EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4111453/2019 Hearing Held at Dundee on 13, 14, 15, 16, 17, 21 and 22 December 2021

Employment Judge: M A Macleod

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Daniel Devine — **Claimant**
In Person

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MML Legal — **Respondent**
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Represented by
Mr K McGuire
Advocate

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim fails, and is dismissed.

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REASONS

1. The claimant presented his claim to the Employment Tribunal on 3 October
35 2019, in which he complained that he had been unfairly constructively dismissed by the respondent, and that his contract of employment had been breached by the respondent in respect of the payment of company sick pay.

2. The respondent submitted an ET3 response in which they resisted the claimant's claims.

3. A Hearing on the Merits was listed to take place on 13 to 17, and 21 and 22 December 2021. The claimant appeared on his own behalf, and was supported throughout by the presence of his sister, Mrs Leonard, who assisted him by asking questions during his examination in chief but did not go so far as to act on his behalf. The respondent was represented by Mr K McGuire, Advocate, instructed and assisted by Mr J Lawson, solicitor.

4. The parties presented a bundle of productions which were relied upon by both during the course of the hearing.

5. At the outset of the hearing, there was a lengthy discussion based on the respondent's objection to certain documents which were included in the bundle but which were "without prejudice", and therefore subject to exclusion on the basis of legal privilege and confidentiality.

6. Following that discussion the parties were able to agree that certain documents could be included and would be referred to for the restricted purpose of allowing the claimant to argue that he had not acted inconsistently with his resignation by having a discussion with the respondent, following resignation, to the effect that he may be willing to work with them by accepting referrals in medical negligence and personal injuries cases. Accordingly, the relevant documents were included within the bundle and reference will be made below to those documents.

7. In addition, there was a discussion about the appropriate designation of the respondent, who has hitherto been designed Muir Myles Laverty. It was agreed by both parties that the correct designation of the respondent is MML Legal, and the instance has been amended accordingly.

8. The Tribunal heard evidence from a number of witnesses.

9. For the claimant, evidence was led from:

    - The claimant himself, Daniel Devine;
    - Helen Meldrum, GMB Trade Union; and
    - James Cunningham, GMB Trade Union.

10. For the respondent, evidence was led from:

    - John Muir, Senior Partner;
    - Victoria Clancy, Cashier;
    - Alan Fraser, Partner;
    - Ryan Russell, Partner;
    - Lisa McGinnis, Secretary; and
    - James Laverty, Senior Partner.

11. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

12. The claimant, whose date of birth is 8 April 1956, commenced employment with the respondent as a solicitor on 28 October 2002. He attended the University of Dundee from 1997 until 2000, securing the degree of Bachelor of Laws (LLB) and the Diploma of Legal Practice. He is not only a qualified and enrolled solicitor but is also a Notary Public, having qualified as a solicitor on completion of his legal traineeship with the respondent on 30 October 2004.

13. The respondent is a firm of solicitors based in Dundee, currently employing approximately 10 solicitors and 15 support staff.

14. Following his qualification as a solicitor, the claimant practised broadly in the area of civil litigation, encompassing medical negligence, personal injuries and employment law for some years until, in time, specialising in medical negligence and personal injuries work. He was assumed as a "salaried partner" by the respondent on 1 March 2011, but on 1 November 2014, he ceased his role as a partner and resumed the position of assistant.

15. At no time during the course of his employment did the respondent provide the claimant with a written statement of terms and conditions of service.

16. In April 2017, the claimant approached the respondent, in the person of Mr Muir, who was his direct line manager and the senior civil partner within the firm, to propose that he reduce his working days from 5 to 4 each week. At that point, the claimant's salary for a full time week was £45,000 per annum. He had suffered some ill health, following a fall in his house in December 2016 in which he had been concussed. He said to Mr Muir that since he had been unwell for some time, and was now 61, he wished to reduce his hours. Mr Muir was willing to agree to the claimant's reduction in hours.

17. As a result of working 4 days a week, the claimant agreed with Mr Muir that his salary would be reduced to £40,000 a year.

18. There was a divergence in the evidence between Mr Muir and the claimant as to the level of that reduction. The claimant's evidence was that his salary was reduced by £5,000 per annum, from £45,000 to £40,000, and that he had told Mr Muir in the course of that conversation that he could not accept a reduction of more than £5,000 at that point due to the high mortgage which he still required to pay on his house. As a result, the claimant saw it as a one-off reduction of £5,000 in his annual salary.

19. Mr Muir's evidence was that he was quite content to agree to the claimant's reduction in hours, and with that a commensurate reduction in salary. He also accepted that the claimant's salary was to be reduced to £40,000 per annum, on the basis that he worked 4 days per week. However, where his evidence diverged from the claimant's was when he said that he had felt that the claimant's salary had not been increased for some years, and as a result, he increased it to £50,000 per annum, so that he then reduced his salary by £10,000, or one-fifth, to reflect the reduction of one-fifth in his working hours.

20. Ms Clancy's evidence was that Mr Muir did tell her that he had increased the claimant's wages to £50,000 full time, and had therefore reduced his salary to £40,000 for 4 days a week, on a pro rata basis.

21. I have concluded that it was Mr Muir's clear decision that he had increased the claimant's salary, after a number of years without a pay rise, to £50,000,

but only at the point when the claimant asked to reduce his working days, and, it appears, at least partly for the purpose of making the calculation of his new pay simpler by reducing it by one-fifth to £40,000 per annum for 4 days. His evidence on this is supported by Ms Clancy, whom I considered to be a fair and honest witness.

22. In compliance with what appears to have been the process – such as it was – to agree an amendment of working hours and pay, the claimant emailed Ms Clancy, the respondent's cashier, and Mr Muir, on 6 March 2017 (95):

"Victoria

FYI

I have agreed with John my annual salary shall be adjusted to £40,000 per year. Please, have this commence from July 15.

Thanks,

Danny"

23. Ms Clancy responded within an hour (95):

"Hi Danny

John confirmed the adjustment with me on Friday. However he indicated that the adjustments was to commence in April.

Victoria"

24. The claimant replied:

"OK. Let's go with April, unless you hear date change from John.

I shall take it, the salary change shall not be reflected in my pay until May.

Can we make it April 15 to reflect wage slip due in May?

Danny"

25. Following a further exchange of emails (96) the claimant agreed that payment of the adjusted salary should begin in April.

26. None of the written correspondence in relation to this alteration made any reference to a “pro rata” reduction in salary.

5 27. Wages are paid by the respondent on the 15th day of each month, reflecting two weeks’ pay for work already carried out, and two weeks’ pay for work to be provided in the remainder of the month.

28. The claimant duly reduced his hours to work 4 days per week from the start of April 2017, and his salary was reduced to £40,000 per annum
10 accordingly.

29. The precise hours worked by the claimant were never set by the respondent. He tended to arrive late and leave late, as he put it, meaning that he would start work in the office towards the middle of the morning and leave the office after 6pm. The evidence demonstrated, however, that there
15 was no regular pattern of work adopted by the claimant nor demanded of him by the respondent other than that he work 4 days each week.

30. In October 2018, the claimant started to suffer from migraine headaches. He continued to attend work but he felt unwell, and required to take medication to mitigate the effect of these headaches upon him. Over the
20 Christmas and New Year holiday, during which the respondent’s offices would close, the claimant decided to request a further reduction in his hours. He understood that doing so would bring with it a reduction in his salary.

31. The claimant went to see Mr Muir on or about the morning of 10 January
25 2019 in Mr Muir’s office. He explained that he was not feeling well, and that he had been thinking of reducing his working week to 3 days from 4. Mr Muir responded that he was not surprised at this request. He asked the claimant whether he had considered retirement. The claimant replied that he thought he may retire at age 65 (at the date of that meeting he was 62),
30 in just over 2 years’ time. Mr Muir made the point that the firm would require

to consider who would be in a position to take over the personal injuries and medical negligence work from him on his retirement.

32. The meeting was conducted in a cordial and friendly manner.

33. On the evidence before me, there were a number of divergences between the claimant and Mr Muir as to what had been said at that meeting.

34. Firstly, the claimant said that Mr Muir agreed to the claimant's request that he should reduce his working days to 3 per week, whereas Mr Muir said that he had "nothing against it in principle", but that before he agreed to it he would need to know which days the claimant intended to come into the office, and also work out how to effect a handover to a new solicitor taking over that work from the claimant.

35. Secondly, the claimant insisted that the specific pay which he was to receive for 3 days a week was confirmed. His evidence was that he proposed that since he had sustained a reduction of £5,000 for the day he had taken off his working week in 2017, he should sustain a similar reduction of £5,000 for the further reduction of one day to 3 days a week. Accordingly, he maintained that he had told Mr Muir, expressly, that he would expect to be paid no less than £35,000 a year for 3 days per week, and indeed that with his mortgage commitments he could not afford to accept any less than that figure in salary.

36. In contrast, Mr Muir insisted that he did not reach any agreement with the claimant about the salary to be paid to him for 3 days a week. He maintained that no figures were agreed in that meeting, and that when a solicitor came to him in similar circumstances to seek a pay rise, he would always seek to buy himself time by declining to agree any change to salary in a short meeting without investigating the matter further. It was therefore Mr Muir's position that there was no discussion nor agreement about a specific salary to be paid to the claimant on the reduction of his hours.

37. These divergences can only be resolved by examining further the evidence of the subsequent events and of statements given during the claimant's grievance procedure.

38. At the end of the meeting, both Mr Muir and the claimant were contented with its terms.

39. No emails were exchanged by the parties to confirm the terms of their agreement. Unlike in 2017, the claimant did not email the cashier, Ms Clancy, to confirm that he was reducing his hours and to notify her of the agreed change of salary.

40. Following his meeting with Mr Muir, the claimant told his secretary, Lisa McGinnis, that he was reducing his working days from 4 to 3. She has no recollection that he told her that his salary was to be reduced by any particular amount.

41. He also spoke to Ms Clancy, the cashier, to tell her that he was reducing his working hours to 3 days per week. Again, Ms Clancy's evidence was that the claimant had not mentioned any salary figure to her at that time, and that in particular he had not told her, as he asserted he had, that he was to receive £35,000 per annum for 3 days per week.

42. The matter rested there. The claimant did not raise the issue again, and nor did Mr Muir. Ms Clancy did not check with Mr Muir whether or not the claimant would be reducing his hours in April.

43. Ms Clancy, conscious that she had been told by the claimant that he was reducing his hours in April, emailed him on 11 April 2019, shortly before the salaries would be paid on 15 April (102):

"Hi Danny

I am doing the salaries right now.

As of April you are now 3 days. This will be your new salary based on your Annual Earnings. (£29,998.80)."

44. The claimant had reduced his hours to 3 days per week. When he received this email, he replied at 9am the following day (102):

"Hi Victoria

5 *Just seen this last night re my reduction in hours and salary and have two questions.*

1. *How did you calculate this amount?*
2. *What is my current annual salary?*

Can you respond as a matter of urgency?"

45. Ms Clancy responded at 9.19am that day (101):

10 *"Hi Danny*

So your annual salary is £40000. Based on this I calculated it as follows:-

1.£40000/52 = £769.23 (this is your weekly amount)

2. £769.23/4 = £192.31 (this gives me your daily rate)

3. £192.31 x 3 = £576.93 (this gives me your new weekly rate)

15 *4. £576.93 x 52 = £30000.36 (this gives me your new annual salary).*

I rounded up your daily figure this time."

46. The claimant was annoyed by this email, and responded to Ms Clancy (101) at 9.29am:

"Hi Victoria

20 *Why on earth would you do that when I advised you personally of my agreement with John Muir senior partner that my salary would reduce by £5,000 annually from £40,000 to £35,000 effective April 2019. Please respond immediately this is stressing me out.*

Regards,

Danny"

47. Ms Clancy responded at 9.42am (101):

"Hi Danny

I spoke with John and he told me otherwise and this was correct in the way I was calculating your salary based on your reduced hours.

If you want to give him a call to sort this out I think this would be better. I am the middle man here and its nothing to do with me. I unfortunately have to go with what the Senior Partner advises me."

48. The claimant then attempted to contact Mr Muir, who was on a day's leave assisting a family member move house. The claimant alleged that his salary had been reduced to £30,000, when in fact he had agreed with Mr Muir that it should be £35,000. Mr Muir said he had no recollection of this, and indeed said that he had not agreed to the new arrangement at all. He told the claimant that he would speak with him on the Monday when he returned to business. The claimant then emailed Ms Clancy again asking when it was that Mr Muir had told her that he approved her calculation for the reduction in his salary as opposed to what the claimant described as "my agreement with John in January 2019 to reduce my salary by £5,000". She advised that she had spoken to Mr Muir at the end of the previous week to confirm the salaries.

49. The claimant was extremely dissatisfied and determined to go and speak to Mr Muir on the Monday morning.

50. On his arrival at the office on Monday 15 April, Mr Muir spoke to Ms Clancy to ask her what she understood about the claimant's allegation that his salary was £35,000. She told him that it was the claimant who had told her this, but that she had responded by saying that she had assumed that the salary was to be reduced to £30,000, and had done so.

51. He asked Ms Clancy to provide him with a printout of the claimant's fee income, and then went to find the claimant, who was on a telephone call.

He returned to his room, and was drinking coffee and reviewing files when the claimant arrived. He entered Mr Muir's office, and stood in front of his desk. Mr Muir said to him at the outset words to the effect that he should "stop harassing Victoria Clancy", or that he should "treat Victoria Clancy in a more civilised manner". The claimant responded by asking what he meant by that, and by stressing that all he had done was to email Ms Clancy to try to clarify the reduction in his salary.

52. There was then a discussion about the claimant's salary. The claimant said that they had had a meeting at which Mr Muir had agreed to pay him £35,000 per annum for 3 days per week. Mr Muir replied that he had no recollection of such a meeting. There followed an argument about this. The claimant did not raise his voice at this meeting, but resolutely maintained that he was in the right, and suggested at least once to Mr Muir that he (Mr Muir) was calling him a liar in denying that the discussion or meeting had taken place.

53. Mr Muir became angry when he considered that the claimant was suggesting that the only reason that Ms Clancy was supporting his version of events was because Mr Muir had, in effect, instructed her to do so, and had colluded with her to this effect. Mr Muir raised his voice on more than one occasion, and used strong language. Mr Muir produced the printout of the claimant's fee income over the previous year and had suggested that he look at the figures, but the claimant declined to do so.

54. Mr Muir accused the claimant of trying to obtain a salary of £60,000, which would be the proportionate full time equivalent of £35,000 for 3 days a week, and told him that he could not have the claimant coasting towards retirement. The claimant declined to discuss any alternative arrangement but continued to insist that his salary had been agreed by Mr Muir at £35,000 per annum for 3 days per week. He went on to say that he was taking the matter further, and when asked for clarification said that he intended to raise Employment Tribunal proceedings. Mr Muir was angered by this, and told him that if he wanted more money, he should "get the fuck

out of my office, get back to your own office and start earning more fucking money", or words to that effect.

55. Mr Muir considered that the claimant was acting in a very provocative manner, but accepted before this Tribunal that he had raised his voice (and that the claimant had not), had used swear words and that he had regretted this. He denied that he had been abusive towards the claimant.

56. The following day, 16 April, the claimant did not attend work. He sent an email to Mr Muir, which he copied to Ryan Russell, another partner of the respondent's firm and a friend of the claimant's (103). In that email, he said:

"John,

As a result of your abusive treatment of me yesterday when I raised with you the issue of you unilaterally reducing my salary by £10000 without my approval or consent/knowledge I am now acutely ill and not fit for work so attach my fit note.

I shall provide you with a formal grievance re this matter when I feel well enough to do so.

Notwithstanding your comments that I am coasting and have not been working hard I have numerous cases that are at critical stages involving timebar/limitation periods fast approaching so out of professional curtesy (sic) I would strongly advise you appoint a solicitor to manage my case load/speak with Lisa as I would not wish mml to be face negligence claims.

I have copied Ryan in as I understand he is aware of this situation.

Regards."

57. He attached a Statement of Fitness to Work (105) dated 16 April, certifying that he was not fit for work due to work related stress, until 30 April 2019.

58. The claimant then attended at the offices of the GMB Scotland trade union, and consulted with Helen Meldrum, Regional Organiser. She submitted a

letter dated 22 April 2019 (110) in which she attached a grievance letter written by the claimant and dated the same date (111).

59. The grievance identified two complaints made by the claimant against Mr Muir: firstly, that he had unilaterally reduced the claimant's salary; and 5 secondly, that he had subjected him to abusive treatment.

60. The grievance then set out the claimant's complaints in detail:

*"**UNILATERALLY REDUCED MY SALARY***

I learned from Victoria Clancy, Chief Cashier, by email, on the 11 April 2019 that my annual salary would be 29,998.80 effective as of 1 April 2019. This 10 came as a complete shock as I had verbally agreed with you personally in January 2019 that my annual salary would reduce from £40,000 to £35,000 as a consequence of reducing my work week from 4 days to 3 days. I initially believed that Victoria must have made an error but when I contacted her by email on 12 January to clarify she advised that you had approved a 15 £10,000 annual reduction and not the £5,000 that we had agreed.

I then telephoned you to clarify the salary reduction but you informed me that you were too busy to speak to me at the time and would discuss with me on Monday 15 April 2019. I met with you in your office and discussed with you that we had a prior agreement as stated above but you told me that 20 there was no such agreement. I raised with you the fact that my salary had been reduced from £45,000 to £40,000 in 2017 when my work week was reduced from 5 days to 4 days. I reminded you that when we spoke in January 2019 we had agreed a similar reduction of £5,000 due to my work week reducing from 4 days to 3 days. However, your position remained that 25 there was no such agreement.

I view the reduction in my salary without my knowledge, consent or approval as a material breach of my employment relationship with you.

ABUSIVE TREATMENT OF ME

From the outset of my meeting with you, your demeanor (sic), tone and abusive language was quite despicable. You accused me of harassing Victoria Clancy by sending her emails. In fact, the emails were simply me seeking clarification of my reduction in salary. You then castigated me that I was 'coasting' and not working hard, which I felt extremely hurtful as it is quite the opposite from the truth.

You then raised issued about my fee earnings for the current year but you did not provide me with any breakdown. During this entire meeting you were shouting and screaming at me with so much venom and anger that staff at Reception were able to hear you. Indeed, I actually was in fear of a physical attack when you grabbed a cup and I felt you were going to throw it at me.

Despite your abusive language, I sought to remind you that following our agreement in January 2019 to reduce my annual salary by £5,000 that I had, immediately at the time of our agreement, informed Victoria Clancy and she had noted the details down. You, at this point, told me that Victoria Clancy could not recall any such discussion with me.

In my view the only plausible explanation for this would be that you have colluded with Victoria Clancy to support your position that there was no prior agreement to reduce my salary. By your actions, I have completely lost all trust and confidence in you. it is deeply concerning to me the lengths you will go to justify your actions. It would be completely absurd for me to agree reducing my work week from 4 days to 3 days without knowing how much my salary would be.

During the course of this meeting your abusive behaviour left me feeling completely demoralized, dejected, humiliated and extremely hurt given that I have been a loyal employee of yours for nearly 20 years. Your actions have made me acutely ill and, as you are aware, I am currently signed off as being unfit for work.

You ended the meeting by jumping up from your seat in a rage and shouting at me at the top of your voice to 'get out of my office and go do some work'.

Given that you have raised issues regarding my fees, please treat this as a formal request for a Subject Access Request (SAR). Please provide me with my entire personnel file including all paper and electronica data/emails concerning myself and any 3rd parties. Specifically provide me with my payroll information, fees and absences from the commencement of my employment to date.

I understand that Mr Ryan Russell (copied in) is acting in a mediator role so look forward to hearing from your (sic) or him in due course. At any further meetings I will be represented by my union official.

Yours

Danny Devine"

61. The grievance was passed to Alan Fraser, a partner in the respondent's firm. He wrote to Ms Meldrum on 25 April 2019 (113) to acknowledge receipt of the grievance letter, and to ask the claimant to clarify a number of points within the grievance.

62. On 26 April 2019, Jim Laverty, joint senior partner with Mr Muir, wrote to the claimant (114) in the following terms:

"Your current period of sickness absence began on 16th April 2019. Your entitlement to full pay will accordingly end on 30th April 2019, after which you will be entitled to receive Statutory Sick Pay at the current fixed rate of £94.25 per week. Statutory Sick Pay is payable for 28 weeks in any one period of sickness absence.

If you have any queries in respect of your entitlement to sick pay then please contact me."

63. The claimant replied to Mr Fraser's letter through Ms Meldrum, who emailed Mr Fraser on 3 May 2019 (115) attaching the claimant's further reply (116).

64. In his reply, the claimant suggested that while he could not be sure of the date of the meeting at which the "prior agreement" had taken place, he thought it was 10 January 2019. He said that it followed the same process as previous discussions with Mr Muir involving increases or decreases in salary, whereby he would agree the increase or decrease verbally with Mr Muir then inform the cashier of the change. He insisted that the change in 2017 was not a pro rata reduction, and that that was never discussed.

65. He went on:

"When I met with Mr Muir in January 2019 we agreed verbally to reduce my salary by a similar amount of £5,000 based on my work week reducing by a further day from four days to three days effective 1st April 2019. There was never at any point any discussion regarding my salary being reduced pro rata based on my annual earnings. As normal I advised Ms Clancy of my verbal agreement with Mr Muir. I cannot recall the exact date, but it would have been at the first available opportunity. I distinctly remember Ms Clancy writing down the details.

I had no reason to distrust that Mr Muir would not honour our agreement given past agreements when salary increased/decreased. I was completely shocked when I learned in April 2019 from Ms Clancy that my salary had been reduced by £10,000 – not the £5,000 I had agreed with Mr Muir in January 2019.

The first time I had ever heard of pro rata from Mr Muir was when I met with him on April 15th, by which point he had already approved the £10,000 reduction with Ms Clancy without my knowledge, consent or approval. Had Mr Muir advised me that my salary would reduce by £10,000 pro rata I would not have agreed to that as this would jeopardize my mortgage obligations and place my house in grave danger of being repossessed. I specifically recall when I spoke with Mr Muir in January that the most I could sustain as a reduction was £5,000 given my financial circumstances.

It is well known that Ms Clancy and myself are not best of friends given previous issue in the past. I have no way of knowing whether it was

Ms Clancy who instigated the pro rata question when she discussed with Mr Muir my salary was reducing. This is a matter for your to investigate. I presume you shall note detailed statements from Mr Muir and Ms Clancy. I would expect you to furnish me with copy of their statements PRIOR to the grievance meeting.

For the avoidance of any doubt, at the meeting on 15th April there was only one raised voice and that was Mr Muir. Everyone at MML knows you do not get into shouting matches with Mr Muir.

In terms of the suggestive (sic) collusion that I had inferred was the only plausible explanation after Mr Muir informed me at the meeting on April 15 that I did not have a prior agreement with him (he had initially said that he could not recall the agreement) then Mr Muir advised me Ms Clancy could not recall my discussion with her in January re the reduction of £5,000. Perhaps, Mr Muir said this during the course of his temper tantrum and his worsening behaviour? All I can recall is that this is not something minor that Ms Clancy would not recall or remember. At no point in the past when I have advised Ms Clancy of any changes to my salary has she failed to recall my discussion with her. I would presume that once Ms Clancy is advised by a solicitor of a verbal agreement with Mr Muir of an intended increase/decrease in salary she confirms that with Mr Muir…"

66. The claimant went on to suggest that the grievance meeting should be scheduled in the near future and be minuted or recorded.

67. Mr Fraser acknowledged receipt of this further letter from the claimant by email dated 7 May 2019 to Ms Meldrum, and confirmed that he would arrange a grievance meeting. Before doing so, he said he intended to speak to Mr Muir, Ms Clancy and other staff.

68. In the meantime, the claimant engaged in further correspondence with Mr Laverty with regard to his sick pay entitlement. He wrote to Mr Laverty on 29 April (121) to express how "deeply shocked" he was that his entitlement to pay during sick leave was restricted to two weeks, reminding him that he had never had a contract of employment in his entire time with

the respondent. Mr Laverty replied on 30 April (122) to advise that this was "ultimately a discretionary issue". He went on to say that *"You are correct in your observation that there exists no contractual obligation relative to the payment of Sick Pay which means MML are not legally bound to pay you full pay in your absence. Only one member of staff (KP) was on extended absence due to ill health and was paid Statutory Sick Pay."*

69. Further emails were exchanged between the claimant and Mr Laverty (120/1), in which it was confirmed that the decision was taken by Mr Laverty though Mr Muir was alerted to it as an equity partner.

70. The claimant subsequently submitted a grievance in relation to this matter on 11 June 2019 (164), to which I return below.

71. Mr Fraser wrote again to the claimant on 28 May 2019 (137) to advise him that he had taken statements in relation to the grievance, from Ms Clancy, Vicki Wyllie (Receptionist) and Ms McGinnis, and also that Mr Muir had prepared his own statement. He advised that there was no requirement to provide the claimant with copies of any of those statements as the focus of the meeting would be to try and establish matters from his point of view.

72. He set out the time line of the claimant's salary. In particular, he noted that *"In April 2017 when your working hours went down from 5 days per week to 4 days per week, your wage was increased to £50,000 per annum, which was then paid on a pro rata basis, equating to £40,000."*

73. He proposed that the meeting should take place on 31 May 2019 or on any date during the week thereafter, and said that given the nature of the meeting there would be no need for it to be recorded or minuted.

74. The claimant replied on the same date (141):

"Dear Alan,

I note your comments re witness statements NOT having to be provided to me and disagree and refer you to my earlier email and ACAS grievance procedures.

I also disagree with you when you say these types of meetings do not require to be minuted or recorded and again refer you to ACAS.

I have never earned a salary as high as £50000 at MML so I disagree with that comment. Please provide written confirmation of myself ever earning £50000 annually with MML…"

75. Mr Fraser responded by observing that while there is a provision in the ACAS Code of Practice on Disciplinary and Grievance Procedures in paragraph 9 that it would normally be appropriate to provide written evidence in relation to a disciplinary matter, there is no corresponding requirement in paragraphs 32 to 47 of the Code of Practice, which deal with grievance procedures. He also pointed out that there is no requirement in the Code to have a grievance meeting minuted or recorded.

76. The grievance meeting took place on 31 May 2019. The claimant attended, and was accompanied by Ms Meldrum. No minutes of the meeting were taken but following it, on 4 June 2019, Mr Fraser wrote to the claimant to outline his conclusions (153).

77. Mr Fraser noted that *"I think it was accepted by all concerned that the primary purpose of the meeting was to try and find a way forward."* He also observed that this was the first grievance hearing in the history of the firm.

78. He addressed the claimant's salary. He said:

"Your position relative to the change in your salary between 2017 and 2018 was that reducing your working week by a day to only four days actually resulted in a drop of your salary to £5,000.

The position of the firm is that your salary in fact went up at that time but was reduced to £40,000 on a pro rata basis.

The difference of interpretation, for whatever reason, was never actually clarified and persisted until you indicated that you were reducing your

working hours further from four days per week to three days per week, effective as at 1 April 2019.

At that point, your understanding was that your salary would be reduced by only £5,000 to £35,000, while the firm's understanding was that it would again be on a pro rata basis to £30,000.

It is accepted that there was some limited communication about this change before it was implemented, but clearly not enough to avoid the misunderstanding which, on the face of it, has persisted for some two years."

79. He concluded, therefore, that the first part of the grievance – that the claimant's salary was unilaterally reduced – was not upheld, but said that this came from a genuine misunderstanding between the parties involved as to what the other side's interpretation of events might have been.

80. In relation to the second part of the grievance – that the claimant was subjected to abusive treatment – Mr Fraser found that *"the meeting you had with John took place against a background where both sides had their own interpretation of events and both sides were convinced that their interpretation was the right one. Given those entrenched positions, it is perhaps understandable that the meeting did not end well or proceed in a particularly constructive manner. This would not, however, naturally lead me to find that your treatment at that meeting can be described as 'abusive'. Again, as a matter of formality, I would therefore not uphold that grievance."*

81. He then noted that the claimant had made a number of proposals in order to achieve his return to work, and recorded them as follows:

   1. *"That you would return to work on the same terms and conditions as you worked previously, namely, four days per week at a salary of £40,000 per annum. Alternative, you would suggest working three days per week, but would be looking for the salary in that regard to be £35,000. If I understood you correctly, this would not be on a pro rata basis and*

would then be subject to negotiation, should you choose at a later date to go back to working four days or five days.

2. *You would seek reimbursement of your wage loss while you were signed off ill.*

3. *You would be supervised and report to me in respect of your day-to-day responsibilities, as opposed to reporting directly to John.*

4. *There would be no reduction in your salary, whatever was agreed in paragraph 1, until January 2020 at the latest, where matters could be reviewed subject, among other matters, to fee income generated.*

5. *You accepted that there would require to be a meeting with John to effectively clear the air.*

6. *You will appreciate that a good working relationship with the cashroom is essential for any Solicitor. Can you confirm how you would propose to reconcile any differences which may have arisen with Victoria?"*

82. He confirmed that he would speak with Mr Muir and Mr Laverty and revert to him. He also notified the claimant of his right to appeal against the outcome of the grievance.

83. The claimant responded by email dated 4 June 2019 (155). He indicated that he would not require to appeal if an agreement could be reached within the 7 day deadline. He also pointed out that Mr Fraser had omitted to say that if he returned to work on a 5 day basis his salary would be £50,000 per annum.

84. He sent a reminder email on 6 June 2019 (156), pointing out the imminence of the deadline by which he had to submit an appeal.

85. Mr Fraser said in evidence that he then spoke to Mr Muir and Mr Laverty – that he met with them to do so – and then responded further to the claimant by email on 7 June 2019 (161).

86. Mr Fraser confirmed that he had now discussed the matter with Mr Muir and Mr Laverty ("John and Jim"). He then pointed out that the claimant had now been absent ill for just over 7 weeks, and attached a list of 69 active files for which the claimant was responsible.

87. Mr Fraser then said that between 1 October and 5 June 2019 the claimant had raised fees of £37,275.11, and that even on an optimistic interpretation of his work in progress, it was not likely that he would earn fees to cover his salary and ancillary costs by the end of 2019, let alone by the end of September 2019. He went on:

"The upshot of this is that there will require to be a discussion now not only about the hours you are to work, but also about the salary which is to be attributable to that work. The fee income of every fee earner in the firm is subject to constant review to ensure, in simple terms, that there is enough money at the end of each month to pay salaries and other bills. It would be unrealistic, therefore, if the fee income of one fee earner or one area of work was not also subject to that scrutiny. Your proposals relative to your return to work are, for the avoidance of doubt, not agreed."

88. He confirmed that the claimant would not be reimbursed for the wage loss in respect of his time off ill; that he would have to report to Mr Muir; that he would require to meet with Mr Muir to address the allegation that he had made that he had acted dishonestly towards him; that there would require to be action taken to address his allegation that Ms Clancy had acted dishonestly in colluding with Mr Muir; and that he should meet with Mr Muir and Mr Laverty to discuss a way forward, separate to his grievance appeal.

89. Mr Fraser did not advise the claimant what the respondent's view of his current hours and pay were, at that point. He continued to decline to disclose the witness statements to him, and confirmed that he did not rely upon the statements in coming to his views, in any event. The primary evidence, he said, was the claimant's P60 forms.

90. In his reply, the claimant said (163) that his fee income should not be looked at in isolation over a few months, pointing out that he had been unwell in

November and December 2018, that there was a Christmas break and then he had 2 weeks' holiday in February 2019. He pointed out that he had suggested advertising on Radio Tay, which had previously generated new business for the firm, but that that had not been approved.

5 91. On 11 June 2019, the claimant submitted two letters to the respondent.

92. In the first letter, (164), the claimant raised the grievance in relation to the respondent's failure to pay him during his sick leave. He submitted that it was "wholly unreasonable" for the respondent to decide that he should not be paid more than two weeks' full pay. He maintained that having been a
10 loyal employee of the respondent's firm for some 17 years, the decision amounted to an abuse of the discretion. He asserted that the absence of a contract of employment meant that the law would imply terms and conditions on the basis of what a reasonable employer would do. He argued that an average medium sized company would give an employee 6 months'
15 full pay and 6 months' half pay during a sickness absence.

93. He confirmed that he had no objection to Mr Laverty dealing both with that grievance and the appeal against the outcome of his initial grievance.

94. In his second letter (166), the claimant submitted his appeal against the grievance outcome by Mr Fraser. He argued that no reasonable decision
20 maker could have reached the decision made by Mr Fraser, and suggested that he had ignored the evidence.

95. He submitted that if his salary had been reduced pro rata in 2017, his holiday entitlement would also have been reduced pro rata in that and the following years, but it did not. Similarly, there would have been no need for
25 Ms Clancy to check the position with Mr Muir and Mr Muir would simply have told him in January and April 2019 that the reduction in salary was pro rata, but he did not.

96. He went on to make further criticisms of the process followed by Mr Fraser, and summarised by saying that the compelling evidence supported his
30 position rather than that of Mr Muir.

97. The claimant pointed out that this situation would never have arisen had there been a written contract of employment in place, which was especially galling because Mr Muir was an employment law specialist of some thirty years standing.

5 98. He repeated his assertion that he had been subjected to abusive treatment by Mr Muir, and suggested that Mr Fraser had, in effect, ignored this issue. He pointed out that he was unaware of Mr Muir's statement about the meeting of January as he had never seen it.

99. Mr Laverty decided, despite further entreaties from the claimant, not to 10 disclose the statements to him (175) but provided him with copies of his fee figures for the previous 4 or 5 years.

100. The grievance appeal hearing took place on 25 June 2019 in Mr Laverty's office. The claimant was accompanied by James Cunningham, his trade union representative.

15 101. Mr Laverty issued his decision in an undated document which, on the evidence, was received by the claimant on or about 1 July 2019 (177ff).

102. He confirmed at the outset that he intended to deal with the grievance afresh, on the basis that he had not been present at the meeting with Mr Fraser, and that some matters had been raised which were not 20 discussed with Mr Fraser.

103. Mr Laverty confirmed that in 2017 the claimant's salary was reduced on a pro rata basis, having had his salary increased to £50,000 full time.

104. He found it established that at no time in the meeting in January 2019 was the figure of £35,000 for 3 days per week mentioned. He did not 25 find that the claimant had spoken to Ms Clancy and told her that he had agreed a salary reduction to £35,000, and found that he had spoken to his secretary and told her that he would be moving to a 3 day week, working days other than Wednesday and Friday.

105. He found that in April 2019 the claimant's salary was reduced from £40,000 to £30,000, pro rata, though he accepted that the phrase "pro rata" was not actually mentioned.

106. Mr Laverty found that during the meeting of 15 April 2019, *"Mr Muir shouted at you on at least 2 occasions during this meeting and used an expletive on 2 occasions, in the context of this meeting, whilst this regrettable, I do not find that it was abusive. The relationship between yourself and Mr Muir provides context for me to find that his handling of this meeting was not abusive. You and Mr Muir have known one another for some 17 years. During that time there has been a frank and forthright exchange of views on a number of occasions. These have happened professionally and socially."*

107. He repeated that Mr Muir's use of expletives and shouting was regrettable, and that he had found that he had tried to call the claimant the next day to apologise but that the claimant had declined to take his call.

108. He therefore concluded that he did not find that no reasonable decision maker could have reached the decision Mr Fraser reached, and that based on the further investigation carried out and the meeting conducted, he did not uphold his grievance.

109. Mr Laverty went on to say that he had informed the claimant at the meeting of 25 June that he would speak with the other partners and then restate the respondent's position. (Mr Muir, in evidence, struggled to answer a question of whether, following the appeal hearing, Mr Laverty had actually spoken with him about this, and conceded, eventually, that he had no recollection that he had done so.)

110. He noted:

"The firm's position in relation to your return to work would be on the following agreement by you:

> I. *You will return to work on a 3 day week on a salary of £30,000.00. the 3 day week will be a matter which is to be agreed with myself in accordance with the work which you are involved in at the moment.*
>
> II. *You will not be reimbursed your salary for the period after 30 April 2019 in which you were signed off ill.*
>
> III. *Each month you would report directly to myself and Mr Muir in order that the smooth and efficient running of the Personal Injury Department can be assessed and assured.*
>
> IV. *There would require to be a meeting with Mr Muir to clear the air. This would specifically require to address the issue that Mr Muir had been dishonest in his dealings with you. in the earlier letter to you of 7 June 2019 the importance of your relationship with the Partner responsible for the whole civil department was detailed. There can be no perceived trust issues in this regard.*
>
> V. *There would require to be some form of healing of any difficulties between yourself and Miss Clancy on the basis of your stated allegation that she had colluded with Mr Muir. Again as outlined in the letter to you of 7 June 2019 the relationship between any of the firm's solicitors and the cashier is of significant importance. This would not require a meeting but would require some form of mediation as Miss Clancy, because of issues with you in the past, would not wish to meet with you."*

111. The claimant decided, following receipt of this letter, to resign with immediate effect. He wrote a detailed letter of resignation dated 6 July 2019, and hand delivered it to the respondent (181).

112. The claimant explained, at the start of the letter, his reasons for resigning:

"I hereby tender my resignation from Muir Myles Laverty, Solicitors (MML), effective immediately. Without rehashing the entire issues raised through under the Grievance Procedure, I resign for the following reasons.

Firstly, MML have reduced my salary without my knowledge or consent. Secondly, when I raised this issue with Mr Muir I was subjected to abusive treatment by him. Thirdly, the manner in which MML have dealt with me since the raising of my grievance."

5 113. He then set out the detail behind each of these reasons.

1. *"The background to the unilateral reduction in my salary originates from the fact that I have never been provided with a contract of employment in my entire 17 years employed by MML, notwithstanding, Mr Muir is an employment solicitor of some 30 years. As a consequence, a custom*
10 *and practice has developed whereby I would meet with Mr Muir and verbally agree any salary increase or decrease. After the verbal agreement had been reached, I would then inform the head cashier so the salary change could be implemented. That is the scenario that has been used for all my salary increases/decreases.*

15 *In 2017, I met with Mr Muir to discuss a reduction in my work week from 5 to 4 days due to ill health. It was verbally agreed my annual salary would reduce from £45,000 to £40,000 to reflect this. I advised head cashier, Victoria Clancy and the salary change was implemented. In January 2019, I met with Mr Muir once again due to further ill health and*
20 *discussed a further reduction of a day, from 4 to 3 days per week. I specifically indicated to Mr Muir that due to a substantial mortgage repayment/other financial obligations, the most I would be able to sustain as an annual salary reduction would be a further £5000 and we agreed a similar reduction to that in 2017 as it was a similar reduction of*
25 *1 day. Therefore, my annual salary would reduce from £40,000 to £35,000 and be effective April 1, 2019. I duly spoke and informed head cashier, Victoria Clancy and she noted down the details.*

On April 11, I received an email from Victoria Clancy that my annual salary as of April was £30,000. Upon enquiry with Ms Clancy, I learned
30 *she had spoken with Mr Muir the week before and he confirmed my annual salary was now £30,000. At no point from January 2019 and prior*

to my salary change to £30,000 in April 2019 did Mr Muir ever communicate to me or receive my consent/agreement of his salary amount. Had Mr Muir communicated my salary would be £30,000, I would have remained on £40,000 for 4 days per week.

5 *I hold your conduct, Mr Muir as a repudiatory breach and a material breach going to the root of my employment relationship with MML.*

2. *As a result of attempting to confirm with you on the 15th April, the verbal agreement we had reached in January 2019 that my salary was to reduce to £35,000, you Mr Muir subjected me to abusive treatment, not*
10 *just your abusive language, but also the threat of a physical attack. I need not say any more as the specifics are set out in the grievance. However, it is clear that the trigger for your outrageous comments was the level of my fee income for the current year. You did not give me the opportunity to explain why my fee income was lower than previous*
15 *years. Your conduct had a profound affect (sic) on my health which has resulted in myself not being fit for work, and having to be prescribed medication from my GP. This was not an isolated incident as you are prone to a pattern of abusive outbursts, such as sacking me twice at social events such as xmas parties (which I excused as you were under*
20 *the influence of alcohol) and I and other MML staff are aware of your numerous situations where you have been unable to control your abusive behaviour.*

You castigated myself as you threw down on the table, a print out of my current fee income, that I was not working hard and coasting at work
25 *(although you did not permit me to read the printout). I am now aware that since reducing my work week in 2017 from 5 to 4 days, in actual fact my fee income did not drop, so hardly coasting Mr Muir. Moreover, I was sickened to my stomach when I suggested to you that your prior verbal agreement to reduce my salary to £35,000 could easily be confirmed by*
30 *Victoria Clancy, when you informed me, she could not recall such a conversation having taken place. At that point, I lost all trust and confidence in you.*

3. In lodging my grievance, I had hoped that sense would prevail and the salary issue resolve and perhaps, if I was able to return I could perhaps report to Mr Fraser, Partner, or to Mr Laverty, Senior Partner, to avoid any future conflict with Mr Muir, Senior Partner. Sense did not prevail and the following occurred.

a) Mr Laverty took the sole decision (apparently) to restrict my full pay/sick pay to 2 weeks. Thereafter, I would only receive SSP £94.25 per week. I believe that decision to be 'wholly unreasonable' given that I had been an employee of MML for over 17 years and have made profit for MML year in, year out.

b) Mr Alan Fraser, Partner was tasked to chair the grievance. After a long delay, the grievance meeting eventually took place on 31 May. Prior to that meeting, I received a letter from Mr Fraser, dated 28 May, setting out a chronology of events/salary increases etc. to my amazement, Mr Muir was claiming he had actually increased my salary by £5,000 to £50,0000 (sic) in April 2017 at the very time I was reducing my work week from 5 to 4 days, and this was to be paid pro rata, equating to £40,000 per annum. I raised at the grievance this was a ludicrous concoction made up by Mr Muir in a hopeless attempt to support his position of reducing my salary to £30,000 in April 2019. The unequivocal fact is Mr Muir's fictional position does not stand up to any scrutiny. For example, 1) Why were my holiday entitlements for years 2017 and 2018 not pro rata? 2) Why would Mr Muir raise my salary to £50,000 when I am seeking to reduce my hours? 3) Why would Mr Muir increase my salary to £50,000 when my fee income at that time would not justify it? 4) Why did Mr Muir not communicate to me my salary was increased to £50,000 at the time; at the meeting in January 2019; after he spoke with Victoria Clancy in April 2019, and why did he not mention it during the meeting I had with him on April 15, 2019? The only mention of pro rata in that meeting was in relation to reducing from 4 days to 3 days. 5) Why did Victoria Clancy not mention the 2017 pro rata when I emailed her on 12 April 2019? Clearly, she would have, if it had been in place since 2017. 6) Why would Victoria Clancy not advise/deny that I had informed her in January my salary was reducing to £35,000 in her email of 12 April 2019 to me after I raised this with her? 7) Why would Victoria Clancy have to confirm with Mr Muir in April 2019 re her calculation concerning £40,000/£30,000 was to be pro rata, if pro rata was already in place since 2017? The reason was

due to the fact that I did make her aware my salary was to reduce to £35,000, but that did not fit in with her calculation.

c) MML Have provided me with numerous versions of whether I spoke with Victoria Clancy, and if so, what was said. At the April 2019 meeting, Mr Muir informed I did not speak with her after the January meeting. This position was confirmed at the grievance by Alan Fraser, until I raised the issue of why would Victoria Clancy speak with Mr Muir in April if she had not in fact been advised by me that my hours were reducing. Mr Fraser then backtracked, and said I did speak with Victoria Clancy, but only advised her I was reducing from 4 days to 3 days. He did not think it strange that I would not mention what my new salary would be, or that Ms Clancy would not ask me! You, Mr Laverty informed me at the grievance appeal (like Mr Fraser, you had the benefit of Ms Clancy's witness statement) that she denied I had spoken with her in January. However, in your outcome letter to my appeal, you now find I did in fact speak with Victoria Clancy in January 2019. You and Mr Fraser have denied all my requests to be provided with the witness statements. This is not only procedurally unfair as it has prevented me from having access to what the witness is saying, but also prevents me from challenging what the witness is saying. It also provides you, Mr Laverty, with free range to frame a response which supports Mr Muir's position. I have concluded that this is precisely what your outcome to my grievance appeal is attempting to do. You Mr Laverty, like Mr Fraser before, have chosen to ignore the overwhelming evidence that supports my position. I view the entire grievance procedure as nothing more than a SHAM.

d) Mr Fraser concluded that the salary reduction was merely a misunderstanding between myself and Mr Muir. He then found there was no 'Consensus in idem' as to what was agreed and no communication from Mr Muir to me. Despite this he still concluded that my salary had not been reduced unilaterally, which beggars belief. Mr Fraser went on to advise that if I returned to work on a 5 day basis my annual salary would be £50,000, based on the MML pro rata point, or £40,000 for a 4 day week. The proposals that I put forward for a potential return to work were rejected by both of you, so a grievance appeal was necessary. I was advised by Mr Fraser that separate from the grievance appeal, I would require to meet with you both, to discuss NOW, not only my hours, but my

salary. Moreover, the issues that I had raised about Mr Muir and Ms Clancy also required to be addressed NOW.

e) During the initial grievance and also the appeal, MML have given the impression to me that, it might just be possible for me to return to work and despite what MML had put me through, I was seriously considering whether I would be able to return. However, as of today, July 6, some 10 weeks since my employment issues with MML have arisen, I now find myself in an intolerable position after I have considered your decision Mr Laverty. No longer is there an option to return to work at 5 days at £50,000 or 4 days at £40,000, but I would have to agree to return to work at 4 days per week, on a salary of £30,000. I have previously advised Mr Muir, Mr Fraser and you, Mr Laverty at the grievance appeal, that I can NOT meet my financial obligations/debts and in particular my deep concerns that my mortgage payments could not be met, whereby my house would be in real jeopardy of being repossessed if my salary was reduced to £30,000. Notwithstanding, this is the ultimatum you and Mr Muir have given me as a condition of my return to work. Moreover, Mr Laverty, despite finding Mr Muir was shouting and swearing at me, you conclude this is not abusive! I feel betrayed by MML and because I had the audacity to challenge Mr Muir I feel I am now being punished. I had lost trust and confidence in Mr Muir after the April 2019 meeting, and I had suggested I might be able to try restore trust in MML if I were to report directly to someone other than Mr Muir. However, the deplorable manner in which MML have handled my grievance leaves me in no doubt that any trust and confidence I thought might be capable of being restored in MML has gone forever. The both of you should be thoroughly ashamed of yourselves, not just as employers or individuals, but also as solicitors. The lengths you have both went to in an attempt to justify the position of Mr Muir is a disgrace to our profession. Mr Fraser to a lesser extent is also culpable. The conduct of MML has meant that I have suffered stress, anxiety and financial hardship over an extended period of time, and continue to do so.

f) For the avoidance of doubt, I feel the decision by MML in relation to my return to work is untenable for the reasons stated above. I strongly believe I have been constructively dismissed. The primary cause for my resignation is the reduction of my salary without my knowledge or consent. The abuse Mr Muir

subjected me to when I raised with him, and the appalling fabrication and dishonesty by Mr Muir to support his 'pro rata' position, then the complicity of MML to try and justify the conduct of Mr Muir.

g) Finally, I have from the very beginning of the grievance process been denied by numerous requests for copy witness statements and documentation to my personal file, despite my Subject Access Request (SAR). Mr Fraser refused to minute or record the grievance hearing. You, Mr Laverty initially agreed to provide me with witness statements, but shortly before the appeal you advised you would not provide the statements to me. However, after some prompting from me, you did record the appeal hearing on your mobile phone. I would request that I be given a copy of the typed up minutes from your recording. I also wish to formally intimate a further (SAR) under GDPR in relation to all my data/emails, fee income, personnel file and any information you hold in relation to this grievance process. I would remind you at this point of your duty to comply with GDPR.

Danny Devine"

114. Mr Laverty acknowledged receipt of the claimant's letter of resignation on 10 July 2019 (185). He stated that it was not accepted that the claimant was constructively dismissed. He said that he would make sure that any accrued holiday pay was paid to him with his P45, and advised that no contract of employment had existed during his time with the respondent. He confirmed that he would be entitled to 4 weeks' net pay for this. It is understood that what Mr Laverty meant was that the failure to provide the claimant with a written statement of particulars of employment may attract an award of up to four weeks' pay if the matter were referred to an Employment Tribunal (a reference to section 38 of the Employment Act 2002).

115. The claimant asked for a breakdown of the payment made to him and disclosed on his final payslip, at £2,497.66, and Mr Laverty confirmed in reply (by email of 15 July 2019)(185) that it was comprised by:

"£3,333.33 – 1 month salary (£40,000). For the non provision of contract.

£113.10 – SSP.

Total Gross Pay - £2.613.13

Total Deductions ie Tax, NI & Pension - £948.77

Total Net Pay - £2,497.66

5 *I have calculated your holiday entitlement from 1st January 2019 to 8th July 2019. You have already taken 12 days holiday and therefore no further holiday payments are due."*

116. Following the termination of the claimant's employment, he contacted the Law Society, probably towards the end of July, to obtain details from 10 them as to the obligations he would require to fulfil if he were to establish his own legal firm. He required to put in place insurance, indemnities and other matters in order to establish his firm.

117. On 3 October 2019, the claimant presented his ET1 claim to the Employment Tribunal in which he complained of unfair constructive 15 dismissal.

118. In that claim form, at paragraph 10 of the paper apart, the claimant made certain allegations about the character of Mr Muir, including the assertion that he took mood swings "where you do not know how he will be from one day to another…Sometimes he can be pleasant and sometimes 20 he can be nasty. Mr Muir has all the hallmarks of Bi-Polar."

119. Mr Muir was extremely upset by this suggestion.

120. The respondent raised proceedings against the claimant in October 2019 for defamation, both against the firm and against individuals therein. Those proceedings were sisted pending the outcome of the Tribunal 25 proceedings, and, as at the date of the Tribunal, it is understood that they remain sisted.

121. There were informal discussions between the parties as to a potential resolution of their dispute. Privilege has been waived to the extent that these discussions are relevant to the question of remedy in this case.

122. There was a suggestion by the respondent that the claimant had advised them that he would, in his current position as a sole practitioner running his own firm, be prepared to take on certain work for them if they were willing to consider this, as part of an overall settlement. The respondent suggested that this was inconsistent with his position that he had lost all trust and confidence in the respondent's firm.

123. The exchanges between the parties were as follows.

124. On 16 October 2019, Ryan Russell contacted the claimant by text message to suggest meeting up as *"On a personal level I would like this resolved and think I can help broker something"* (206). He subsequently confirmed that all discussions would be without prejudice.

125. Thereafter, Mr Muir and the claimant sent a series of text messages to each other on 5 November 2019 (210ff). In the course of that exchange, the claimant apologised to Mr Muir for his "Bi Polar" comment, and then said that *"if were (sic) to resolve matters between us then there's even possibilities of me assisting MML in Med Neg/PI cases".*

126. On 26 May 2020, Mr Muir wrote to the Tribunal on behalf of the respondent withdrawing consent to participating in the Judicial Mediation process, and copied the email to the claimant on the same day (217). In the email he sent to the claimant, Mr Muir said: *"Any deal would be based on a capital payment … with work offered in the criminal dept principally sitting in with Counsel".*

127. The claimant responded on the following day (216), on this particular point, to say *"I cannot realistically see how I could accept work offered in the criminal department given that I am not even registered to practice criminal law, and have not been on the criminal register for 10 years. Moreover,*

given our relationship has deteriorated to the extent it has, I think it very unlikely I could do work with you."

128. No agreement was reached to allow the claimant to provide any form of legal service either by referral from the respondent, or on contract to them.

129. The claimant set up his own legal firm following his resignation from the respondent's employment, in July 2019. After the outcome of the grievance hearing with Mr Fraser had been issued, he embarked on a Partners' course organised by the Law Society of Scotland, in order to prepare for setting up his own firm.

Submissions

130. Both parties presented written submissions, to which they each spoke. Reference is made to their submissions below, but the Tribunal took full consideration of the submissions made in its deliberations.

The Relevant Law

131. Section 95 of the Employment Rights Act 1996 ("ERA") sets out the circumstances in which an employee is treated as dismissed. This provides, inter alia

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

…

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

132. Where a claimant argues that there has been constructive dismissal a Tribunal requires to consider whether or not they had discharged the onus on them to show they fall within section 95(1)(c). The principal authority for

claims of constructive dismissal is **Western Excavating -v- Sharp [1978] ICR 221**.

133. In considering the issues the Tribunal had regard to the guidance given in **Western Excavating** and in particular to the speech of Lord Denning which gives the "classic" definition:

> "An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged."

134. The Western Excavating test was considered by the NICA in **Brown v Merchant Ferries Ltd [1998] IRLR 682** where it was formulated as:

> "…whether the employer's conduct so impacted on the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract. Although the correct approach to constructive dismissal is to ask whether the employer was in breach of contract and not did the employer act unreasonably, if the employer's conduct is seriously unreasonable that may provide sufficient evidence that there has been a breach of contract."

135. What the Tribunal required to consider was whether or not there was evidence that the actions of the respondents, viewed objectively, were such

that they were calculated or likely to destroy or seriously damage the employment relationship.

136. The Tribunal also took account of, the well-known decision in **Malik v Bank of Credit & Commerce International SA [1997] IRLR 462**, in which Lord Steyn stated that "The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."

137. It is also helpful to consider the judgment of the High Court in **BCCI v Ali (No 3) [1999] IRLR 508 HC**, in which it is stressed that the test (of whether a breach of contract amounts to a breach of the implied term of trust and confidence) is "whether that conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice."

Discussion and Decision

138. It is important, at the outset, to set down the Issues before the Tribunal in this case, and in seeking to determine whether or not the claimant was constructively unfairly dismissed, to establish the basis upon which the claimant advances that claim.

139. The issues to be determined were set out by Employment Judge Maclean in her Note following Preliminary Hearing dated 27 January 2020 (52ff at 55):

a. **Was the respondent in breach of contract by failing to pay the claimant's pay at the agreed rate and to pay company sick pay?**

b. **Did the instances relating to breach of trust and confidence so far as proved to have occurred, amount to conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee?**

c. If so, was there a reasonable and proper cause for that conduct?

d. If not, and there was therefore a fundamental breach of contract, did that conduct cause the claimant's resignation (then being noted that it need not be the sole cause)?

5 **e. If there was a fundamental breach, did the claimant resign in response to it?**

f. What remedy if any should be awarded?

140. The Tribunal noted that the breaches upon which the claimant relies were set out in that same Note, at paragraph 8, as follows:

10 a. Breach of the express terms that the respondent pay the claimant's wages and company sick pay.

b. Breach of the implied term of trust and confidence based on the following:

a. The alleged treatment of the claimant by Mr Muir at a meeting on
15 15 April 2019

b. The respondent's failure to consider the points raised by the claimant during the grievance process which the claimant describes as a "final straw".

141. The claimant did not contest the terms of this Note, or suggest that
20 the Issues had been incorrectly identified by Employment Judge Maclean. Accordingly, I proceed on the basis that they have been accurately laid out in these terms.

a. Was the respondent in breach of contract by failing to pay the claimant's pay at the agreed rate and to pay company sick pay?

25 142. Much of the evidence heard in this case centred on the first part of this issue, namely whether there was an agreement as to the claimant's rate of pay following his reduction of working days from 4 to 3 in April 2019.

Accordingly, it is necessary to examine the evidence in order to reach a conclusion as to whether there was a breach of the claimant's contract of employment.

143. In the claimant's case, and indeed as far as I can gather in the case of all employees of the respondent's firm, there was no written statement of terms and conditions of employment provided to him, either when he commenced employment with the respondent or when his working hours and salary were varied. As a result, there is no written evidence available to confirm the precise terms of the contractual terms to which the parties mutually agreed at any stage of his employment.

144. What is clear is that in January 2017, when the claimant approached Mr Muir to suggest he reduce his working days from 5 to 4, his salary was £45,000 per annum, and had been since 2013. That was the case at the point when the claimant entered Mr Muir's office to discuss the matter. There was no dispute about the claimant's salary after that meeting, either, since it was agreed by the claimant and Mr Muir that he would work 4 days a week, on an annual salary of £40,000.

145. Where a dispute does arise is in Mr Muir's assertion that he raised the claimant's salary to £50,000 during that meeting, and then reduced it pro rata to £40,000, on the basis that there was a logic to a reduction of £10,000, one-fifth of his salary, in exchange for a reduction of one day per week, one-fifth of his working hours.

146. The claimant denies that he was told this, that he was ever aware of it, or that it was an accurate statement. Mr Muir's position was supported by Ms Clancy, the cashier, who said in her evidence that he had told her that he had raised the claimant's full-time salary to £50,000.

147. I found Ms Clancy to be an entirely straightforward and honest witness, and I believed her evidence in this regard. She holds a position of considerable trust in the respondent's firm, and given the heavy responsibility of ensuring the accuracy of financial recording and reporting, I accept that she requires to be a trustworthy person who is not intimidated

by solicitors. I have no difficulty in accepting that Ms Clancy was not persuaded by Mr Muir to enter into collusion in order to protect Mr Muir, and that she was not motivated by her previous difficulties with the claimant.

148. As a result, I conclude that Mr Muir did inform her, shortly after the meeting in January 2017, that the reduction in salary was commensurate with the reduction in working days.

149. What is much less clear is whether Mr Muir actually told the claimant of this. Both are adamant that their version is correct: Mr Muir insists that he did tell the claimant that his salary was being increased so as to justify the pro rata reduction; the claimant insists that there was never any reference either to £50,000 or to “pro rata” as a phrase.

150. The strong impression I was left with was that the claimant and Mr Muir tended to communicate with each other in a robust and on occasions chaotic manner. In this particular meeting, which happened almost 5 years before the hearing before me, it is plain that there was a short discussion leading to a clear agreement, from which both have taken different impressions. Without finding that either of them was being deliberately untruthful, I found that neither of them could be relied upon to be quite accurate in their recollections of their discussions. It is quite possible that Mr Muir thought he had told the claimant about his precise intentions, but did not in fact do so; it is equally possible that the claimant thought that nothing had been mentioned to this effect, but that in fact it had.

151. However, that discussion in January 2017 led to an outcome which was satisfactory to both the claimant and the respondent.

152. Where the dispute became very sharply focused was when the discussions in 2019 took place, both in January and in April.

153. While there was a considerable focus on whether or not there had ever been any reference to “pro rata” reduction of salary, the claimant’s case was not primarily that Mr Muir had said at the meeting in January 2019

that the reduction would or would not be pro rata according to the reduction in working days, but that Mr Muir had expressly agreed that the claimant could reduce his hours to 3 days per week from 4, and that he would be paid £35,000 per annum on that basis.

154. The claimant insisted that in the meeting of 10 January 2019, Mr Muir expressly agreed that he would be paid £35,000 per annum for working 3 days per week.

155. Mr Muir insisted, equally strongly, that he had made no such agreement; that he had not actually agreed that the claimant could reduce his hours to 3 days per week, but had said that he would need to think about it; and that nothing had been said about salary. There, he said, the matter rested.

156. The great difficulty for the Tribunal in determining this crucial matter is that there is so little surrounding and supporting evidence to shed light on what was a conversation, nearly 3 years prior to the Tribunal hearing, between two individuals in a closed room with no witnesses. It may have been expected that a legal firm, particularly one with known experience of and professed expertise in employment law, would have ensured that any such discussion was followed by some form of written confirmation in order to clarify any contractual amendments agreed or proposed. One might be entitled to expect, at the very least, an email from Mr Muir to confirm the outcome, such as it was, of the discussion he understood to have taken place, or an email from the claimant backing up his assertion that a specific agreement on salary had been expressly reached.

157. The evidence is devoid of any such correspondence or any contractual documentation at all. From the claimant's point of view, this is particularly surprising. Given the stress which the claimant placed upon the need for his salary to be maintained at no less than £35,000 per annum, one would have expected him to ensure that this was placed beyond doubt as soon as the discussion had taken place.

158. The claimant said that he spoke to Ms Clancy about this matter and told her, quickly after the meeting, that he was reducing his working days to 3 and that he would be earning £35,000 per annum. Ms Clancy's evidence did not support this assertion, and again, it is my view that her evidence is to be believed.

159. His evidence was that there was a process to be followed in confirming any change in salary following a verbal discussion with Mr Muir, whereby he would speak to the cashier to inform her of the proposed change, and then confirm the matter by email. However, according to the claimant's own evidence, he did not follow this process in this case. He did not email the cashier, and she maintains that he did not tell her that he was to be paid £35,000.

160. In my judgment, it is hardly surprising that a short verbal discussion with no witnesses present can lead to the unsatisfactory and confusing situation which arose in this case. It is difficult to follow the process which should properly be carried out in seeking a pay rise or a change in contractual terms and conditions within the respondent's firm, but if matters are left without written contemporaneous clarification, it is extremely difficult for the Tribunal to make any positive conclusions about the effect or details of that discussion.

161. Since there is no clear evidence to establish, on the balance of probabilities, what agreement, if any, was actually reached, and since Ms Clancy's evidence does not support the claimant's assertion that he told her that his salary was to be £35,000 for 3 days' work per week, I am unable to conclude that there was an agreement to vary the claimant's contractual terms of employment to this effect.

162. That conclusion is supported, in my judgment, by the discussion which took place between the claimant and Mr Muir on 15 April 2019, when it became apparent to the claimant that his pay was to be £30,000 rather than £35,000. The conversation between them, which began badly and

deteriorated rapidly, ended in chaos when Mr Muir, swearing at the claimant, told him to get out of his office and go and do some work.

163. In addressing the question of whether any agreement on salary had been reached by the parties, which is the only question I address at this stage, in my judgment the terms of this meeting, related both by Mr Muir and by the claimant, are clear evidence of little other than that they were in deeply entrenched disagreement about what the claimant was to be paid on the reduction of his working days. The way in which both protagonists dealt with this meeting was extremely unhelpful: Mr Muir became angry and raised his voice, thereby losing a degree of control over the discussion; and the claimant, though remaining calm, appears to have behaved in a persistently contrary manner which had the effect of provoking Mr Muir.

164. The claimant argued that the fact that his annual leave entitlement was not reduced pro rata was an indication that the respondent did not intend to reduce his salary pro rata. The reality of the evidence was that this was simply a matter to which the respondent paid no or little attention. Mr Muir said (and Mr Laverty confirmed this) that the practice within the firm is to treat solicitors as professionals and trust them to take their leave entitlement without being checked. While this is, again, a surprising attitude for a legal firm versed in employment law to take, I do not consider it to lead to any particular conclusion.

165. The claimant agreed a reduction in his working hours in 2017, and there was a clear agreement that this would result in a reduction in his salary. The evidence demonstrates that there was no commensurate reduction in his annual leave entitlement. When there was to be a further reduction in hours and salary in 2019, the fact that his annual leave entitlement remained the same simply shows that the issue was not considered, or not considered to be important.

166. The claimant's point is, at least in part, that he would have expected that if his salary was being reduced pro rata, so would his annual leave entitlement. The respondent's informal attitude towards that benefit means

that such a conclusion cannot be reached. So far as can be established, his annual leave entitlement was never reduced at all.

167. As a result, I am unable to conclude that the claimant has proved his case that there was a contractual agreement between himself and the respondent to the effect that he would, from the start of April 2019, work three days per week at an annual salary of £35,000. It cannot be said, on the evidence, that this was the agreed rate of pay.

168. I note at this point that the claimant plainly expected that as he was reducing his working days per week, there would be a reduction in his salary. That principle was accepted by him. It was the amount of the reduction with which he took issue.

169. The second aspect of this issue, then, is whether the respondent failed to pay the claimant's company sick pay.

170. The claimant, as has been noted, was never supplied with a written statement of terms and conditions of employment. As a result, there is no express term available to the Tribunal either in a contractual document or in any correspondence setting out that the claimant had any entitlement to contractual sick pay while absent from the office due to illness. The claimant has suggested that since other medium sized businesses provide such an entitlement to their employees, it is reasonable to infer that such a provision should be, or was, in his contract of employment. I am unable to sustain such a submission. What other employers provide for their employees cannot bind the respondent if they have not reached the same agreement with their own employees.

171. The essence of the claimant's case appeared to be that it was unfair for the respondent not to have paid him during his sickness absence, beyond the 2 weeks which they agreed, particularly given his years of loyal service to the business. There is no mention of this issue in the claimant's written submissions, but so far as the Tribunal is aware it remains a live issue.

172. The claimant does not specify that there was a written or verbal agreement reached between him and the respondent at any stage of his employment on which he could rely in establishing a basis upon which he should be paid longer than the 2 weeks agreed by Mr Laverty with him.

173. Since the claimant's argument is that the respondent should have paid him sick pay for a longer period, rather than that there was a contractual agreement which obliged them to do so, there can be no breach of contract in this regard. There is no express term in any of the documents before me, nor any evidence that a verbal agreement was reached at any stage, to the effect that the claimant should be paid more than 2 weeks in sick pay.

174. The claimant did not specify how long he considered he should have been paid sick pay for, other than to point at other companies who pay 6 months' full pay and 6 months' half pay during sickness absence. He could not identify any agreement by the respondent to this effect.

175. As a result, there is no basis upon which the respondent's decision only to pay the claimant for 2 weeks of his sickness absence could be said to amount to a breach of contract.

b. Did the instances relating to breach of trust and confidence so far as proved to have occurred, amount to conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee?

176. The breaches of trust and confidence have been identified as:

a. The alleged treatment of the claimant by Mr Muir at a meeting on 15 April 2019

b. The respondent's failure to consider the points raised by the claimant during the grievance process which the claimant describes as a "final straw".

177. The Tribunal must consider whether the conduct of the respondent, in either of these instances, was such as to entitle the claimant to resign immediately on the basis that he is not expected to put up with it, taking the whole conduct of the respondent into account.

5 178. The meeting of 15 April 2019 was, as I have previously indicated, a somewhat chaotic meeting, and establishing the precise facts of the meeting is very difficult. What is clear is that Mr Muir, by his own admission, did raise his voice and swore when speaking to the claimant. He denied that he was abusive in his treatment of the claimant.

10 179. The claimant was plainly very upset and annoyed by Mr Muir's conduct and language at the meeting. He came away from the meeting with the strong impression that Mr Muir did not think he was working hard or earning enough by way of fees. He was taken aback by Mr Muir's references to his fee income over the previous year, a matter which had not 15 been raised at the previous meeting nor since it, and thought that he was being accused both of coasting and of lying.

180. In my judgment, Mr Muir's conduct in this meeting was highly inappropriate, and may be judged to have been insulting towards the claimant. Notwithstanding that they had known each other for some years, 20 and that, as they both suggested, they could have robust discussions with each other; and notwithstanding that the claimant had acted in a provocative manner during the meeting, there was, as Mr Muir acknowledged, no excuse for him to raise his voice and swear at the claimant. Mr Muir did deny that he had sworn at the claimant, but in my 25 judgment, ending the meeting by telling the claimant to "get the fuck out of my office, get back to your own office and start earning more fucking money", or words to that effect, (as I have found were used) can only be interpreted as language directed at the claimant in an inappropriate manner.

181. The fact that Mr Muir telephoned the claimant the following day in 30 order to apologise to him confirms that he understood that he had behaved

in an inappropriate manner. He was unable to speak to the claimant because he declined to accept the call.

182. Did this amount to conduct which was repudiatory of the contract, to the extent that the claimant was entitled to resign without notice? It had an immediate and dramatic effect upon the claimant, in the sense that he was absent from work from the following day, and was signed unfit for work by his GP for a period of months until his resignation. He did not resign immediately, but did choose to submit a grievance, a matter to which I will return below.

183. In my judgment, Mr Muir's conduct at the meeting, which I accept he regretted and which took place in the heat of the moment, must be seen in its context. The claimant had clearly determined to avoid raising his voice, but his conduct was hostile and contrary towards Mr Muir. He accused Mr Muir of lying to him, an accusation which an experienced professional is unlikely to take well and which enraged Mr Muir. Mr Muir raised his voice and swore at the claimant at the conclusion of the meeting, which was the culmination of the exchanges between them. The claimant had no interest in compromise at that meeting, and it is my strong impression that Mr Muir was quite taken aback at the attitude demonstrated by a long-standing colleague whom he had regarded as a friend.

184. I have concluded that neither the claimant nor Mr Muir conducted themselves appropriately at that meeting, but that while Mr Muir crossed over a line by shouting and swearing, he only did so because of the passive aggressive behaviour of the claimant which was, in my judgment, designed to provoke Mr Muir into such a reaction.

185. As Mr McGuire argued, the claimant did not, in any event, resign in response to this meeting.

186. It is my judgment that the claimant's treatment at this meeting did not, of itself, amount to conduct by the respondent which was repudiatory of the fundamental terms and conditions of the contract of employment. It did demonstrate that there was a significant disagreement between the parties,

but neither acted thereafter, in the aftermath, in such a way as to suggest that the relationship was then beyond repair, or that it had been destroyed or seriously damaged such as to amount to repudiatory conduct.

187. The second aspect of the claimant's claim that there was a breach of the implied term of trust and confidence is that the respondent failed to consider the points made by the claimant in his grievance, which he regarded as the final straw.

188. As I understand it, the claimant is highly critical of Mr Fraser, and by extension Mr Laverty, for not upholding his grievance about the terms of the meeting of 15 April 2019, the failure to pay his salary at the agreed rate and the failure to pay his sick pay longer than 2 weeks.

189. Mr Fraser gave evidence before me, and presented in a straightforward and honest manner, which demonstrated that he approached his task with a degree of integrity. He sought to obtain statements from the witnesses identified as relevant, and listened carefully to the claimant as he set out his complaints in the grievance meeting. I do not accept the claimant's characterisation of Mr Fraser as having behaved in a hostile manner during that meeting. He took a careful and considered approach to his task, and in my judgment, he reached conclusions which were justifiable.

190. What is of significance in the context of this claim is that at the conclusion of his investigations into the grievance, he wrote to the claimant to confirm that he was not upholding the grievance, but then set out the claimant's proposals for his return to work (158). These included his return on 4 days a week at £40,000 per year, reimbursement of his wage loss while off ill, a change of supervisor to Mr Fraser rather than Mr Muir, and no reduction in his salary until reviewed in January 2020. In addition, Mr Fraser observed that there would need to be a "clear the air" meeting with Mr Muir, in order to establish that working relationship again in light of the accusations he had made in his grievance, and proposals as to how he would handle his relationship with Ms Clancy in light of the history there.

191. In my judgment, the accusation made by the claimant that Mr Fraser did not consider the points he made is factually incorrect. Mr Fraser, in my view, took a careful approach to the grievance, and listened both to the claimant's submissions and to the evidence he had obtained. He had to find an outcome which was justified on that evidence, and he did so. That he did not uphold the claimant's grievance does not amount to a fundamental breach of the implied term of trust and confidence.

192. It is also significant that what Mr Fraser narrated, following the meeting of 31 May, was a set of proposals put forward by the claimant to allow him to return to work. Included within that statement was confirmation that the claimant acknowledged the need for a meeting with Mr Muir in order to address the allegations he had made during the grievance, including, particularly, the suggestion that Ms Clancy and Mr Muir had colluded with each other in order to defeat the claimant's assertion that there had been an agreement as to salary at the meeting in January 2019.

193. Rather than resigning, the claimant was, by this stage, looking for ways to return to his employment with the respondent. The implication of these actions is that he would have done so had his conditions been accepted by the respondent, notwithstanding what he has argued was a fundamental breach of the employment relationship by Mr Muir in April 2019. In my judgment, this undermines the claimant's complaint that there was such a fundamental breach, since the claimant is clearly seeking to find a way to repair the relationship, with actions both by the respondent and himself involved. He wrote to Mr Fraser on 6 June 2019 to press him for a response before he submitted his appeal, which reinforces his intentions to return to work if he could obtain the conditions he was laying down.

194. Mr Fraser subsequently confirmed that while the grievance was not upheld, there was a way forward, and while the conditions he had proposed were not agreed, by discussion with Mr Muir and Mr Laverty there was some prospect of forging a way forward between the respondent and the claimant.

195. The claimant expressed his dissatisfaction particularly with Mr Fraser's conclusion that he had not been subjected to a level of abuse by Mr Muir at the meeting of 15 April 2019, despite acknowledging that he had raised his voice during that meeting. He said that Mr Fraser had ignored that part of his grievance (168). In my judgment, that is not a fair criticism. He had not reached the conclusion that Mr Muir's conduct was as the claimant had alleged, though he had accepted that he had raised his voice and sworn during the meeting. However, he did consider the evidence of Mr Muir as well as that of the claimant, and in my judgment it is unsurprising that he concluded that he could not sustain the grievance given that he had two conflicting versions of the meeting. He did not ignore that part of the grievance, however, but investigated it so far as was possible.

196. The grievance appeal appears to have been more satisfactory in the hearing by Mr Laverty to the claimant, but he was again disappointed by the outcome. It is my view that Mr Laverty did take consideration of the points raised by the claimant in the appeal, including that part of the grievance relating to his sick pay.

197. Mr Laverty conducted an equally careful and comprehensive exercise in dealing with the claimant's grievance, and came to the same conclusions as Mr Fraser. In so doing, in my judgment, his conduct did not amount to repudiatory conduct intended to demonstrate that the respondent no longer intended to be bound by the fundamental terms of the contract.

198. He went on, indeed, (180) to set out an agreement for the claimant to return to work, based on a number of conditions. It is important to remember the context of this letter. The original discussion about the claimant's pay following reduction in his hours took place in January 2019. Since that time, the claimant had engaged in the meeting of 15 April 2019, and the subsequent correspondence with the respondent, in the course of which he had accused Mr Muir and the cashier of having colluded over their statements, a serious allegation. The conditions put forward by the respondent included the condition that there would have to be a meeting to clear the air between them and address the allegation that Mr Muir had

been dishonest in his dealings with the claimant. The factors to be addressed in seeking to return the claimant to work with the respondent were wider than the issue of pay and hours.

199. Following receipt of that letter, the claimant decided to resign.

5 200. In my judgment, it cannot be concluded that the respondent handled the grievance in such a way as to ignore or fail to consider the points he had raised in that grievance. The claimant's perspective throughout this process was that he was not prepared to brook any disagreement as to the salary he would receive. He took the view that he could not continue to work on 10 £30,000 per annum, and he told the respondent this throughout. However, in my judgment, the handling of the grievance and the grievance appeal did not amount to repudiatory breaches of the implied term of trust and confidence. The respondent was, entirely legitimately, concerned to establish how their relationship with the claimant, which from their 15 perspective had been seriously damaged by his allegations of dishonesty against one of the senior partners of the firm, could be restored in any realistic way.

201. It is therefore my judgment that the respondent was not guilty of conduct which fundamentally undermined the implied term of trust and 20 confidence between employer and employee in this case. That the claimant was, in effect, negotiating a return to work following an impasse recognised that the relationship was not beyond repair and that had certain conditions been agreed, the actions which he said fundamentally undermined trust and confidence could have been overcome by the parties. The relationship was 25 damaged, no doubt, but not so seriously, in my judgment that the fundamental term of trust and confidence had been breached, partly due to the manner in which Mr Muir and the claimant were accustomed to speaking with each other, and partly due to the grievance process having been pursued by the claimant in the way he did.

30 202. I note the terms of the authority quoted to me by the claimant, **Gordon v J & D Pierce (Contracts) Ltd UKEATS/0010/20/SS**, in which it

was found that the fact that an employee takes up a grievance process does not mean that he has affirmed the breach of contract. However, I distinguish that case from the current case in two ways: firstly, I have not found that there was a fundamental breach of contract which the claimant in this case could have affirmed; but secondly, even if I am wrong about that, any affirmation of that breach arises in this case not from the fact that the claimant raised a grievance but that during it he sought to discuss and agree with the respondent the terms of his return to work.

203. I have concluded that the fact that the claimant did not resign in response to what he argued amounted to repudiatory conduct by Mr Muir at the meeting of 15 April 2019, and that he subsequently sought to negotiate a route whereby he could return to work, are both important indications which were inconsistent with his argument that the contractual relationship was destroyed or seriously damaged by breaches of contract by the respondent.

c. **If so, was there a reasonable and proper cause for that conduct?**

d. **If not, and there was therefore a fundamental breach of contract, did that conduct cause the claimant's resignation (then being noted that it need not be the sole cause)?**

e. **If there was a fundamental breach, did the claimant resign in response to it?**

f. **What remedy if any should be awarded?**

204. In light of my conclusions above, I take these final issues together. Since I have not found that there was a fundamental breach of the claimant's contract of employment, either on the basis of the express or implied terms, it follows that none of these questions fall to be answered.

205. This is a case which has resulted in a most unfortunate severing of a longstanding professional and personal relationship between the claimant and the respondent. It is not for the Tribunal to express regret that the

parties have found themselves at such a pass when better communication between them at all stages, and clearer communication about the contractual terms and conditions upon which the relationship was based, might have been expected to bring about a mutually satisfactory conclusion. While the parties before me conducted themselves in a professional manner, there were times when it was apparent that very strong feeling exists between the main protagonists, which may not have been moderated by or during the Tribunal process.

206. However, on the evidence before me, it is my judgment that the claimant's claim of constructive unfair dismissal must fail, and be dismissed.

Employment Judge:	**M Macleod**
Date of Judgment:	**10 February 2022**
Date sent to parties:	**11 February 2022**