to consider the claimant's concerns, but rather it formed the

impression that she felt under pressure, and to the degree frustrated in the course of a cross examination, and while this is not a criticism of Ms Strain, the this was as a result of similar lines of questioning being repeated, and the manner in which the questions were asked.

5 95. Furthermore , while the claimant said he felt threatened by what Ms Meigan told him were the consequences of not returning to the office, he did not give evidence to the effect that Ms Meighan adopted a hostile or threatening tone in imparting this information; rather he accepted in cross examination that he and Ms Meighan disagreed with each other and they both stated their
10 respective positions clearly. The Tribunal was not persuaded that Ms Meighan had adopted a threatening or hostile tone to the claimant.

96. There was no material factual dispute as to what was said the course the telephone calls which took place between the claimant and Mr Meighan, or in the email correspondence between them, produced in the bundle of
15 documents.

97. There was an issue of credibility in relation to the degree to which there was compliance with the Covid safety measures in the office, which is dealt with bellow.

Submissions

20 98. Both parties are very helpfully produced written submissions which they supplemented with all submissions. For the sake of brevity, these are not reproduced here, but the relevant parts are dealt with in the Tribunal's consideration of the evidence and its consideration of its decision.

Consideration

25 99. The effect of Section 95 (1) (c) of the ERA is that dismissal occurs where the employee resigns, terminating the contract with or without notice, in

circumstances such that he would be entitled to resign without notice because of the employers repudiatory breach of contract .

5 100. The leading authority on what is commonly referred to as the constructive dismissal, is the case of *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221*.

10 101. What was said in that case is that if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, which shows the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employers conduct. He is constructively dismissed.

15 102. In order to claim constructive dismissal the claimant must therefore establish firstly there was a fundamental breach of the contract on the part of the respondents, secondly, that the respondents breach caused the claimant to resign, and thirdly that he did not delay too long before resigning, thus affirming the contract.

20 103. The Tribunal understands that it is the first of these tests which is the battleground in this case. The respondents do not take issue with the fact that the claimant resigned in response to what he considered to be a breach of contract on the part of his employer; nor is it argued that he delayed too long before resigning, thus affirming the contract.

25 104. The contract terms relied upon are firstly the implied term that the respondents would not act in a way which was calculated or likely to destroy the relationship of trust and confidence between employer and employee; and secondly the implied term that the respondents would provide a safe working environment for the claimant.

105. The Tribunal considered it helpful to remind itself of the legal test to determine if there has been a breach of the implied term. In the case of *Malik v Bank of Credit and Commerce International SA 1997 ICT HL*, the House of Lords recognised the existence of the implied term of mutual trust and confidence, but emphasised that there is a breach of the term only where there is ‘*no reasonable and proper cause*’ for the employers conduct, and then the conduct is calculated and likely to destroy serious damage relationship of trust and confidence.
106. Ms Strain referred to *Leeds Dental Team v Rose 2014 IRLR 8* to support the proposition, which the Tribunal accepts, that it is not necessary to show intent on the part of the employer.
107. As indicated above there are three matters upon which the claimant relies in claiming that the respondents breached the implied term of mutual trust and confidence. The first is the respondent’s insistence that he work in the office, the second is what says was the threatening behaviour he was subjected to by Ms Meighan and the third is the refusal to uphold the grievance or grievance appeal.
108. The background to the dispute was the imposition of second national lockdown and the claimant’s concern about the spread of Covid and the rising death rate.
109. Much of the questioning of the respondent’s witnesses in cross examination was framed in such a way as to suggest that they were under legal obligation to allow the claimant to work from home. On submission the claimant’s position on this seemed to shift a bit from this, and the Tribunal understood Ms Strain’s position to be that the respondents were under a legal obligation to consider and apply the Guidance
110. The Tribunal considered the extent to which there was a positive legal obligation on the respondents to allow the claimant to work from home.

111. Ms Strain referred the Tribunal to the following;

1. The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 and (the Regulations);
- 5 2. The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 10) Regulations 2021 (the Amended Regulations) and;
3. The Guidance, referred to above.

112. In submitting the respondents were under a legal obligation to consider and
10 apply the Guidance, Ms Strain relied on Sections 9 and section 8 (1) (b) of the Regulations which provide;

Guidance on minimising exposure to coronavirus in a Level 4 area

15 **9.—** (1) *A person who is responsible for a place of worship, carrying on a business or providing a service in a Level 4 area must have regard to guidance issued by the Scottish Ministers about measures which should be taken in accordance with paragraph 8(1)(b) relating to its premises, business or service.*

Requirement to take measures to minimise risk of exposure to coronavirus in a Level 4 area

20 **8.—**(1) *A person who is responsible for a place of worship, carrying on a business or providing a service in a Level 4 area must take—*

(a) measures to ensure, so far as reasonably practicable, that—

(i) the required distance is maintained between any persons on its premises (except between persons mentioned in sub-paragraph (2),

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(ii) *persons are admitted to its premises in sufficiently small numbers to make it possible to maintain the required distance, and*

(iii) *the required distance is maintained between any persons waiting to enter its premises (except between persons mentioned in subparagraph (2), and*

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(b) *all other measures which are reasonably practicable to minimise the risk of the incidence and spread of coronavirus on the premises, for example measures which limit close face to face interaction and maintain hygiene such as—*

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(i) *changing the layout of premises including the location of furniture and workstations,*

(ii) *controlling the use of entrances, passageways, stairs and lifts,*

(iii) *controlling the use of shared facilities such as toilets and kitchens,*

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(iv) *otherwise controlling the use of, or access to, any other part of the premises,*

(v) *installing barriers or screens,*

(vi) *providing, or requiring the use of, personal protective equipment, and*

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(vii) *providing information to those entering or working at the premises about how to minimise the risk of exposure to coronavirus.*

113. It was not clear that the provisions referred to directly impose a duty on the respondents to consider the Guidance document which was produced in the bundle, in that it unclear that the Guidance had been issued pursuant to Regulation 8(1) (b).

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114. However, regardless of that the Tribunal was satisfied that the respondents

had considered the Guidance on home working. Such a conclusion was supported by the evidence of Ms Meighan, the fact that the Respondents had a Covid 19 Policy which provided for home working; the email from the Chief Executive advising that there was increased capability for staff working remotely, and the fact that some staff were working remotely.

115. Ms Strain also relied on the Amended Regulations at paragraph 18 (2)(b).

18.—(1) *For the purposes of regulation 17, examples of what constitutes a reasonable excuse (see regulation 5(4)) include leaving the place where the person is living, for the purposes set out in sub-paragraph (2).*

(2) *The purposes are to—*

(a) *obtain or provide—*

(i) *food and medical supplies for those in the same household (including animals in the household) or for vulnerable persons,*

(ii) *supplies for the essential upkeep, maintenance and functioning of the household, or the household of a vulnerable person,*

(b) *work or provide voluntary or charitable services, where it is not possible for the person to do so from home*

.....

(k) *move home or undertake activities in connection with the maintenance, purchase, sale, letting, or rental of residential property that the person owns or is otherwise responsible for*

116. The Amended Regulations did not however seem to the Tribunal to advance matters in terms of founding the basis of a legal obligation on the respondents to apply the Guidance in the way suggested by Ms Strain, so as to allow the claimant to work from home. The provision referred to only goes as far as to set out examples of reasonable excuses from the obligation to stay at home,

which include where it is not possible to work from home, and for the purposes of undertaking activities in connection with moving house.

5 117. Ms Strain's position appeared to be founded on the proposition that the claimant was under a legal obligation to stay a home, unless there was a reasonable excuse not to, and it followed that there was a legal obligation on the respondents to support him working from home.

118. That however is not what the Regulations or the Amended Regulations or the Guidance provide.

10 119. The Guidance, which is just that-guidance, provides for organisations to make *reasonable efforts* to make home working the default position, and where a *worker can perform their* work from home, they should continue to do so.

15 120. That Guidance it did not place the respondents under any enforceable legal obligations with regard to home working. That it appears to the Tribunal is made clear from its terms set out in the findings of fact which provides *inter alia*;

The guide is underpinned by a spirit of collaborative working between the companies and their workforce that organisations have a legal responsibility to maintain workplace health and safety including for those working from home...

20 121. While the respondents therefore remain subject to the legal responsibilities to maintain health and safety, no separate legal obligation is imposed on them as a result in the Guidance, albeit it urges employers to make a reasonable effort to make working from home the default position.

25 122. That takes the Tribunal back to the fundamental question of whether there was no reasonable and proper cause for the respondents to refusal to accept the claimant's position on home working, but instead to insist that he work in the office, and whether this was conduct which was calculated and likely to

destroy or seriously damage the relationship of trust and confidence with the claimant.

123. The first element which the Tribunal considered was whether there was no reasonable and proper cause for the conduct complained of. This is an objective test for the Tribunal, having regard to the relevant elements.

124. In considering whether the respondents have acted in breach of the implied term of mutual trust and confidence, it is relevant to take into account that the respondents were not in breach of a positive legal obligation to allow him to work from home.

125. It is also relevant to take into account that that the property sector in which the claimant worked was legally permitted to remain open during the second lockdown, unlike other sectors of industry, for example the licenced trade.

126. The Tribunal had a great deal of evidence from the claimant, Ms Meighan and Ms Brooks about what the claimant's job involved, why on the claimant's evidence he could work effectively from home, and why on Ms Meighan's and Ms Brooks evidence he had to come to the work in the office. These are set out above in the findings in fact.

127. In reaching its conclusions the Tribunal consider it appropriate to take an overall view of the work which the claimant performed. There was evidence to support the conclusion that in the three months prior to his employment coming to an end, the claimant conducted an average of five property viewings per week. This supported the conclusion that he did not spend the majority of this time out of the office, and as spoken to by Ms Brooks in particular. As set out in the findings in fact the claimant had considerable input in terms of generating business, and supporting other members of staff by working as part of a team of three, and of doing so by facilitating the real time the flow of information to other team members which allowed them to perform their jobs effectively in a fast paced sales environment; working with

them to generate sales; covering lunches; dealing with telephone calls when required, and providing holiday and sickness cover to avoid one person working alone.

5 128. While it may not have been the most significant factor in the performance of his role, it was plausible that had the claimant taken part in Activity Days remotely, the efficacy of these may have been adversely impacted by the fact that the workforce, and the activity itself, could not be managed as easily by virtue of the fact that one of the team was working remotely.

10 129. It was appropriate on an objective basis to have regard to the additional workload that would be placed on other members of staff by virtue of the claimant not working in the office, which was likely to mean that they would spend more time fielding telephone calls, or checking messages left on the answering machine and dealing with these, and more significantly, in making telephone calls or emailing the claimant asking him to respond to queries or
15 passing on information about clients. This in turn impacted on the time available to them to do other work.

20 130. It was also appropriate on an objective basis to consider the importance of response time in a competitive sales environment and the impact of the claimant not being in the office to take telephone call from his clients or prospective claimants.

25 131. It was also appropriate to take into account that the time available to the claimant for his work may be impacted by this working from home due to additional travelling distances to travel to viewings/valuations and that his ability to conduct viewings or valuations at short notice may also have been adversely impacted as a result of not working in the office.

132. Ms Strain also made reference to the respondents Covid 19 People policy, suggesting this had been breached. The Tribunal was not persuaded the respondents had acted in breach of their policy. The policy provides that if an

employee felt unsafe returning to work, time off will be agreed either by accessing the Furlough scheme, annual leave, or unpaid leave. There was nothing to suggest that Furlough would have been appropriate, given that there was still a requirement for the claimant to do his work; the claimant did not request annual leave; and the respondents did advise the claimant that if he stayed away from the office this would be treated as unpaid leave, which was not acceptable to him.

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133. Ms Strain on her questioning of Ms Meighan, and in her submission made much of the fact that there had been no attempt to compromise on the part of the respondents, and she cast this as unreasonable. She put to Ms Meighan a number of alternatives, including working on a rota, which she suggested should have been considered with the claimant. The fact that the respondents did not explore alternative suggestions him, is however is not determinative of the relevant question. The claimants case in the ET1 is that in the respondents rejected his request to work from home and insisted that he worked in the office. That question therefore for the Tribunal is whether the respondents, in denying the claimants request to work from home and in insisting that the claimant work in the office, conducted themselves without reasonable and proper cause, in a manner which was calculated and likely to seriously damage or destroy the relationship of trust and confidence with their employee. If the answer to that question, or the first part of that question is no, then there is no breach of contract. If the respondents were entitled to reject the request to work from home, and insist on the claimants working in the office, they cannot be in breach by falling to agree to alternatives to that.

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134. The Tribunal reminded itself that the test is not whether the respondents acted reasonably but, but whether objectively there acted without reasonable and proper cause. The reasons why the claimant was required the claimant to work in the office did not necessarily conflict with the conclusion that there were considerable elements of his job which the claimant could perform remotely. The fact however that the claimant could perform a number of the aspects of his job remotely did not necessarily lead to the conclusion that the

respondents acted without reasonable and proper cause in rejecting homeworking and insisting that he work in the office. While the claimant may have disagreed with the respondents decision, the Tribunal was satisfied that on an objective test, there were elements of performance embedded into his role which meant that there were credible and legitimate grounds upon it could be concluded that for the claimant to work effectively in his role of Valuer as part of the team in the Livingstone branch he had to work in the office.

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135. The Tribunal therefore concluded that the respondents refusal to allow home working and insistence that the claimant carry out his work from the office, and not remotely, could not be regarded as conduct on their part of the respondents which was without reasonable and proper cause.

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136. Ms Strain was clear that no issue was taken with the process of the grievance or appeal, and it was the decision not to uphold these which was relied upon. If follows therefore from the Tribunals conclusions as to the legitimacy of insisting that the claimant work in the office, that the failure to uphold the claimant's grievance, or his appeal against that grievance did not amount to conduct on their part which was without reasonable and proper cause and was calculated and likely to destroy or damage the implied term of mutual trust and confidence in the claimant's contract of employment.

Ms Meighan's behaviour

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137. The Tribunal considered whether Ms Meighan's alleged threatening behaviour towards the claimant was conduct which was capable of amounting to a breach of the implied term of mutual trust and confidence, either as a stand-alone breach or as part of a series of events upon which the claimant could rely.

138. The Tribunal agree with Mr Lewinski that casting Ms Meighan's outlining to the claimant the consequences of not returning to the office to work as a

'threat', is a matter of semantics. Technically it could be argued that Ms Meighan's telling the claimant what would happen to the if he did not come into the office to work constituted a threat, in the sense of '*if you don't do X, Y will happen*'.

5 139. However her statement to the effect that his launch pad capability would be removed and he would be placed on unpaid leave, if he did not return to work in the office, outlined the lawful consequences for the claimant as a result of his refusal to work in the office. The respondents were entitled to treat the claimants refusal to work in the office as required by them, as opposed to
10 working on the terms he outlined, as a failure to obey a reasonable instruction. The statements made by Ms Meighan were justified on this basis, and could not be regarded as conduct without reasonable and proper cause, even if the claimant found the statements to be threatening. Her conduct therefore could not be relied upon in support of an argument that that there was a material
15 breach of the implied term of mutual trust and confidence.

Claimants Alternative Case on Breach of the Implied Term

140. Ms Strain made submissions on an alternative case to the effect that if Tribunal was not with her on the conclusion that insisting that the Claimant come into the office was in of itself a repudiatory breach of contract, then she
20 submitted that the following events amount to such a breach:

- a) Lorna Meighan requiring the Claimant to work in the office 100% of the time.
- b) Lorna Meighan's refusal to consider a trial period working from home.
- c) Lorna Meighan's refusal to allow the Claimant to work from home part of
25 the time.
- d) Lorna Meighan's refusal to allow the Claimant to come into the office between 6:30 and 8:45am and work from home the rest.

- e) Lorna Meighan's failure to propose any sort of compromise or alternative solution to 100% office working.
 - f) Lorna Meighan's comment that it was 'business as usual' during a global pandemic.
 - 5 g) Lorna Meighan's email stating that if the Claimant did not return to work, he would not be paid and access to his launchpad removed.
 - h) Lorna Meighan's phone call stating that the Claimant must come into the office and face his pay being deducted.
 - 10 i) The Claimant being forced to attend an office environment where he did not feel safe on 8 January 2021.
 - j) Graham Hilley's decision not to uphold the Claimant's grievance.
 - k) Graham Hilley's failure to offer solutions to Mr Leitch rather Mr Hilley advised the Claimant to arrange a meeting to return to work in the office
 - l) .Scott McDonald's failure to allow the Claimant to work from home.
- 15 141. Ms Strain's submission was that the final straw was Mr McDonald's appeal outcome.
142. She submitted that the Tribunal should find that objectively each of these facts collectively amount to a repudiatory breach in response to which Mr Leitch was entitled to resign.
- 20 143. It appeared to the Tribunal that this was a new case being pleaded on submission, which was not supported by an application to amend, in that it cast a number of alleged failure by the respondents, distinct to the matters clearly identified in the ET1, as facts and matters to be relied upon in considering if there had been a repudiatory breach of contract.

144. In any event, leaving that aside, it appeared to the Tribunal that the suggested alternative case was something of a red herring, in that essentially it sought to approach the fundamental point of whether the respondents were in breach of the implied term by refusing the claimants request for homeworking and insisting he work in the office in a different way. The Tribunal has already considered this issue and its conclusions on that are as outlined above.

Duty to provide a safe working Environment

145. There was no clear statement in the ET1 or at the commencement of the hearing in the identification of the issues, as to how it is said the respondents were in breach of this duty.

146. In submission Ms Strain submitted that the Respondent's position was that their office was Covid secure, whilst it is clear from the Claimant's evidence that it was not Covid secure. The Claimant was rightly concerned about the transmission of coronavirus by virtue of his contact with other people. The Claimant wanted to limit his contact with other people, as he was being instructed to by the Government. The Claimant did not feel secure as the office had no windows, shared facilities, was small and it was difficult to social distance. She submitted that given the severity of coronavirus, the Claimant was rightly concerned about his health and safety at work.

147. Ms Strain further submitted that if Tribunal find that the office was Covid secure, then it is submitted that this has limited significance on whether there was a fundamental breach of the Claimant's contract of employment. It is submitted that Mr Leitch made a reasonable request to work from home when there was a legal obligation on him as an individual to stay at home unless he had a reasonable excuse. As a result of this Mr Leitch correctly requested to do the parts of his job that he could from home. Mr Leitch was denied the ability to do so without deduction from his pay. The government and medical guidance were that there was no substitute for staying at home when considering health and safety. Accordingly, even if the Tribunal accept the Respondent's position that the office was Covid secure, which it is submitted

they should not, the Tribunal are still able to find that in demanding the Claimant work in the office with his concerns, amounted to a fundamental breach of contract.

148. Firstly the Tribunal considered the expression that the office was 'Covid Secure'. Clearly it could not be guaranteed of any premises that they were Covid secure in the sense that it was impossible to rule out all risk if catching the virus.

149. The Tribunal was satisfied that this language by the respondents was intended to convey that they had complied with the Government safety measures for office premises. The Tribunal was satisfied that they had done so in terms of the social distancing, mask wearing, cleaning and closed door policy as well as client Covid protocols. The Tribunal was not persuaded that there were any significant issues with compliance with social distancing or other Covid measures. Such a conclusion was not supported by the evidence of Ms Brooks, nor by the fact that the claimant had worked in Livingstone branch without complaint about social distancing /Covid measures in place up until January 2021. Given the extent of the claimant's concerns about his health January, even against the background of a second lockdown, it lacked plausibility that he would not have raised a complaint before, that had there been significant compliance issues.

150. The Tribunal considered the question of whether demanding that the claimant attend work in this environment amounted to a breach of the implied term to provide a safe working environment.

151. The employers duty to protect employees from harm does not extend beyond taking reasonable precautionary steps. That, it appeared to the Tribunal's is what the respondents had done by adapting their office premises so that they complied with the government guidelines on social distancing. To conclude otherwise would lead to the conclusion that no office premises should have been allowed to open during the second lockdown, even if they complied with

the relevant guidance. That position, it appeared to the Tribunal , cannot be correct.

152. The Tribunal therefore did not conclude that the respondents had failed to provide a safe working environment.

5 153. The effect of these conclusions is that the claim for unfair dismissal fails and is dismissed.

Employment Judge: Laura Doherty

Date of Judgment: 22 October 2021

10 Entered in register: 03 November 2021
and copied to parties