EMPLOYMENT TRIBUNALS

Claimant: Mr R Williams

Respondent: Mitie Limited

Heard at: Manchester (by CVP) **On:** 22 and 23 June 2021 and 13, 14, 15 December 2021 and 16 December 2021(in chambers).

Before: Employment Judge Ross

REPRESENTATION:

Claimant: In person
Respondent: Ms S Robertson (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unlawful deduction from wages is not well-founded and does not succeed.

2. The claimant's claim for unfair constructive dismissal is not well-founded and does not succeed.

REASONS

Introduction

1. The claimant was employed by the respondent and its predecessors as an Electrical Installation Engineer. The claimant's employment was transferred to the present respondent in 2016 under the provisions of Transfer of Undertakings Protection of Employment Regulations 2006 "TUPE."

2. The claimant believed during the course of his employment with the respondent that he was being underpaid his wages. He brought a claim for unlawful deduction from wages (case number 2402545/2019) but withdrew that claim. It was dismissed on 30 April 2018. He said he received no payment when he withdrew that claim.

3. The claimant then presented claim number 2303779/2019 on 19 March 2019 (page 7) alleging unspecified arrears of pay. The response denied liability.

4. At a case management hearing for claim number 2303779/2019 conducted by Employment Judge Ainscough on 5 August 2019 the claimant clarified that he contended following a TUPE transfer and change of payroll system that he was subject to a series of underpayments and overpayments which amounted to a net underpayment at the end of each month. The claimant also stated his claim included the period from November 2017 to April 2018 and stated this claim was not included within his previous claim for unlawful deduction from wages which had been dismissed on 30 April 2018 without payment.

5. Employment Judge Ainscough dismissed any claim for unlawful deduction from wages for two years prior to presentation of the claim under section 23(4A) Employment Rights Act 1996 (pages 61-62). Accordingly, any claim for unlawful deduction from wages under claim 2402545/2019 was only from November 2017 to May 2019 (see page 53 – note of Employment Judge Ainscough).

6. During the course of his employment with the respondent the claimant raised six grievances about various issues, including issues related to his wages.

7. On 15 April 2019 the claimant resigned his employment (page 655).

8. On 6 September 2019 the claimant presented a claim for unfair constructive dismissal (case number 2303779/2019) (page 68). The claimant relied, in part, on an alleged unlawful deduction from wages.

9. The response denied liability and sought further particulars.

10. Both claims were combined.

11. At a case management hearing before Employment Judge Tom Ryan (pages 92-98) the order combining both claims was confirmed. Employment Judge Ryan clarified the issues for both claims (pages 93-94). He also ordered the claimant to supply further information in relation to his grievances and a properly itemised Schedule of Loss.

12. The claimant provided further information for the constructive dismissal claim (see pages 101-108). The respondent filed an amended response denying liability (pages 109-118).

13. At the outset of the final hearing the Schedule of Loss relied upon by the claimant was at pages 789-791 of the bundle. By the claimant's calculation he was owed £3,840.64 in wages for the period 23 October 2017 until the end of his employment in March 2019. The respondent disputed at the time of the hearing that there were any sums owed to the claimant.

Witness Evidence

14. I heard from the claimant. For the respondent I heard from Mr Bryers, the Account Director; Mr Littler, Head of Delivery; and Mr Kaye who was the claimant's line manager prior to his resignation.

15. I had two electronic bundles of documents amounting to a total of 842 pages.

16. In addition I had a chronology provided by the respondent. I also had an interview record form for a meeting dated 17 August 2017, the handwritten notes and the typed version of the notes.

17. I also had a helpful annotated document prepared by Ms Robertson, respondent's counsel, annotated in both red and green. It was an annotated copy of pages 789-790 of the bundle, the claimant's schedule of under and overpayments. The red annotations showed the hours paid by the respondent and the green annotations showed any corrections following the claimant's evidence under cross examination.

18. These documents had also been disclosed to the claimant.

19. Finally, I had an opening note and a closing skeleton note from the respondent plus copies of the following cases:

- Kaur v Leeds Teaching Hospital NHS CA IRLR [2018], 833
- Morgan v West Glamorgan County Council [1995] IRLR 68
- WA Goold (Pearmak) Limited v McConnell [1995] IRLR 516
- Sutherland (Chairman of the Governors of St Thomas Bennett RC High School) v Hatton [2002] IRLR 263
- Marshall Specialist Vehicles Limited v Osborne [2003] IRLR 672

The Hearing

20. Due to the COVID-19 pandemic, this case was heard remotely by Cloud Video Platform ("CVP"). The hearing was originally listed for four days commencing on Tuesday 22 June 2021. The claimant, a litigant in person, understandably found it difficult to connect to a remote video hearing and also view a very extensive bundle of documents on the same device. Unfortunately, he had not been provided with a full and complete paper copy of the bundle in advance of the hearing in June 2021. It was agreed on the first day of the hearing that the respondent would send a complete paper copy of the bundle to the claimant by next day delivery so that the hearing could commence the following day. Unfortunately, a full set of the complete bundle did not arrive.

21. It also became clear that the claimant considered there were further documents of his which were missing from the joint bundle. In these circumstances it was not in the interests of justice to continue with the hearing in June 2021.

22. I made an order in relation to disclosure, adjourned the hearing and relisted the claim for 13-16 December 2021. It was hoped that the December hearing would be in person, or at least a hybrid, because the claimant as a litigant in person would have preferred to attend in person.

23. However, shortly before the resumed hearing the Government issued new guidance to work from home where possible, and in these circumstances the hearing reverted back to a fully remote hearing by Cloud Video Platform.

24. Meanwhile before the hearing in June 2021 was adjourned, I heard the respondent's application to strike out the claimant's constructive dismissal claim on the basis that there was no jurisdiction to hear the claim because the ACAS early conciliation certificate was in the wrong name. I refused that application giving reasons for my refusal.

Facts

25. I find the following facts.

26. The claimant believed that he was persistently underpaid his wages after he transferred to the respondent. He believed there was a series of overpayments and underpayments. At the outset of the hearing he believed the shortfall was over £3,000. By the end of his cross examination he initially conceded there were no sums owed to him but later stated believed he was owed wages but was unable to specify the amount.

27. During the length of long and painstaking cross examination Ms Robertson took the claimant through each column of his table at pages 789 and 790, taking the claimant in turn to the supporting documents and through the arithmetic. At the end of his evidence the claimant agreed that the information annotated on the schedule in green is correct. The schedule showed the claimant had claimed on his timesheets the sum of £785.68 but he was actually due the sum of £457.08, and in fact had been subject to an overpayment of £557.15.

28. The claimant is a hardworking man. The respondent's payroll system is not easy to understand. I find the claimant had a genuinely held but mistaken belief that he had been subject to persistent underpayment throughout his employment with the respondent.

29. I find there was a period of time where the claimant was not paid for his travel time, an entitlement under his contract with a previous employer, McAlpine. However I find this issue had been resolved completely by January 2018.

30. I find that in the course of the grievances presented by the claimant to the company he repeatedly complained about the same issues in relation to his wages. I find the respondent sought to address the complaints he had raised, but when the claimant received an outcome which he considered was not satisfactory he revisited the issue in a further grievance. I find the claimant became stressed by his perception that he was not being paid correctly. I find eventually this was part of the reason the claimant resigned his employment.

31. I find that after the claimant had given his evidence in cross examination he felt unable to articulate how much money, if any, he was still owed by the respondent.

32. The claimant was transferred to the respondent by TUPE transfer on 10 May 2016. The claimant's TUPE employee starter form is at pages 149-156. The letter confirming his transfer of employment is at pages 157-158.

33. The claimant had transferred from Kier May Gurney (“KMG”). I find that Kier Limited had bought May Gurney Limited, and prior to that the claimant had been employed by May Gurney Limited from March 2013. There are no terms and conditions in the conditions for the claimant's employment with May Gurney (later bought by Kier Limited). I accept the evidence of the respondent’s witnesses that the information provided under the TUPE process from KMG, the claimant’s immediate predecessor employer, was limited.

34. Prior to employment with May Gurney Ltd, the claimant was employed by GSH. Before that the claimant was employed by McAlpine. The terms and conditions of his McAlpine contract are at pages 145-148.

35. It is not disputed by the claimant that the claimant had continuous service which commenced on 20 December 2004 (page 157).

36. The claimant understood that under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 his terms and conditions were protected. One of the claimant's key concerns was that initially the respondent did not pay him correctly in relation to one hour’s travel time as set out in his contract of employment with McAlpine (page 145). I find that some of the claimant's terms and conditions under his Mitie contract were more generous than his terms and conditions under McAlpine. Under “sickness benefits” in his McAlpine contract the claimant was entitled to one week’s sickness benefit, full basic salary, in any 12 month period. Otherwise the entitlement was statutory sick pay only (page 88). Under his contract with the respondent the claimant received four weeks’ full pay and four weeks’ half pay (see Mitie welcome letter page 158).

37. The welcome letter to Mitie confirmed his travel time entitlement: “Travel time: the company will pay for one hour’s travel time per day at single time excluding days away from work due to holidays, sickness and training”.

38. Overtime in the claimant’s McAlpine contract at pages 145-146 was noted as weekdays, single time up to 5.00pm, time and a half after 5.00pm. Saturday first five hours at time and a half, thereafter double time. Sunday – double time. On the Mitie contract overtime rates are stated to be time and a half on weekday evenings until 9.00pm and until 1.00pm on Saturdays; double time after 9.00pm on weekdays and after 1.00pm on Saturdays and to midnight on Sundays.

39. During the course of his employment with the respondent the claimant presented six grievances. The grievances are sometimes hard to understand as the issues raised frequently overlap, and often the same issue is raised again.

Grievance 1

40. The claimant presented a first grievance on 19 May 2017 (page 101). The outcome was given on 28 July 2017 (page 288A-B). The grievance was heard by Richard Littler who gave evidence to the Tribunal. I found Mr Littler to be a clear and conscientious witness. I find the signed notes of the meeting are at pages 252A-J. I find there was a lengthy meeting where Mr Littler gave the claimant the opportunity to put forward his concerns. I find that the majority of the claimant's concerns related to his manager, Stephen McGovern. I rely on Mr Littler's evidence that he spoke to the claimant's line manager and interviewed him, particularly with regard to the communication issues the claimant had raised with him. I find Mr Littler instructed Mr McGovern in more effective use of his mobile phone to help him manage his calls better, when communicating with his team. I find Mr Littler contacted other members of the team and could find no other evidence of favouritism.

41. I find that item 16 on the claimant's list of grievances was an item in relation to travel time. Mr Littler spoke to the claimant's line manager and believed the issue had been resolved and any back payments made, but I find it was not resolved at that stage but it was later, following an appeal (see below).

42. I find that the claimant was absent from work on sick leave from 28 June 2017 until 16 July 2017 (pages 269-272 – stress at work). I find that as a result Mr Littler felt it was not appropriate to send the claimant a copy of his grievance outcome, which had been unsuccessful on the whole, whilst he was on sick leave. I find Mr Littler sent the claimant a copy of his final outcome on 28 July 2017 by post. Mr Littler offered the claimant the right of appeal, which he took up.

43. The claimant lodged an appeal on 1 August 2017 (see page 290). The appeal was conducted by Mr Bryers. I find that Mr Bryers was made aware of a hard copy of the claimant's appeal when he was emailed it by Mr Littler. I find Mr Bryers was working away at the respondent's London office at the time. I find Mr Bryers conducted a grievance appeal hearing promptly, meeting with the claimant on 17 August 2017. I find that effectively Mr Williams was asking Mr Bryers to re-hear his grievance, all 31 points. I find Mr Bryers, who was a forthright and clear witness, did conduct a rehearing and listened to the claimant's points from his original grievance. Although the claimant seemed suspicious of the interview record form, I am satisfied that both the handwritten notes which have been signed by the claimant and the typed notes are an accurate record of the meeting which started at 14:55 and ended at 16:40.

44. I find Mr Bryers dealt with the appeal very conscientiously. He considered each of the 31 points raised by the claimant. The detailed outcome letter dated 24 August 2017 is at pages 340-344. I find that Mr Bryers found that many of the claimant's points related to Mr McGovern, who was by then no longer the claimant's manager. I find in or around July/August 2017 Mr Kaye became the claimant's manager. I find, relying on the evidence of the claimant and Mr Kaye, that Mr Kaye was a former colleague and a friend of the claimant and that the claimant considered him a good manager, in the main.

45. I find that Mr Bryers resolved item 6, which was a complaint about the claimant's pension rights, in the claimant's favour and progressed the changes to benefit him.

46. The claimant's item 16 was a complaint that he was not receiving one hour's travel time as required under his McAlpine contract. The complaint was that Mr McGovern, his former manager, was removing this element from his timesheet. I find Mr Bryers accepted the claimant's argument and agreed he should be paid for his travel time. I find that although Mr Bryers stated "the initial claim for missing travel time hours has been paid and this item can be closed, as we agreed during the appeal hearing" in fact took a little longer to resolve. I find that the issue was resolved by 21 December 2017 (see page 379) with back payments paid in January 2018 and the claimant agreed in evidence that that was the case.

47. The claimant agreed that the pension issue was resolved in his favour.

48. In the course of his evidence the claimant suggested that his new manager, Mr Kaye, also amended his time sheets to remove his claim for travel time. I accept the evidence of Mr Kaye that initially during the handover period between himself and the claimant's former manager, Mr McGovern in July 2017, he was instructed by Mr McGovern (page 289) to inform the claimant he should remove the travel time from his time sheet.

49. However, I find that once Mr Kaye was fully appointed as the claimant's manager, the claimant asked him informally at a meeting in September 2017 to look into this issue, which was still a problem, about not being paid his one hour travel time. I find that Mr Kaye looked into the matter for the claimant and sorted it out in the claimant's favour (see page 379). I find HR calculated the claimant was 105 hours' back pay in relation to travel time which was paid to him in January 2018 and shown on that month's wage slip which records the matter (page 761).

50. The fact the issue was being discussed between the claimant and Mr Kaye is evidenced by the email exchange at pages 360-361.

51. In fact the situation was sometimes due to the claimant's error. During cross examination the claimant conceded that on some occasions he had omitted to claim the travel time-see 27, 28 and 29 November 2017 (page 672A).

52. Confusingly at around this time the claimant wrote to Mr Bryers saying that he had not received an outcome to his grievance (see page 365 – email sent by the claimant on 6 November 2017).

53. Mr Bryers had sent the appeal outcome to the claimant by special delivery back in August 2017.

54. The claimant then accepted on 14 November 2017 that he had received the outcome appeal letter and the letter of 18 September 2017 confirming the backdate on his pension (page 368). The letter had been sent special delivery and had required a signature.

55. Meanwhile I find there was further confusion raised when the claimant contacted Mr Mark Smith on 6 November 2017 raising general issues about his wages (page 367).

56. I find on 21 December 2017 Mr Kaye contacted the claimant informing him that, "Mitie have now agreed to pay the one hour travel per day going forward. Also

finance are currently working through the missed payments you are owed and a payment of these missed payments will be made in the January pay run". The back payment was paid to the claimant on his wage slip of January 2018 (see page 757). I therefore find that there was no issue in relation to the claimant's travel time from January 2018, although I find the calculation could have been explained in a clearer fashion by payroll to the claimant.

Grievance 2

57. I find this grievance related to sick pay. I find it arose out of the claimant being overpaid sick pay by the respondent and the respondent then clawing it back from the claimant under the deductions clause which existed both in his original McAlpine contract and under his Mitie terms and conditions. I find under his McAlpine conditions the claimant was only entitled to one week's company (full) sick pay. Under his Mitie conditions he was entitled to four weeks' full pay, four weeks' half pay. The respondent, in error, paid more than his entitlement under his Mitie contract.

58. The claimant says he presented a grievance (page 101) on 17 July 2017. There is no copy of the formal complaint in the bundle, but there is evidence of a series of emails between the claimant and his then manager, Mr McGovern, concerning his July timesheet (page 289). The emails are at pages 300-306. Mr McGovern referred the matter to Payroll. The letter stated:

> "Richard has a number of salary deductions on his July payslip due to sickness. Richard was overpaid in June because we were not aware he was off sick and we did not receive a doctor's note from him at the time. Some of the salary deductions shown on the July payslip care cancelled out by the 100% sick pay which was paid to Richard also on July's payslip."

59. It goes to state that the claimant's sick pay entitlement is eight weeks' full pay and eight weeks' half pay (that was erroneous).

60. By 9 August the claimant's manager had realised the error in relation to his entitlement to sick pay, being only four weeks' full pay and four weeks' half pay (see pages 309-310) and he suggested an informal meeting to discuss the matter on 15 August. The meeting took place on or around 16 August. The notes are at pages 274-277. Present at the meeting were the claimant, his manager (Mr McGovern) and Mr McMahon. The claimant was given a detailed explanation as to his entitlement to company sick pay, the overpayment which had been made to him and the deductions.

61. I find the claimant never accepted the explanation he was given in relation to deduction for sick pay in June/July 2017. He continued to raise the issue during his employment. He was given a further explanation on 9 February 2018 from Payroll (see pages 410, 411 and 412).

Grievance 3

62. The claimant says he raised this grievance on 19 December 2017 (page 102). He says this grievance is about "harassment" by Ian Bryers. The claimant's List of

Issues for this meeting is at pages 398-400 and I find the minutes of the meeting are at pages 401-404. The meeting took place on 7 February 2018.

63. The claimant raises the issue of his travel time again in this grievance, but I find that the timesheets for this period show that the claimant was in receipt of travel time by February 2018. I find the issue had been sorted in his January 2018 payslip for the back payment and he was continuing to receive the travel time payment thereafter.

64. The claimant raised the issue of "callout" payment which had been dealt with in his previous grievance. I find the evidence given by the claimant at the Employment Tribunal was that he was paid in full for his entitlement to callout payments.

65. I find the notes of this meeting illustrate the claimant's misunderstanding of the situation. At page 402 the notes record that "then my July 2017 pay was £1,100 less than it should have been, I was seething". I find that this is a reference back to the sick pay deduction issue which had been explained to the claimant at the meeting with his manager and Mr McMahon.

66. I find the outcome of the grievance was given on 13 March 2018 (see pages 428-431). The first issue was the travel time. The grievance found that the claimant was now in receipt of his travel time, and I find that that is factually correct and was confirmed by the claimant when he gave evidence at the Employment Tribunal.

67. The second issue was in relation to callout pay. The issue had already been determined at a previous grievance.

68. The third issue was in relation to electrical work, and again that had been dealt with at the previous grievance.

69. The claimant's grievance was not upheld on the other items, in particular his allegation that in dealing with his pay concerns there was harassment and victimisation from Mr Bryers. The grievance found that was not upheld.

70. From the evidence it is puzzling as to why the claimant should think that Mr Bryers was harassing him in relation to these issues. Mr Bryers had found in the claimant's favour in relation to the pension issue and that was actioned from September 2017. He had also found in the claimant's favour in relation to the TUPE travel time issue and although there had been a delay in that being actioned, it had also been found in his favour by Mr Bryers. The claimant had said after the appeal hearing "I feel a weight has been lifted from my shoulders (page 338).

71. The claimant did not appeal against the outcome of grievance 3.

<u>Grievance 4</u>

72. The claimant says grievance 4 was about "illegal modification of timesheets" (page 102). There is no grievance email in the bundle.

73. However, at page 445 the respondent's Elise Tootell informed the claimant in an email dated 13 June 2018 that she has forwarded an email complaint from him about modification of timesheets.

74. I find that the claimant himself confirmed in an email on 30 May 2018 that "travel time payments now showing".

75. I find this grievance was heard by Joanne Solway on 18 July 2018. The outcome letter is dated 6 September 2018 (pages 457-458). The claimant again raised the same issue, that when he transferred to Mitie in 2016, his terms and conditions were not protected and his travel time was not being paid, which in turn led to a number of back payments to make good any loss.

76. Ms Solway confirmed that there had been a past problem but it had been corrected and the back payments had been paid, and she was not satisfied that there was any illegal modification of the claimant's timesheets.

77. I find therefore the issue in relation to the timesheets was historic by the time Ms Solway heard this further grievance of the same issue in the summer of 2018.

78. I also remind myself at this point that the claimant was being managed by Mr Kaye. The claimant agreed in cross examination that his relationship with Mr Kaye was generally positive and Mr Kaye tried to sort out any issues the claimant raised with him.

79. Despite this the claimant raised an appeal against the outcome of grievance 4. There is no appeal letter in the bundle. However, a grievance appeal hearing took place on 14 November 2018 (see page 484). It was conducted by Nick Crossland and the claimant's union representative was present. The claimant was again complaining that the historic adjustment to his timesheets had been illegal and should not have been done (page 484). He raised a new issue, that he considered he was not being paid double time on Saturday. The claimant was sent notes of the meeting on 14 November. The notes are at pages 483-486. In the meeting the claimant confirmed that he had been reimbursed the monies he had been owed but felt unhappy about the situation. When asked what the claimant would like to achieve from the meeting he stated, "Mitie as a company should not treat its staff like this", and he wanted the perpetrators of these issues to be dealt with.

80. Mr Crossland updated the claimant on 30 November 2018 (pages 571-572). There was a delay in the outcome being communicated to the claimant because of a change in personnel. The claimant chased the outcome on 17 January 2019 (page 608). The claimant received an outcome letter dated 8 February 2019 (page 591). It was the outcome of the appeal following the meetings held on 17 October and 14 November 2018 and did not uphold the claimant's historic grievance, which was essentially the same issue which had been resolved in January 2018.

<u>Grievance 5</u>

81. This grievance concerned a historic incident on 4 September 2017 and data protection. The claimant presented the grievance on 24 February 2019 (page 581). It concerned the claimant's former manager, Stephen McGovern, breaching data protection back in 2017 when he was the claimant's manager. I find the grievance

officer, despite the historic nature of the grievance, conducted a thorough investigation, meeting with both the claimant's former manager and his current manager, Mr Kaye. He held a meeting with the claimant (pages 626-629) and the outcome was that the claimant's grievance was upheld in a letter of 13 March 2019 (pages 624-625).

Grievance 6

82. Despite this being the last grievance which the claimant raised before he resigned, there is no copy of it in the bundle. In the claimant's further particulars document at page 103 he says the grievance was about his manager, Mr Kaye, and that he lodged it on 28 January 2019.

83. I accept the evidence of Mr Kaye, whom I found to be a genuine and honest witness, who was sympathetic to the claimant, that he did not know anything about that grievance. I find when the claimant was asked about it in evidence, he was unable to explain why there was no reference to it in his written statement or in his claim form. However, I find that the claimant must have presented such a grievance because the respondent sent a letter to the claimant dated 15 March 2019 inviting the claimant to a formal grievance hearing to take place on 3 April 2019 (page 630). I find the meeting was rescheduled because the claimant's union representative was unable to attend on 2 April 2019.

84. The scheduled meeting was to take place on 16 April 2019 (page 643) but it did not proceed because the claimant resigned the day before it was due to take place.

85. Shortly prior to the claimant's resignation he was invited to a disciplinary investigation meeting which took place on 27 March 2019 (pages 638-640 and 641-642). The claimant said in evidence that the disciplinary investigation was not a factor in his resignation because he considered he had done nothing wrong.

86. During the course of the Tribunal proceedings a letter was drawn to the claimant's attention which suggested the senior management were exasperated with the claimant. The email surfaced in a data subject access request by the claimant. However, the claimant confirmed that he was unaware of it at the time of his resignation and it was not a factor therefore in the reason why he left.

87. I find that during the course of his employment the claimant felt stressed about his perceived non payment issues. I find Mr Kaye, who was a conscientious manager, contacted HR in the summer of 2018 following a stress related absence of the claimant in June 2018 about what action (if any) he should take. I find that Mr Kaye, as directed by HR, conducted a welfare meeting with the claimant on 13 September 2018. I find Mr Kaye suggested to HR that the claimant attend an Occupational Health assessment (page 467). He also confirmed that the claimant had contacted the support helpline and they had suggested that until his stress causing issues were resolved they would not be able to start to reduce his stress. Mr Kaye said the claimant told him that his grievances were causing him stress.

88. The HR team suggested to Mr Kaye that because the claimant's grievances were ongoing and the employee stress was there, an Occupational Health referral would not useful until the grievance was resolved.

89. I find that Mr Kaye again requested an Occupational Health assessment in February 2019 (page 599) and an Occupational Health referral was progressed on 15 March 2019 (pages 631-635). The claimant attended an Occupational Health consultation on 2 April 2019. I find the Occupational Health report appears at pages 651-654. Mr Kaye said he did not see that report whilst the claimant was in employment. The claimant could not recall whether or not he had received the Occupational Health at pages 651-654 before he resigned. The notes state that:

> "Mr Williams has indicated his wish to have a copy of my report issued to him in advance of you and we have complied with that request."

90. I find it is therefore likely that the claimant had received the report, which is dated 11 April 2019 prior to his resignation on 15 April 2019.

91. The report suggests that the claimant's perception of his work related stressors "form the central trigger for his stress related symptoms, and it is only by addressing those allegations, whatever the outcome, that Mr Williams' psychological health will improve sufficiently to allow him to return to the workplace".
Although the Occupational Health assessment implicitly suggests that the claimant was absent from work, I find the claimant was in fact working at the time he resigned his employment.

The Law

92. The relevant statute in a constructive dismissal case is found at Section 95(1)(c) of the Employment Rights Act 1996:

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

93. The relevant principles are found in Western Excavating –v- Sharp 1978 IRLR 27 CA where Lord Denning stated "if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed".

94. The claimant relied on a breach of the implied duty of trust and confidence. In Malik –v- BCCI HL 1997 ICR 606 it was stated "an employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

95. In determining whether the respondent has acted in such a way so as to breach the implied term of trust and confidence the Tribunal is to apply an objective test. In Courtaulds Northern Textiles Limited –v- Andrew 1979 IRLR 84 Browne/Wilkinson J stated "to constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine

whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

96. In Western Excavating –v- Sharp it was established that there must be a fundamental breach of contract. In Morrow –v- Safeway Stores Plc 2002 IRLR 9, it was established that the breach of the implied term of trust and confidence is inevitably fundamental.

97. The claimant must resign in response to the breach and must not delay too long in terminating the contract or he will have been deemed to have affirmed the breach: "the employee must make up his mind soon after the conduct of which he complains for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged". See Western Excavating –v- Sharp

98. In Buckland –v- University of Bournemouth 2010 EWCA Civ 121 it was held that a repudiatory breach of contract cannot be "cured" by the employer.

99. If the claimant has resigned for a number of reasons the Tribunal must ask itself whether the employer's repudiatory breaches played "a" part in the employee's resignation: Wright –v- North Ayreshire Council 2014 ICR 77 EAT.

100. Both limbs of the test as espoused in Malik must be satisfied, conduct which destroys trust and confidence is not in breach of contract if there is a reasonable cause (Hilton –v- Shiner Limited Builders Merchants) 2001 IRLR 727.

101. In Omilaju –v- Waltham Forest LBC 2005 ICR 481 it was held that where the resignation follows a "last straw" (where cumulative conduct is replied upon to form the breach of the implied term), the last straw does not have to be of the same character as the earlier acts and nor must it constitute unreasonable or blameworthy conduct but it must contribute, however slightly to the breach of the implied duty of trust and confidence. An entirely innocent act on the part of the employer cannot be a last straw.

The Issues

102. Employment Judge Ryan identified, and it was agreed at the outset of the final hearing that the Tribunal must decide:

(1) Did the respondent commit a repudiatory breach of the claimant's contract of employment?

(2) Did the claimant resign in response to that breach?

(3) Did the claimant delay in resigning such that it can be held that the breach was waived and the contract affirmed (page 93)?

103. The breaches of the implied duty of trust and confidence relied upon by the claimant are as set out in Employment Judge Ryan's note and as agreed with the parties at the outset of the hearing:

(1) Changing his job title and job description unilaterally without his agreement (8.2.1 – page 94);

(2) Over the whole period of his service, including prior to October 2016, the respondent made a series of unlawful deductions from the claimant's wages (8.2.2 – page 94);

(3) The respondent failed to follow company procedures in relation to grievances he raised by failing to address them reasonably and/or properly and failed to address them within a reasonable timescale (8.2.3 – page 94);

(4) The respondent, by his line manager Philip Kaye, committed arbitrary breaches of the claimant's contract by making up his own policies in respect of holiday pay and pay cut-off dates and the arrangements for booking doctor's appointments (8.2.4 – page 94);

(5) That Philip Kaye and Steve McGovern, the previous line manager, modified the claimant's timesheets by taking off travelling time for which, according to the claimant's terms and conditions, he was entitled to be paid (8.2.5 – page 94);

(6) The claimant's resignation letter has "breach of contract (stress at work)" as the "last straw". The issues that have contributed to this are listed in the List of Issues at page 94.

104. I turn to consider the first alleged breach:

(1) Changing his job title and job description unilaterally without his agreement.

105. I find the claimant's original McAlpine contract said he was an Instore/Project Air Conditioning Engineer/South (page 145). The claimant agreed that is what it said but said it should have said "North" instead of "South". The claimant did not accept it was a multi-tasked role. The claimant did accept in evidence that at page 378 "ETR was electrical testing inspection that in practice, depending on who was in the team of engineers, someone could be deployed with this skillset." The claimant could not remember agreeing to do PPM (preventative work) at the meeting with Phil Kaye.

106. I find at point 25 of the grievance appeal he heard, Mr Bryers found the claimant was a multi skilled engineer covering both planned and reactive maintenance and the data from his immediate predecessor employer described him as multi skilled (page 343).

107. The claimant agreed he did not object to being called a field engineer (page 226). I rely on the email from Elise Tootell to the claimant on 21 June 2018 which states:

> "As previously discussed, both during your informal meeting and again with Philip separately, you did not challenge or question changes to title/duties made by previous employers Kier or GSH. The change of job title by Mitie was performed under an ETO change communicated as part of your transfer and in line with our engineering job family within the wider business which at the time was not challenged at the point of transferring to the company. You

have carried out your duties under this title on our system since the transfer, and this has not caused any substantial detriment."

108. The claimant agreed he took no action following that email.

109. Accordingly, I find there was a change in title from Instore/Project Air Conditioning Engineer/North when the claimant worked for McAlpine in 2004 to PPM Multiskilled Engineer by the time he worked for the respondent. I find the claimant disputed his job title in 2017 in his grievance and appeal and complained again on 30 May 2018, but I find that he had been working from his transfer to Mitie under that title and carrying out those tasks without objection from June 2018 (see page 448).

110. I find that although there was a change to the claimant's job title and job description this does not amount to a breach of the implied duty of trust and confidence calculated or likely to destroy the implied duty of trust and confidence without proper cause.

111. I find he was transferred to Mitie. I also find that the respondent was never provided with the claimant's full contract with his immediate predecessor employer, and although his title with McAlpine was provided by the claimant to the respondent, it is possible that that title had since changed in the meanwhile. In any event, taking the case at its highest, in the circumstances of a TUPE transfer I am satisfied it does not amount to a breach of the implied duty of trust and confidence to change an employee's job title.

112. If I am wrong about that, given the length of time from the date of transfer until the claimant resigned, any breach was waived by the claimant.

(2) Over the whole period of his service, including prior to October 2016, the respondent made a series of unlawful deductions from the claimant's wages.

113. I find there were occasions where the respondent made deductions from the claimant's contract. Sometimes, as in July 2017, they were deductions they were entitled to take under the deduction clause of his contract because he had been overpaid sick pay. The claimant struggled to understand that. He conceded that he had not received some correspondence explaining a deduction – e.g. page 273 explaining his pay in July 2017. He said he had moved house so not received it.

114. There was a period of time where the respondent did not pay the claimant his one hour travelling time which he was entitled to under his TUPE contract from Mitie. However, that situation was eventually resolved. The claimant agreed in evidence, and the documents show, that it was no longer an issue from January 2018 when the overpayment was made good.

115. The claimant did not help himself in terms of his wages. It was his job to submit his timesheets. However, as late as March 2019 the claimant was sending in old expenses from 2018 (page 621) despite the fact that Mr Kaye had told him he should be submitting his expenses in good time.

116. I find it surprising that the claimant said no one explained the pay cut off period in relation to the period on the payslip to which overtime payments related, until the Tribunal Hearing.

117. I find that Mr Kaye strove to address any concerns from the claimant in relation to his pay. When the claimant raised again the deduction in relation to his sick pay which had already been answered, concerning deductions in July 2017, the in an email dated 4 April 2019, Mr Kaye tried to explain it to the claimant and then contacted Payroll (page 647) asking them to "give this engineer an explanation in language he can understand".

118. The painstaking examination of the claimant's timesheets, the expense form and payslips conducted by the respondent's counsel at the Tribunal Hearing shows that the claimant actually had overclaimed for the relevant period and was overpaid. It is therefore factually incorrect to say that the respondent made a series of unlawful deductions from the claimant's wages.

119. The respondent made a payment to the claimant, based on a sum which the claimant's union representative said the claimant considered he was owed of £349.18 (page 775). The payment was made in his March 2019 payslip.

120. When asked about this in cross examination, the claimant was vague and said he believed Mr Crossland spoke to his union representative. I rely on the email at page 613 from Mr Kaye dated 28 February 2019 to find that £349.18 was the sum the claimant had told ACAS, via his union representative, he was owed.

121. I also find Mr Kaye set up a monthly meeting with the claimant so the claimant could raise and check his figures submitted on his timesheet against his pay slips (page 613).

122. I find, as shown by the cross examination of the claimant, that he was not owed wages at the point he resigned and was had in fact been overpaid.

123. I therefore find there was no breach of the implied duty of trust and confidence with regard to this allegation.

(3) The respondent failed to follow company policies in relation to grievances he raised by failing to address them reasonably and/or properly and failed to address them within a reasonable timescale.

124. The Tribunal finds that this is factually incorrect. The claimant raised six formal grievances and other informal grievances. The claimant accepted that his line manager, Mr Kaye, was sympathetic and tried to resolve his concerns. The Tribunal finds the claimant's other grievances were often repetitive and covered ground which had been raised in earlier grievances. I find that in the main all the claimant's grievances were dealt with thoroughly and conscientiously by the respondent. There was some delay in relation to the claimant's grievance 4, but I find it was not excessive (communication of appeal outcome).

125. Where the claimant's first grievance was apparently unresolved in relation to the timesheet travel time issue, it was corrected on appeal. There was some delay before the outcome of Mr Bryers' appeal was fully implemented, but it had been done and any sums owing paid to the claimant by January 2018 at the latest.

126. Some of the claimant's complaints at the Employment Tribunal in relation to his grievances were frankly difficult to understand. He appeared very suspicious of minutes of meetings and did not accept that he had signed minutes.

127. I find the claimant's memory was also not always good. He agreed that although Mr Bryers had given him an appeal grievance outcome letter promptly in which he had been partially successful, he wrote to him months later asking for the outcome, believing he had not received it.

128. So far as the delay in providing a grievance appeal outcome to grievance 4, I am satisfied that the reason was a change in personnel.

129. I am therefore not satisfied that there was a breach of the implied duty of trust and confidence calculated or likely to destroy without proper cause the trust and confidence between the parties in relation to this allegation.

130. However, if I am wrong about that, the claimant is in difficulty because his grievance 5 was entirely upheld by the respondent despite the fact it was an historic allegation which had occurred over two years previously by a manager who was no longer managing the claimant. Grievance 6 is not even mentioned in his claim form and is puzzling to understand. Both in emails and at Tribunal the claimant said that Mr Kaye was a supportive manager who had formerly been a friend and work colleague and who tried hard to resolve his issues. The contemporaneous evidence shows that was the position right up to the claimant's resignation, where he sought and obtained an Occupational Health referral for the claimant at his request and asked the Payroll Department to give the claimant a clear explanation for something he did not understand from a historic sick pay deduction in 2017.

131. The claimant has not provided a copy of this final grievance, but says it was a complaint about Mr Kaye. From the evidence before the Tribunal, it is difficult to understand what the claimant's concern about Mr Kaye could have been.

132. In any event the respondent was willing to action the grievance and had arranged a date for the claimant to attend a grievance meeting with his union representative. Despite this the claimant resigned before such a grievance hearing could take place.

133. If the claimant is right and I am wrong that the respondent acted unlawfully in relation to how it progressed his earlier grievances, I find the latest date that the claimant could be relying on as a possible breach of the implied duty of trust and confidence was 8 February 2019 because that was the date when he received the grievance 4 appeal outcome, which he complained was delayed. (He cannot be relying on grievance 5 because he succeeded, and he cannot be relying on grievance 6 because he resigned without attending the grievance hearing).

134. Yet the claimant did not resign until 15 April 2019 – a further two months, from 8 February 2019. Therefore, even if there was any breach of the implied duty of trust and confidence in relation to the claimant's grievances, I find the claimant has waived the breach.

(4) *By his line manager, Philip Kaye, committed arbitrary breaches of the claimant's contract by making up his own policies in respect of holiday pay and cut-off dates and the arrangements for booking doctor's appointments.*

135. I find it is factually incorrect to say that Mr Kaye made up his own policies in respect of holiday pay, cut-off dates and the arrangements for booking doctor's appointments. I find the evidence is that Mr Kaye was a conscientious manager.

136. So far as the pay cut-off dates were concerned, I find that those were company policy. The claimant agreed in cross examination that the pay cut-off policy and were not made up by Mr Kaye (see pages 142-4).

137. So far as holidays are concerned, page 829 sets out the company policy. In answering questions about the policy the claimant appeared to expect that the policy should be rigidly applied without any discretion applied by a manager as to whether or not to allow holiday to be taken and to have regard to whether or not other members of the team were absent.

138. The claimant put emails in the bundle at pages 801, 802, 842 and 808 where Mr Kaye had given replies to requests for leave but he had not put his request for leave into the bundle.

139. The claimant did not accept that the word "normally" within the policy suggests it gave the management discretion as to whether or not to grant leave, even if it was requested within sufficient time. The claimant said that he did give sufficient notice when requesting leave, but the email requests are not there to show that is so.

140. I rely on the evidence of Mr Kaye that he was managing a team of engineers and he could not grant all leave as requested by whoever wanted it, all of the time. He exercised his discretion and tried to be fair when granting leave, but he had to ensure the business had sufficient engineers on duty at any particular time. I find Mr Kaye to be a fair and conscientious manager. I find that Mr Kaye did not "make up" the holiday policy.

141. So far as the policy for attending medical appointments is concerned, this is set out at page 831. I find, relying on the evidence of Mr Kaye, that the respondent was able to operate flexibly with regard to doctor's appointments and permitting attendance, especially if they were at the start or end of the day. However, if there was an appointment in the middle of the day it was more difficult to accommodate. I find it was company policy that the time should normally be made up. I rely on the email exchange at pages 603-607 and in particular page 605 where the claimant's trade union representative at the time agreed Mr Kaye was following company policy.

142. Accordingly, I find no breach of the implied duty of trust and confidence in relation to this allegation.

(5) *Philip Kaye and Steve McGovern (previous line manager) modified the claimant's timesheets by taking off travelling time for which, according to the claimant's terms and conditions, he was entitled to be paid.*

143. I find it is factually correct that Mr McGovern, believing the claimant was not entitled to the travel time, did modify the claimant's timesheets and pass them back to him for removal of that amount and that was initially done also by Mr Kaye, on Mr McGovern's instruction, when he was transferring as the claimant's manager. However, as I have set out in my findings of fact, the issue was taken up first by Mr Bryers and then by Mr Kaye. By January 2018 the claimant had been paid the outstanding amounts owed for 105 hours and contemporaneous emails from 2018 confirm that the claimant was receiving the hour's travelling time. In addition the claimant was taken to numerous examples within the bundle for 2018 which showed he was seeking and being paid the one hour travelling time.

144. I do find it is factually correct that Mr McGovern and Mr Kaye modified the claimant's timesheet and passed them back to him asking him to remove the travel time at times in 2017.

145. I find that Mr McGovern and Mr Kaye at the time thought they were acting lawfully because that the Mitie contract of employment for other employees did not pay travel time. However, once it had been investigated by Mr Bryers and Mr Kaye, the claimant was given the benefit of his TUPE contract from his original employer, McAlpine. I find the mistake was an innocent error and it was not calculated or likely to destroy the implied duty of trust and confidence. However, if I am wrong about that and it was a fundamental breach of the implied duty of trust and confidence the claimant was waived the breach because on his own evidence the problem had been resolved from January 2018 and the claimant did not resign for a further year and three months.

(6) *The claimant's resignation letter has breach of contract/stress at work as the last straw and the other issues have contributed to this.*

146. There is no doubt that the claimant was stressed by the grievances he raised with the respondent. He had a number of short-term absences due to stress at work, most recently returning on 4 February 2019. I have had regard to the case law referred to me by counsel in relation to stress at work cases. I find the respondent through Mr Kaye acted responsibly and conscientiously when the claimant raised with him that he was stressed at work. Mr Kaye held a welfare meeting with the claimant after his return to work in the summer of 2018. Mr Kaye asked on several occasions for the claimant to be referred to Occupational Health but the claimant had not met the trigger requirement in terms of length of absence. He did not have a long-term absence from work. In the summer of 2018 HR was also of the opinion that there would be no purpose in an Occupational Health referral until the claimant's grievances had been resolved.

147. Likewise, the claimant had been referred to the employee counselling line, but they too felt they could not assist until the grievances had been resolved.

148. The claimant seemed unable to "let his grievance go" in relation to the travel time issue. Although it had been resolved in January 2018 he continued to raise grievances about the same issue. Likewise, the deduction from his pay in July 2017 which had been explained to him on a number of occasions was still causing him to contact the respondent as late as 4 April 2019.

149. The respondent operated a system where the claimant worked a number of hours per week and was paid different amounts for overtime depending whether it was time and a half, double time, and depending on when the overtime happened (i.e. day of the week and time of the day), and he was also entitled to his one hour travel time. The overtime period did not marry up with the pay period. All of this information, together with the fact that the claimant sometimes submitted his overtime late, made his payslips sometimes hard to understand. This caused the claimant to feel stress.

150. However, having regard to the checklist I had to consider whether or not there was negligence on the part of the respondent and whether it was foreseeable that the claimant would become unwell, and I find there was no negligence and it was not foreseeable the claimant would become unwell.

151. I find the claimant raised his concerns, either formally or informally, and the respondent sought to resolve them.

152. I find that any employer will occasionally cause a computational error – it was agreed I find that there is one computational error at page 674(b) and the uploader is the source of the error. Table 575 is accurate – timesheet entry 15 December 2017.

153. I step back to consider whether, individually or cumulatively, there was a breach of the implied duty of trust and confidence calculated or likely to destroy, without proper cause, the implied duty of trust and confidence. I find the errors in relation to underpayments to the claimant were historic from the end 2017 and were resolved by the back payment in the payslip of January 2018. Thereafter the claimant received the one hour travel time as he agreed in cross examination. Any other shortfall in relation to wages (although it turns out, on studying the documentation, the claimant was actually overpaid) did not amount to a breach of the implied duty of trust and confidence.

154. The claimant had a pattern of initially trusting managers, such as Mr Bryers who found key allegations in a grievance appeal in his favour and Mr Kaye who worked hard to resolve his issues, and then turned against them, accusing Mr Bryers of harassment and in his final (unseen) grievance against Mr Kaye, raising allegations against him. It is puzzling why the claimant resigned when he did. He said the disciplinary investigation against him was not troubling him and was not a factor in his resignation. His most recent grievance (number 5) had been fully upheld in his favour. His grievance number 6 against Mr Kaye had been listed for a hearing and yet be chose to resign the day before the meeting at which his union representative was due to attend with him. The claimant had asked to be referred to Occupational Health and the respondent had done so. The claimant had either not received the report or more likely he had received it (he cannot remember), but yet he still chose to resign. In his resignation letter dated 15 April 2019 the claimant said he was resigning due to "constructive dismissal by breach of contract (stress at work) being the last straw and other issues that contributed to other breaches of contract, unilateral contract changes, breach of confidence and trust, arbitrary breaches, unlawful treatment" (page 655).

155. When Mr Kaye was made aware of the claimant's resignation he reached out to him by letter, concerned that the claimant might be acting in haste and asking him to meet, offering him an opportunity to reconsider his resignation and giving him until

23 April to do so. P656. The claimant contacted Mr Kaye by telephone and confirmed he wished to proceed with his decision.

156. The claimant perceived he was being badly treated by the respondent. The concerns that he raised early in the transfer of his employment were addressed by the respondent. Although it was sometimes unclear to the claimant why he was paid the amounts he was or why, for example, in July 2017 when he had received a deduction in wages, when the claimant raised these issues, the respondent made efforts to to explain them to him.

157. I find the claimant found it difficult to let matters lie once he had received an explanation and he felt increasingly aggrieved and that caused him to resign. However, I am not satisfied there was a breach of the implied duty of trust and confidence, either individually or cumulatively, which entitled the claimant to find himself constructively dismissed for the reasons I have set out above and accordingly his claim for constructive dismissal fails at this point and I do not need to consider any further issues.

Unlawful Deductions from Wages.

158. The issue is whether the claimant received less than the sums properly payable under his contract of employment. The law is found in section 13(3) Employment Rights Act 1996.

159. I rely on my findings of fact above. At the end of the hearing despite conceding in cross examination that he was not owed wages when he was taken through his time sheets, pay slips and the arithmetical calculation for each month in the period of 23 October 2017 to the end of March 2019, the claimant said at the submissions stage that he was owed wages but could not state the amount.

160. The burden of proof is on the claimant to show he received less than the sums properly payable under his contract of employment. I am satisfied that the claimant can not show any shortfall in his wages at the end of the relevant period and therefore that claim also fails.

Employment Judge Ross

Date: 17 January 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
20 January 2022

FOR THE TRIBUNAL OFFICE

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