EMPLOYMENT TRIBUNALS

Claimant: Mr S Heaton

Respondent: Alan Howard (Stockport) Limited

Heard at: Liverpool (by CVP) **On:** 12 and 13 September 2022
16 January 2023
21 February 2023
29 March 2023
(In Chambers)

Before: Employment Judge Ganner

REPRESENTATION:

Claimant: Mr D Jones (Counsel)
Respondent: Mr R Cater (Consultant)

JUDGMENT

The judgment of the Tribunal is:

1. The complaint of unfair dismissal by way of a constructive dismissal contrary to Part X of the Employment Rights Act 1996 fails and is dismissed.

2. The complaint of unauthorised deductions from pay contrary to Part II of the Employment Rights Act 1996 in respect of the period 9 June 2021 to 19 October 2021 fails and is dismissed.

3. The complaint of breach of contract in relation to notice pay fails and is dismissed.

REASONS

Introduction

1. By his claim form presented on 2 March 2022, the claimant complained of constructive unfair dismissal, unlawful deductions from pay and breach of contract in relation to notice pay.

2. By its undated response form, the respondent denied the claims in their entirety, contending there had been no fundamental breach of contract that entitled the claimant to treat his resignation as a dismissal and that the claimant was not owed any money in respect of wages, nor was the claimant entitled to notice pay.

3. The final hearing took place 12 and 13 September 2022 and was then adjourned part-heard to 14 October 2022 a date, which, through no fault of the parties was changed to 2 December 2022. On 1 December 2022 the respondent sought a postponement on the ground that it had not received the notice of hearing which, it said, had been incorrectly sent to the inbox of their representative who had then left the business. The matter remained listed.

4. On 2 December 2022, Mr Cater attended on behalf of the respondent. He sought an adjournment on the grounds he had just been instructed and needed more time to prepare the matter effectively. He now conceded the respondent accepted it was at fault and stated it was willing to pay the claimant's wasted legal costs should the hearing not proceed. On that basis and giving effect to the overriding objective to deal with the case fairly and justly, I granted the application and relisted the hearing for the 16 January 2023 when it was resumed. The matter was further adjourned part-heard until 21 February 2023 when the evidence concluded and a timetable was set for the exchange of written submissions and replies. Once these documents were received, the matter was listed for deliberation on 29 March 2023 with reserved judgment to follow.

5. I wish to express my gratitude to both Mr Jones and Mr Cater for their co-operation with each other and the Tribunal in the period between 2 December 2022 and 16 January 2023. It was also evident from the depth and structure of his written submissions, that Mr Jones had taken care to ensure his opponent had the full picture of the hearing that Mr Cater's predecessor had attended. Mr Cater found himself in the difficult position of taking up the reins of a part heard case from another representative. That situation could have placed his client at a disadvantage and the fact it did not do so was down to the cooperation to which I have just referred.

6. I wish to apologise to the parties for the length of time it has taken to prepare this judgment which has in part been due to the pressure of other judicial work.

The Issues

7. The particulars of claim argued there had been a constructive dismissal based on a series of actions dating back to 2014 which "collectively" amounted to a fundamental breach and which continued until a grievance appeal outcome which was "the last straw" immediately prior to the claimant's resignation in October 2021. The wages claim pleaded breach of an implied term of contract based on custom and practice.

8. At the outset of the hearing, I sought clarification of the factual allegations regarding the constructive unfair dismissal claim and asked the parties to try and agree a list of issues overall.

9. Mr Jones, lacking wholehearted co-operation from the respondent's former legal representative, provided his draft list which began with factual allegations to do with the Coronavirus Jobs Retention Scheme that began in March 2020 and ended

in October 2021 as before. In his final written submissions Mr Jones narrowed the issues to three strands any single or combination of which amounted to a fundamental breach that enable the claim to succeed. These were summarised as follows:

(1) A failure to pay the claimant company sick pay for the period 9 June 2021 until 19 October 2021, the date of his resignation/dismissal; and/or

(2) Issuing the claimant with a disciplinary sanction without reasonable and proper cause; and/or

(3) Failing to provide the claimant with a reasonable opportunity to redress his grievance.

10. A revised List of Issues was annexed to the written submissions as follows:

Constructive Dismissal

1. Can the claimant prove that there was a dismissal on 19 October 2021 (EDT)? (A copy of the claimant's resignation is at (312-314)).

2. Did the respondent do the following things:

Disciplinary action against claimant.

a. Commenced a disciplinary investigation into the claimant's conduct on 25 May 2021;

b. On 8 June 2021, informed the claimant that he was required to attend a disciplinary hearing (191);

c. Issued the claimant with a written warning on 17 June 2021 (203), a conclusion that no reasonable employer could have reached in the circumstances;

d. At the end of the disciplinary hearing, Jonathan Littler sought to explore redeployment opportunities with the claimant;

e. On 25 June 2021, Jonathan Littler pressurising the claimant into accepting a lesser role of BDM covering FY, LA and CA territories (211-215);

f. The respondent failed to give due consideration to the claimant's disciplinary appeal;

g. The respondent dismissed the claimant's disciplinary appeal on 2 July 2021 (231), a conclusion that no reasonable employer could have reached in the circumstances.

Company sick pay

h. The respondent failed to pay to the claimant company sick pay (being his full salary) for the period 9 June 2021 to EDT (223);

Grievance

i. The respondent failed to promptly and reasonably investigate the claimant's concerns outlined in his grievance dated 16 August 2021 (249-254);

j. The respondent failed to deal with the claimant's grievance in a fair manner by appointing Kim Hobson to determine the grievance who was not independent

and providing an outcome without further reference to the claimant following the original grievance being submitted;

Grievance appeal

k. The respondent failed to promptly and reasonably investigate the claimant's concerns outlined in his grievance appeal dated 9 September 2021 (267-269); and

l. The respondent reached a conclusion that no reasonable employer could have reached in the circumstances in rejecting the claimant's Grievance and subsequent appeal in full, the latter by a report dated 7 October 2021 (293-311) (last straw).

3. Did that course of conduct (either singularly or cumulatively) breach the implied term of trust and confidence? Taking into account the actions or omissions alleged in the previous paragraph, individually and cumulatively, the Tribunal will need to decide:

a. Whether the respondent had reasonable and proper cause for those actions or omissions, and if not;

b. Whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

4. Was the breach a fundamental one?

5. Was the fundamental breach of contract a reason for the claimant's resignation?

6. Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

7. If successful, how much should the claimant receive from the respondent by way of compensation?

Unlawful deductions from Wages

8. Was it an implied term of the claimant's contract of employment that during periods of sickness absence, he would receive full pay?

9. If so, was it a fundamental term?

10. If so, did the claimant resign in part in response to a breach of that fundamental term?

11. If so, was the claimant entitled to be paid in full for the period 29 June 2021 to EDT as opposed to statutory sick pay?

12. If so, how much is due to be paid to the claimant?

11. The revised List of Issues no longer sought to argue that the CJRS matters amounted to a fundamental breach though some of those factual issues remained relevant to the grievance outcome. In respect of that grievance outcome the list differed from the pleaded case in so far as it was no longer put as mere "straw" but as one of the alleged fundamental breaches.

Evidence

12. There was an agreed bundle of documents which ran to 642 pages and any reference in this Judgment to page numbers in brackets is a reference to that

bundle. A small number of additional documents were introduced during the hearings, and these will be identified where necessary.

13. The claimant gave evidence on his own account and the respondent's evidence was given by Mr Jonathan Littler, Director, and Ms Kim Hobson, HR.

Relevant Legal Principles – Employment Rights Act 1996

Constructive Unfair Dismissal

14. The constructive unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed. The circumstances in which an employee is dismissed are defined by Section 95.

15. Section 95(1)(c) provides that an employee is dismissed by his employer if:

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

16. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat herself as constructively dismissed only 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.

17. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1998] AC 20** the House of Lords considered the scope of that implied term and Lord Nicholls expressed it as being that the employer would not:

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

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

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

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

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

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

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

21. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal reaffirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

22. Of course, even if the last straw turns out to be innocuous or trivial, there might still have been a constructive dismissal if previous conduct amounted to a fundamental breach which has not been affirmed: **Williams v Alderman Davies Church in Wales Primary School UKEAT/0108/19/LA**

23. There is also an implied term that an employer will reasonably and promptly give employees an opportunity to seek redress for any grievance: **Goold WA (Pearmak) Ltd v McConnell [1995] IRLR 516.** Alternatively, failure to handle a grievance properly might amount to breach of the implied term as to trust and confidence if serious enough to be repudiatory.

Unlawful Deduction from Wages

24. The Employment Right Act 1996 states at section 13:

Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless —

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

25. "Wages" are defined in Section 27 of the Employment Rights Act and mean "any sums payable to the worker in connection with his employment". It includes contractual or Statutory Sick Pay.

Notice Pay

26. The amount of notice to which an employee is entitled on termination of the employment contract is normally set out as an express term of the contract and should be recorded in the written statement of terms and conditions issued under section 1 of the Employment Rights Act 1996 ("ERA") .

27. A claim for notice pay is a claim for breach of contract.

Relevant Factual Findings

28. The claimant was employed as a sales manager for the respondent between 9 April 2008 until his resignation on 19 October 2021.

29. The respondent is a family-owned business headed by its chief executive officer Mr Howard Littler but effectively run by his two sons Mr Anton Littler and Mr Jonathan Littler the latter having recruited the claimant to the business and been his line manager throughout. The company has approximately 240 employees. In 2019 it had a turnover of £39 million which reduced to £32 million in 2021 because of a downturn in business caused by the pandemic.

30. I consider the most logical way to set out my findings of fact is by reference to alleged 3 fundamental breaches dealing with undisputed matters first and then moving on to the resolution and determination of contentious matters.

31. The credibility of witnesses and their recollection of conversations that took place many years ago lies very much at the heart of this case. In these circumstances I remind myself of the need to consider documents where they exist and the consistency of evidence with the surrounding facts.

32. Although I do not intend to make a global finding of credibility in respect of either of the principal witnesses, it will in the end be necessary to stand back and look at the totality of the circumstances when considering whose version is substantially true.

Failure to pay company sick pay for the period 9 June 2021 to 19 October 2021

33. The handbook (52-53) which formed part of the claimant's contract of employment provided as follows:

> "1. You are entitled to statutory sick pay if you are absent for four or more consecutive days because of sickness or injury, provided you meet the statutory qualifying conditions.
>
> 2. You must notify us by telephone on the first day of incapacity at the earliest possible opportunity and by no later than the start of your shift.
>
> 3. You should try and give some indication of your expected return date and notify us as soon as possible if this date changes. The notification procedure should be followed on each day of absence unless you are covered by a medical certificate.
>
> 4. If your incapacity extends to more than seven days you are required to notify us of your continued incapacity once a week thereafter unless otherwise agreed.
>
> 5. Medical certificates are not issued for short-term incapacity. In these cases of incapacity, up to and including seven calendar days, you must sign a self certification absence form on your return to work.
>
> 6. If your sickness has been, or you know that it will be, for longer than seven days…you should see your doctor and make sure he/she gives you a medical certificate and forward this to us without delay. Subsequently you must supply us with consecutive medical certificates to cover the whole of your absence."

34. A copy of the claimant's statement of main terms of employment (64-69) was signed by him on 5 August 2014. This document states *inter alia*:

> "There is no contractual sickness/injury payment scheme in addition to SSP. Any additional payments which may be made will be at our absolute discretion."

35. On 9 June 2021, the claimant went off sick from work claiming stress and anxiety. He never returned. His GP signed him off for work on various dates thereafter. He received statutory sick pay until his resignation in October 2021.

36. On 19 July 2021, the claimant's solicitors sent a letter claiming unlawful deduction of wages based on the contention that when absent through sickness "he has always received company sick pay". The letter went on to say:

> "Our client's entitlement to company sick pay on his full salary is an implied term in his employment contract due to a clear and established custom and practice. Your failure to pay such sums is a breach of our client's employment contract and an unlawful deduction from wages under the Employment Rights Act 1996, both of which are directly actionable by our client in the Tribunal."

37. In the light of the above our client requires you, by no later than seven days from the date of this letter to:

> (1) pay our client the sum owed for his company sick pay from the beginning of his absence to date.
>
> (2) confirm that our client will receive company sick pay for the remainder of his sickness absence going forward." (Pages 237-238)

38. On 21 July 2021, Ms Kim Hobson, the respondent's HR Manager, sent an email to Beverley Berry (239-240) which reads as follows:

> "Hi Bev,
>
> Can you confirm Steven Heaton has had no recorded periods of absence and that he has not been paid for any period of absence? I have been asked to doublecheck before responding to him there are no periods of absence on the HR system."

39. On 23 July 2021 Ms Hobson wrote to the claimant (241-242) as follows:

> "I am emailing you to respond to the letter we have received from a solicitor...The letter states you have always received company sick pay – I have gone back through to 2017 on the HR portal and there is not one instance of recorded absence on there. I have also asked payroll to check back through their records and in six years of going back they have also confirmed they have not had any recorded sickness absence for you, so I am unsure where you feel you have had sickness absence that has previously been paid. At any time, you or any other employee are not well enough to attend work, as is the case presently, this is recorded on our HR system and on payroll spreadsheets.
>
> As per company contracts, yours included, and also reiterated in the company handbook which you can access at any time through the HR portal, it states that sickness absence is covered by SSP. This applies to any level of the company. When we have had Sales Managers off previously with sickness absence, they have also only received SSP.
>
> The solicitor's letter states that a number of other colleagues always receive full pay when unable to attend work. I am unsure where you are getting this information from as the only time an employee would receive any discretionary payments (and this would not usually be ongoing indefinite payments) would be in extreme mitigating circumstances, examples being a long-term employee having a stroke, heart attack, cancer or some other potentially life-threatening illness. If this is something you have done for your own team members in the past then this is not a standard company policy,

> and any payments should have been agreed and discussed what the circumstances are with your manager."

40. On 16 August 2021, the claimant wrote to the respondent in respect of a number of grievances concerning his employment (250-253). In relation to the issue of wages, the claimant wrote as follows:

> "The tone and wording of the email implies I was dishonest in relation to my sickness absence and payment procedures in the past. However, I have been off sick during this period and if this has not been recorded on the system this is through no fault of my own. The implication that I am lying about this has caused further stress and anxiety. Although this should be unnecessary, I can confirm that my dates of absence were as follows:
>
> 1. April 2009 – food poisoning (paid in full).
>
> 2. October 2016 – stress reaction (paid in full).
>
> 3. March 2019 – hospital admission due to stress (paid in full).
>
> On each occasion I was paid full pay and I have both information from my doctor and wage slips to prove this.
>
> I hope providing such confidential and sensitive information regarding my health does not become necessary to show I have been receipt of sick pay and have not been dishonest in this regard.
>
> The email also implies I have paid sick pay to members of my team without authority. I am aware that Dean Harris and Jason Spicket were paid full pay whilst off sick for stress and a broken ankle respectively. I did submit the timesheets for this but only with the approval of Jonathan [Littler] and payments were made by payroll. Both of these conditions were not long-term life-threatening illnesses and are contrary to the alleged policy you appear to be relying on in your email…The stress of this whole unfortunate situation has affected me to such an extent that I have been made unwell and have been signed as unfit for work by my GP until 24 August 2021 with stress and anxiety."

<u>Disputed Evidence-Sick Pay</u>

41. There was a sharp divergence of evidence between the claimant on the one hand and Mr Jonathan Littler (Director) on the other.

42. The claimant's case was that full sick pay was one of the benefits of working for the respondent and formed part of a package when he first joined the company. He said this was borne out by subsequent events because he reported and obtained authority for full payment in respect of both his own sickness absences and those of select colleagues. In his witness statement he said:

> "As far as I was aware, it was company practice to pay full pay during periods of sickness absence rather than SSP to certain members of the team, namely Sue King, Dean Harris, Jason Spicket and myself. To me it was one of the

benefits of working for Alan Howard and formed part of the package when I first joined."

43. He went on to say, in relation to pay, he instructed solicitors "as I had understood that I was entitled to full company sick pay as an implied term under my contract of employment due to the fact that this had always been paid to me on previous occasions of absence".

44. In his oral evidence, the claimant expanded upon his recollection of a verbal agreement with Mr Jonathan Littler when negotiating a package for himself and his colleagues. He said that Dean Harris, Sue King and himself were considered in what he described to be in Mr Littler's words," not mine", as "an elite sales team with higher basic wages and health insurance together with preferential treatment which would mean they would be paid in full when off sick".

45. Mr Littler's position was that there had been no discussion, let alone agreement as to full sick pay. If the claimant or his colleagues went off sick, they were only entitled to claim Statutory Sick Pay as per company policy. He had never authorised full sick pay to the claimant and had only exercised his discretion to do so in respect of others in exceptional circumstances.

46. His oral evidence was as follows: the claimant was part of a group of rival salespersons who had approached him back in 2008 when expressing dissatisfaction with their then employers. The group was originally five in number but eventually went down to three, leaving the claimant, Sue King and Dean Harris. He described the claimant as the spokesperson and following discussions with his brother, Anton, it was agreed they would join the company on an attractive package. They wanted to call themselves "the elite team" and put that on their business cards. Mr Littler said he was more interested in how they performed rather than their self-chosen title but was happy to agree to their suggestion. The claimant was happy with the deal, being confident he would achieve good earnings based on the agreement as to uncapped commission. An agreement was reached as to private medical insurance which Mr Littler said was not something which would normally be offered, save to family, and the group were also given enhanced holiday entitlement of 25 days instead of 20.

47. It was put to Mr Littler in cross examination that full sick pay was also part of the deal but this was flatly denied by him. He stated that the company would never agree to pay a new employee sick pay at the outset of employment and commented that if the matter had been raised that would have rung alarm bells in his mind.

48. Mr Littler then referred to an "offer letter" which he thought would have reflected the terms he had just described in evidence. Mr Jones understandably challenged Mr Littler about the letter asking where it was in the bundle, or indeed in his witness statement. Mr Littler initially struggled to lay his hands on the document and requested time to do so over the recess when he would be able to look at his computer and contact the office HR, etc. At this point Mr Jones stated his client's instructions was that the letter did not exist. At a later point in the day the letter was found and served on the claimant and the Tribunal. No objection was taken to the admissibility of this lately produced document. The letter was dated 6 March 2008 and read as follows:

"Dear Steve

> Thank you for your recent meeting. I am pleased to offer you a Sales Manager's role within our existing team. The job is offered on a six month probation basis. The job will involve building new business of specialised lines…
>
> Your basic salary will be £36,000 per annum plus a commission of 20% of the profit on the product mentioned above.
>
> The job will include a car allowance of £550 per month, PPP private healthcare and a welcome one-off payment of £10,000 after your first full month with the company. This is only repayable should you leave within the first six months.
>
> Your holiday entitlement will be 25 days plus all statutory Bank Holidays…
>
> I look forward to hearing from you in the near future. If you would like to discuss any matter further, please do not hesitate to contact me.
>
> Yours sincerely
>
> Jonathan Littler"

49. I prefer Mr Littler's version as to the terms of the oral agreement and find that there was no agreement to give the claimant or any member of his team the right to full company pay when sick. His point that such a discussion would have triggered alarm bells in his mind was persuasive but more important were the documents to which he referred.

50. Had the oral agreement alleged by the claimant been made, one might reasonably have expected to see it reproduced in the job offer letter and/or the contract of employment but it was in neither. The original contract was not in the bundle, but it was accepted that document only referred to SSP.

51. More tellingly, only SSP is recorded as the claimant's entitlement in the statement of main terms and conditions (64-69) that he signed on 5 August 2014**,** 6 years after he joined the company. Mr Littler said this document may have been requested by the claimant to regularise his position, although it could equally have been something that was just an administrative catch-up. Whatever the position, I do not consider it likely this term would have been signed up to by the claimant unless it reflected his understanding of the contractual position.

52. I now turn to the claimant's evidence that, whatever the position in written documents some kind of custom and practice had developed in which he reported both his own sickness absences and those of certain colleagues who then invariably received full pay.

53. It is true that the claimant was paid in full in respect of all his stated absences between 2009 and 2020. Mr Littler did not contend the claimant had never been off sick but struggled to recall most of the occasions in question. He reiterated that as the claimant's line manager, sickness should have been reported to him on the day in terms of the company procedure. A great deal was done on trust and he did not closely manage the claimant given his senior position. Mr Littler said they

spoke/emailed on a regular basis and in more recent times they used to meet once a fortnight at his house.

54. I proceed to make findings in respect of the alleged dates of absence, both in relation to the claimant himself and those colleagues for whom he "authorised" payments.

Mr Heaton's sickness absences

April 2009

55. This was a food poisoning absence for which the claimant was paid in full and since it was such a long time ago it is understandable that the claimant appeared vague about the length of the time, he said he was not at work. In his witness statement he referenced a "prolonged" period of sickness. In evidence and cross examination, the time frame was variously put as being anything between one, two and up to three weeks. The sick notes produced by the claimant (316-317) are both dated 6 April 2009 but do not state a period of absence.

56. Mr Littler was not able to say whether the claimant had taken some time off sick but could say he had not done so and under the applicable procedure at that time which was to report them on a from or in an email which would then go to payroll. There was no record of this. Moreover, Mr Littler said if this matter *had* been reported to him the year 2009 was still at a very early point in the claimant's career and the rules would have been applied by the letter. He described full sick pay payment as a "red line" which he would never have crossed. He therefore was sure the claimant had *not* told him about the matter.

57. In the absence of any supportive documentation and given the stated position of Mr Littler that adherence to the policy would have been strict in the above circumstances, I find that the absence was not reported to Mr Littler who therefore did not authorise the full payment the claimant got.

October 2016

58. Turning to the October 2016 reported absence, the claimant's evidence was that he had a stress reaction and took "some time off work". This was clarified as being a five-day period which is what he told the grievance procedure. There is a doctor's note dated 10/10/16 with a given history which included an entry "busy at work and lots on at home" and references other lifestyle matters (page 617). The claimant produced a payslip showing full pay (614).

59. In his grievance the claimant (302) told Anton [Littler] he was on the edge at the time. Mr Anton did not give evidence. All Mr Jonathan Littler could say is that the matter was not reported to himself as the line manager nor payroll in accordance with company procedure. He produced the applicable spreadsheets (…) which had no entries concerning this absence.

60. I find the claimant did likely take five days off but that full sick pay was neither properly notified nor duly authorised.

March 2019

61. In March 2019, the claimant said he had become unwell, suffering panic attacks and a suspected heart attack, resulting in him spending a day in hospital. His evidence was that he was upset the company did nothing to support him during that time. He said the heart attack occurred on the Friday and he had the weekend to recover, returning to work on the Monday. He told both the Tribunal and the grievance that he had told the company about this admission. No medical evidence has been provided to the Tribunal to confirm this hospital admission, nor was any submitted to the grievance.

62. Mr Littler told the Tribunal that if the claimant had reported this, he would have authorised payment in full as an exception. He would have remembered if told something as drastic as a suspected heart attack had befallen the claimant, and insisted this matter was never brought to his attention until the post disciplinary grievance letter. He also produced the spreadsheet relating to the period in question and confirmed it contained no reference to absence on that day.

63. Ms Kim Hobson told the Tribunal that a new HR System had been set up in 2017 and all absences were recorded to show they were the same as the information provided on the managers' individual wages forms. There were no absences recorded on that system for the claimant at any time (302-grievance outcome).

64. Mr Littler also said there was nothing documented on the HR system then in operation that would back up the claimant's assertion in his witness statement that he had reported this in the "correct" manner.

65. My finding is that the claimant did not inform Mr Littler of his suspected heart attack, either at the time or indeed shortly after. This event was as recent as 2019 and I am satisfied Mr Littler would have remembered this if it had been brought to his attention in any way.

March 2020

66. The claimant then referenced having suffered a panic attack on 4 September 2020 just before he was due to conduct a remote sales meeting with his team. He managed to get a team member to conduct the meeting in his absence and got his wife to attempt to contact Mr Jonathan Littler on the phone but he did not answer and she then sent him a text message indicating that he had sorted out a replacement. He stated there was no reply to the text. He was paid in full for this absence.

67. Mr Littler told the Tribunal he did not get the message immediately but called back at a later point. His position was that the claimant may not have been technically off sick at all as he was on flexi furlough at that time and was paid on an hourly basis. In these circumstances I am unable to determine whether this was classed as an absence from work.

Sick pay authorisation to Mr Heaton's colleagues

68. The claimant went on to say that as Sales Manager he was responsible for submitting wages for his Business Development Managers. He was aware that both Jason Spicket and Dean Harris were off sick for periods of 2018 and as required submitted their wage information using the Excel spreadsheet provided by the company. He went on to say that "as instructed by Jonathan Littler I confirmed them

to be on sick leave and requested they receive full pay not SSP". (73-75, 82-83). It was clearly put to Mr Littler in cross examination that the claimant considered this was the company practice for favoured members of the team.

69. Mr Littler's position on this was as before, company policy was to pay SSP only and only in rare circumstances did he exercise his discretion to pay full sick pay. He referred to a document which he said reflected this approach in practice namely a letter dated 6 April 2016 (340) to Carol, an employee on the claimant's team . The letter stated, "As you know we do not pay full sick pay unless in extreme circumstances such as your cancer treatment which is viewed differently by the company for obvious reasons."

70. As regards the suggestion put to him by Mr Jones that members of the elite team were always paid in full Mr Littler felt that was an angle put forward by the claimant to his colleagues Sue and Dean with whom he had previously worked at Power Promotions. Mr Littler pointed out that the claimant had also paid Jason Spicket who had been to school with the claimant. He referenced the payment in paragraph 68 above where the claimant had authorised full sick pay for Mr Spicket as follows: *2-13 sick pay (leg).* Mr Littler added this payment was authorised by the claimant but that it was "not in his gift" to do so.

71. Mr Littler's belief that the claimant was misusing the system became apparent in an email sent to Beverley Berry, copying in Kim Hobson and the claimant. (98). Mr Littler stated it came as a shock to him that the claimant had "looked after" his friends on a number of occasions. He said that on or about 5 December 2019 he had discovered the claimant had authorised full sick pay to Dean Harris. He had a conversation with Mr Harris confirming this was **not** the company position. He sent an email clarifying the position as follows:

> "Hi everyone
>
> Just to let you know I have had a conversation with Dean this morning and I have explained our stance on sick pay. On this occasion I have agreed only to deduct two days as opposed to four as a gesture of goodwill, however he is now aware of the company's position moving forward."

72. It was put to Mr Littler the *claimant* had not been minded to approve full payment but Mr Littler had considered it appropriate to do so and made the authorisation. Mr Littler denied this and was eventually able to find a wage sheet (400) which he said indicated that it was the claimant who had authorised the 4 days in question.

73. Mr Littler went on to explain he made his gesture of goodwill to pay Dean Harris the 2 days full sick pay as he believed the latter was genuinely aggrieved at being paid less than the full amount which he regarded as an "entitlement". Mr Littler referenced the fact that Dean Harris had had a heart attack back in 2009 when he had authorised full sick pay and it concerned him that this might be happening again

74. Mr Littler said he then went on to have a conversation with the claimant "clarifying" the company position which was that employees did **not** get full sick pay and if they did it was a discretionary matter. He said the claimant had asked "what about" senior managers such as himself and was told both he and other managers one of whom he named got SSP only. Mr Littler was challenged along the lines that if

he had to "clarify" this matter it followed the position pre-December 2019 must have been ambiguous in his mind and this was inconsistent with the clear policy he sought to portray to the Tribunal. Mr Littler responded to this by saying he should not have needed to clarify anything, and it was only because the claimant had been "called out" on this matter that he had to meet up with Dean and explain the correct position.

75. Mr Littler also produced later pay records 2022 that showed only SSP was paid to Mr Harris.

76. Once again, the documentary evidence is more supportive of the respondent's case. I consider the evidence of Mr Littler more credible and consistent than that of the claimant whose evidence concerning authorisations of full sick pay is inconsistent especially in relation to Mr Spicket whom the claimant referred to as a member of a "special team" in his witness statement at the same time as accepting he was *not* one of the "elite team" who got a package which included full sick pay back in 2008 .

77. For these reasons, I find Mr Littler did not routinely "instruct" full pay in relation to members of the claimant's team.

Disciplinary

78. The respondent had a disciplinary policy (58-61) which provided *inter alia*:

> "4(d) You will only be disciplined after a careful investigation of the facts and the opportunity to present your side of case.
>
> (g) If you are disciplined you will receive an explanation of the penalty imposed and you will have the right to appeal against the finding and the penalty."

79. The rules covering misconduct indicated that bullying was an offence which ranged in gravity between ordinary misconduct and gross misconduct, which in a serious instance would normally result in dismissal. Unsatisfactory standards or output of work was classified as misconduct or serious misconduct depending again on the gravity of the matter.

80. On 17 May 2021, an exit interview (183-184) was conducted in respect of an employee, Mr Simon Baptist, who had decided to leave the company, giving as one of the reasons the breakdown in his relationship with the claimant. Mr Baptist alleged he had been bullied by the claimant over the years, had constantly worked in fear, been intentionally embarrassed in front of his peers and further alleged that the claimant was incompetent of running a "modern sales team". Mr Baptist said he spent every day dreading the claimant doing an accompaniment and that his happiest days were the few days after the claimant had been with him, knowing that he had a few weeks before the next one. He stated he constantly worried about what the claimant would do and what sort of person the claimant would be when he turned up – either the jovial or the aggressive and intimidating one.

81. Mr Baptist gave a detailed and specific account of the allegations of bullying in respect of a successful contract/account he had got following a joint visit with the claimant to a salon in Poulton-le-Fylde. He alleged the claimant took the credit for getting the contract and embarrassed him in front of the rest of the sales team by

publicly stating, “that was one I won for you” and rolled his eyes. Mr Baptist went on to say that in December 2020 the claimant had asked him to buy a Christmas gift for the salon owner in question. The claimant suggested a bottle of champagne, but Mr Baptist had to explain that he was struggling to buy presents for his family so could not afford to buy them for salons. The claimant offered to give Mr Baptiste a bottle of champagne for him to give to the salon owner.

82. In a subsequent sales meeting, the claimant asked Mr Baptist what he had done to “go the extra mile to obtain the account in question”. Playing along with this, Mr Baptist responded by telling the team about the gesture he had made to which the claimant's response was, “you didn’t buy the champagne though, did you, as you couldn’t afford it?”. Mr Baptiste said this left him feeling belittled and was another example of everything always having to be about the claimant.

83. Mr Baptist spoke of regular belittlement at sales meetings by the claimant and went on to say the morale of the team was “on the floor” and that no-one enjoyed working with the claimant and at least four salespeople would be resigning shortly.

84. On 19 May 2021, an exit interview (185-186) was conducted with another employee who had decided to leave the company, Mr Paul Breslin. He did not allege bullying against himself but did accuse the claimant of bullying five named employees, including Mr Baptist. He said the issue with the claimant was that if you rang him for help or any issue, he “just passes the problem back”. He said the claimant was never organised for meetings and it would normally take him 20 minutes to get his presentation onto the screen. Mr Breslin felt the claimant did the bare minimum and was toxic and controlling, managing by fear.

85. Mr Breslin said the claimant lived in the past and reminisced about years gone by, not accepting things had changed. He also said that when CRM and the report server were introduced, he had been given no training and just had to teach himself.

86. When asked to be more specific about bullying, Mr Breslin spoke about how the claimant had belittled Mr Baptiste in every meeting and how the claimant had won the Poulton-le-Fylde account and not Mr Baptist who, he said, had been sworn at in his appraisal. Mr Baptist said the claimant belittled another employee at the same time.

87. On 25 May 2021, an investigatory meeting (187-189) took place following these allegations. The meeting summarised the areas of real concern as follows:

(1) 4-6 BDMs were actively looking to leave the company in addition to Messrs Breslin and Baptist .

(2) Morale within the team was at an all-time low.

(3) Feelings of victimisation and bullying.

88. It was made clear that the biggest concern was those made by the two leavers and the allegations were put to the claimant in full. The record of the investigatory meeting recited detail of another bullying incident that had been drawn to Mr Littler’s attention where the claimant was said to have bought an employee a new pair of shoes as a good deed but later had told other people in the business about his generosity, causing potential embarrassment to the employee in question.

The claimant is recorded as having admitted being annoyed at himself for the incidents referred to, showing a "lack of class". He did not however believe that Mr Baptist should be credited with winning an account if he had not done the work for it.

89. The record of the investigation meeting also refers to a conversation with Mr Littler during the second lockdown about how the claimant had lost the team, that he should use this lockdown to regularly speak with them and that he now had a second chance to put things right, which he had not done in the first lockdown. The claimant responded he had been in regular contact with everyone and thought morale within the team was upbeat.

90. The investigatory meeting concluded with Mr Littler explaining that he would be contacting all team members to gauge the temperature within themselves.

91. The disciplinary points that arose from the meeting were "wrapped up" in a written summary (187) of the allegations. The first allegation was of bullying and belittling behaviour, and largely reproduced the matters brought up in the above exit interviews. The second allegation was of failure to manage and maintain a strong relationship with the team, and encompassed the matter contained in Mr Breslin's exit interview plus allegations arising from observations sourced from other team members who had said morale was extremely low. The third allegation was one of failure to carry out basic management requests referenced in Mr Breslin's exit interview in terms of receiving little training for CRM, forcing him to work it out for himself, and a failure to rebuild relationships during the latest lockdown as requested by Mr Littler (January to April 2021). It included observations that had been made to the investigation from team members who said they had not spoken to the claimant in this year and that he had failed to accompany sales team members on visits on a regular basis.

92. On 8 June 2021, (191) the claimant was required to attend a disciplinary meeting to discuss the three matters of concern set out above. The letter indicated that if the allegations were substantiated the respondent would regard them as serious misconduct. The letter enclosed the notes of the investigation meeting of 25 May together with copies of the exit interviews of Mr Baptist and Mr Breslin. The letter stated the hearing would be conducted by Jonathan Littler and Paul Brooks, and that Ms Hobson of HR would be in attendance as the notetaker. The letter indicated that if the claimant was unable to provide a satisfactory explanation for the matters of concern set out above, he could be given a penalty ranging from a warning to a final written warning if deemed appropriate in accordance with the disciplinary procedure. The claimant was given the right to be accompanied by a fellow employee.

93. On 9 June 2021, at 15:35 the claimant sent an email indicating that he wished to make it clear from the outset that he refuted the content of the two exit interviews which he considered to be totally malicious from two former employees who did not like being managed. He sought clarification of the status of the forthcoming hearing, whether it was investigatory or disciplinary. If the latter, he stated he was "advised" the respondent should furnish the evidence sooner rather than later in order that he could prepare for the hearing.

94. Ms Hobson replied on 10 June in an email which explained the purpose of what was to be a disciplinary hearing following allegations made in two exit interviews which both seemed to suggest bullying behaviour. The letter stated there

was no further evidence other than the two interviews, which he had copies of, and it explained the burden of proof for a disciplinary hearing is reasonable belief and that the respondent intended to consider the statements and the claimant's version of events, listen to any mitigation or evidence he provided and then make a decision on whether they had a reasonable belief the allegations were correct. It reiterated the claimant's right to be accompanied by a fellow employee or trade union official. The hearing was rescheduled as per the claimant's request and fixed for 16 June 2016.

95. On 16 June 2021, the hearing took place before Mr Jonathan Littler and Mr Paul Brooks with Ms Kim Hobson being notetaker. The claimant was accompanied by Mr Jason Spicket, his work colleague (194-202). The claimant was asked for his responses (these are summarised at paragraph 98 below) to the following allegations:

(1) Alleged bullying and belittling behaviour, further particulars being "it is alleged that you treat members of the sales team unfairly and have publicly humiliated a member of a team during a team meeting".

(2) Alleged failure to manage and maintain a strong relationship with the team, further particulars being that "BDMs feel you control by fear and the sales meetings are repetitive and you are not capable of supporting the team going forward".

(3) Alleged failure to carry out basic management instructions, further particulars being that "you have failed to roll out the new daily report which was requested back in July 2020. To date this has still not been completed".

96. At the conclusion of the meeting, there was recorded a discussion in which Mr Brooks said, "we do not wish to get rid of you and there are times we have shared good practice with each other" and Mr Littler asked the claimant how he saw the role moving forward, how was he going to build team morale, etc. He gave him confidence how he was going to get the team back on side and "…move forward". The claimant answered he could not answer that as was in shock due to the meeting taking place. The claimant was informed that the respondent would reflect on everything that had been discussed and let him know the outcome of the meeting. It was recorded that the claimant was not feeling well enough to attend work and was going to enter a medical note for at least two weeks while he got his health matters looked at.

97. On 17 June 2021, the claimant was informed by letter (203) sent by Mr Littler that the following allegations had been upheld, namely:

(1) bullying and belittling behaviour, further particulars being he treated members of the sales team unfairly and had publicly humiliated a member of the team during a team meeting; and

(2) failure to manage and maintain a strong relationship with the team, further particulars being that BDMs felt he controlled by fear and that the sales meetings were repetitive.

98. The letter summarised the claimant's denials of bullying given to the disciplinary being that he did not rule by fear and considered himself firm but fair having a mixed relationship with his team but that his meetings were run by the company template. He had explained not wanting the team member to take credit for something he had not done as the reason why he had acted in the way he did when mentioning that matter publicly in front of his colleagues. The letter stated that it was considered the claimant's explanation was unsatisfactory because the behaviour towards the team member was not acceptable and would not have been seen as acceptable by other bystanders. The decision was that a written warning was the appropriate sanction and specified improvements that were being looked for in his conduct and performance moving forward. The letter gave a right of appeal within a period of five days.

99. The claimant appealed against the written warning by way of a letter which summarised the grounds of his appeal as follows:

> "No issues with my behaviour or alleged failure to manage have been brought to my attention, either formally or informally, or indeed in any performance discussions prior to this point. No informal discussions, being mentoring or feedback meetings, have taken place prior to this to provide an opportunity to adjust any behaviours."

100. The claimant stated that he had a clean disciplinary record during 13 years of service. He felt that part of the misconduct that attracted the written warning should have been dealt with through a performance management process as opposed to a disciplinary one and that he had acknowledged the feedback and undertook to consider it going forward. The claimant concluded by stating the sanction of a written warning should be removed as it was disproportionate and unnecessary.

101. On 25 June 2021, the respondent conducted an exit interview with a further employee, Ms Joanne Rostron, who made a serious allegation of bullying against the claimant, focussing on one occasion when he accompanied her on a visit to a salon in September 2021. She made complaints about his management style (209-210).

102. On 25 June 2021, Mr Littler sent a letter to the claimant summarising a conversation with him from 22 June 2021 in which the claimant had disclosed he did not want to return to his current role, feeling his job was untenable and was concerned about failing. The claimant explained he had been considering his options as to other jobs ranging between that of a van driver with zero stress or looking to become a successful businessman in his own right. Another role had been discussed within the company and the letter offered him that position in which he could work four days per week (213-215). The email sent to the claimant attaching the offer letter referenced a further conversation in which Mr Littler was asked to reconsider the outcome of his disciplinary and it was explained that he was not prepared to do this.

103. On 28 June 2021, the claimant was sent a letter confirming his appeal would be heard by Mr Anton Littler, director, on 30 June 2021. The letter stated the appeal would be conducted by way of a review of the original decision and reproduced the grounds of appeal that had been formulated by the claimant in his appeal letter. The claimant was informed of his right to be accompanied and that it was important of him to contact Mr Littler in advance of the hearing if there was anything further that he wished him to consider. The claimant was advised that he needed to bring with

him any paperwork or other evidence as Mr Littler would only be able to make his decision on the information that was made available to him.

104. Following the appeal notification, there was an exchange of emails (e.g., pages 217-218) between the claimant and Ms Hobson regarding both his health and welfare and discussing a possible adjournment of the appeal until such time as he felt better. Ms Hobson indicated the respondent would be receptive to such a proposal and canvassed a later date in July, but in due course the claimant indicated he was happy for the matter to proceed on 1 July 2021.

105. On that date, the appeal did take place before Mr Anton Littler with Ms Hobson acting as notetaker as previously. The claimant went through the points he had raised in his letter (228-229). Specifically in relation to the bullying allegations the claimant argued that Mr Breslin had spread negativity about him, to which Mr Littler responded that a lot of Mr Breslin's interview had been taken with "a pinch of salt" but the situation with Mr Baptist had been substantiated. The claimant referred to another role being offered from Mr Jonathan Littler which he described as an "insulting offer".

106. On 2 July 2021, the claimant was sent notification of the outcome of his appeal. The letter set out the grounds that were relied upon and discussed but indicated that having given the matter full consideration the original decision taken by Mr Littler was upheld.

107. On 9 July 2021, an interview (232-234) was conducted with another employee, Mr Chris Bauress. He made specific complaints about the claimant's management style and provided examples of bad experiences with the claimant when visiting salons, making specific reference to a visit to salons in Ormskirk and Warrington, on both occasions alleging bullying behaviour including, on the Ormskirk visit, a physical assault.

<u>Disciplinary-Disputed Matters</u>

108. There were, in respect of this part of the narrative, further areas of dispute between the parties, some of which it is necessary for me to resolve.

109. Firstly, the claimant told me that when the issue of bullying was raised at the disciplinary meeting Mr Brooks, Mr Littler and himself ended up having a giggle about it, saying they were just two bitter individuals and that the matter would be taken no further. He alleged they had said Simon Baptist was "useless" from day one.

110. Mr Littler's account was that apart from there being some acknowledgement that Mr Breslin might struggle in a new role [and there is also reference to his allegation being taken with a pinch of salt by Mr Anton Littler on the appeal], he completely refuted the claimant's account of this conversation. Whilst I accept the claimant may not have appreciated how serious the bullying allegations were at the investigatory meeting, he had the two full written accounts. I find his evidence that Messrs Littler and Brooks told him the matter would be taken no further is not credible being inconsistent with the decision to take disciplinary proceedings which swiftly ensued.

111. Secondly, there was an issue whether the claimant was provided with the evidence that was used against him in the disciplinary hearing.

112. I find the principal focus of the disciplinary hearing was to consider the allegations of bullying and belittling behaviour. Mr Jonathan Littler emphasised this and I accept that matter was his main concern. In respect of these, I find the claimant had the full and detailed picture.

113. In respect of allegations of losing the team, the claimant was provided with brief details of a conversation with Jonathan Littler prior to the second lockdown.

114. In respect of the wider accusations from a number of members of the team as to his management style, which went beyond those made above, the claimant was not given all the available documentation. I make the same finding in respect of the alleged failure to maintain strong relationships with the team. This was conceded by Ms Hobson to an extent in her evidence when she agreed more could have been done.

115. There were other allegations where the claimant was alleged to have failed to carry out basic management instructions which are put to him at page 200 of the transcript of the disciplinary hearing, where again he had not been provided with sufficient advance notice of individual complaints that were being put to him during the meeting. These allegations were not referenced in the disciplinary outcome at paragraph 97 above.

Grievance

116. The respondent had a grievance procedure (63) which provided, *inter alia*:

> "If you feel aggrieved at any matter relating to your work…you should first raise this matter with the person specified in your statement of main terms of employment, explaining fully the nature and extent of your grievance. You will then be invited to a meeting at a reasonable time and location at which your grievance will be investigated fully. You must take all reasonable steps to attend this meeting. You will be notified of the decision in writing, normally within ten working days of the meeting, including your right of appeal…If you wish to appeal you must inform your Area Manager within five working days. You will then be invited to a further meeting which you must take reasonable steps to attend."

117. On 26 August 2021, the claimant raised a formal grievance in respect of his employment (250-254). This raised numerous issues dating back to 2014, which I have taken from a list (294-5) taken from the grievance appeal outcome which sets them out succinctly as follows:

(1) You believe you negotiated an additional five days' holiday that Jonathan Littler is now trying to take away from you.

(2) You believe you received zero positive feedback from the directors after surpassing targets in 2016.

(3) You feel you have started to suffer from stress due to issues of stock and it is hard to keep exceeding targets during autumn 2016.

(4) You feel that in 2017-18 you had the fudge brand taken away from you without any valid reason, causing significant stress and undue work pressure.

(5) You attended hospital with a suspected heart attack in 2019.

(6) You had concerns you broke the rule during furlough as you were still required to work.

(7) You believe that some BDMs and senior management who were deemed to be working received a percentage of pay whilst yours was kept at 20%.

(8) You believe that the failure to correspond with your wife when you suffered a panic attack in September 2020 showed a complete lack of respect to your mental health and the impact work was having on you.

(9) You believed that attending sales training whilst on furlough constituted working.

(10) You feel that reporting protocol was stressful.

(11) You believe it was wrongly assumed by Anton that a BDM (Sue King) had not been trained in the use of CRM.

(12) You felt under threat of redundancy in October 2020 due to comments made by JL.

(13) You believe that BDMs were asked to take days off from their holiday entitlement to work and not even be paid in full.

(14) You believe that JL did not care what senior management have had to endure through the last year.

(15) You believe that yours and Paul Brooks' sales team were writing a letter of complaint about unfair treatment during the pandemic but this did not get sent due to other BDMs panicking about repercussions.

(16) You believe you were wrongly subjected to a disciplinary in June 2021 even though you allege complaints about you were not raised formally.

(17) You felt that it was insulting to be offered a BDM role that paid you less than when you joined the company.

(18) You were disappointed to only receive statutory sick pay whilst being signed off with stress.

(19) You feel that veiled allegations that you have paid sick pay to members of your team without authority are incredibly hurtful and a further example of the company's mistreatment of yourself

118. The claimant required the following outcomes:

(1) Confirmation in writing from the company that the disciplinary decision has been set aside with immediate effect.

(2) Confirmation of back pay for the sums due for company sick pay during this period of absence.

(3) A stress management procedure be put in place.

(4) An apology from Anton and Jonathan Littler.

(5) That both be sent on a People Management training course.

119. The letter went on to state that the claimant wished to have receipt of the formal grievance confirmed and to be provided with a written decision by close of business on 27 August 2021. The letter went on to say:

> "As I am too unwell to attend a meeting during this period of sickness absence, I am content for this grievance to be dealt with in writing alone."

120. On 6 August 2021, a welfare meeting (255-256) took place with the claimant conducted by Kim Hobson. The claimant's wife was also present. The claimant was asked questions as to how he was feeling in terms of when he first went absent, what had caused the recent flare-up of stress and further questions were asked about what his GP or consultant had said about return to work and when would he be likely to return. The claimant was asked whether any reasonable adjustments needed to be made or any support that could be considered to aid his return to work in due course.

121. On 1 September 2021, Ms Hobson wrote a letter with detailed findings in respect of all the matters raised in the grievance (257-266). The letter stated:

> "These findings have been made following investigations with Jonathan Littler, Anton Littler, Bev Berry (payroll) and Paul Brooks."

122. Ms Hobson told me, and I accept, that her investigations included these individuals and several checks of documents they had – sick note files, emails and investigations with payroll – and that she spoke to everybody she could. It was put to Ms Hobson that it would be difficult for her to have determined the grievance as she was not an independent person given her subordinate position to those who she was investigating. I found Ms Hobson to be a careful and credible witness and accepted her testimony, namely that she was a fair and honest person who had been with the company for a long time and as such felt confident enough to challenge the directors if necessary. This sentiment was mirrored by Mr Littler in his evidence. Guarding myself against the apparently self-serving nature of these assertions, I was persuaded that Ms Hobson carried her enquiries in a diligent and fair manner which is reflected in the well documented nature of her findings and the production of relevant documents to back these up.

123. Ms Hobson's enquiries and findings as to the principal matters of the sick pay and disciplinary matters are sufficiently recorded earlier in the judgment and need not be repeated here. They also reflect the evidence given to the Tribunal by both her and Mr Jonathan Littler.

124. Examples of other significant findings made are as follows:

125. In response to the 2016 grievance, that the claimant received zero feedback after surpassing targets Ms Hobson wrote:

> "Steve achieved his Q4 bonus on Joico worth £5k and achieved a £10k annual bonus for achieving the annual growth target. The large growth was possible due to the launch and success of Lumishine. Steve was not given a £20k bonus, nor was this ever an afterthought. Please find the attached email sent from Jonathan Littler to Steve Heaton and payroll for payment of these bonuses."

126. Ms Hobson attached an email congratulating him on the £15k bonus ending "Well done Steve!!!".

127. In response to the March 2019 grievance that the claimant had to attend hospital with a suspected heart attack, Ms Hobson recorded:

> "The company and Jonathan Littler are not aware that Steve had a suspected heart attack at the dates given. There is no record of absence at this time and no doctor's fit note supplied for this period."

128. In response to the 4 September 2020 grievance in which the claimant alleged a lack of respect to his mental health and the appreciation stress was having upon him, when he suffered a panic attack, the response was:

> "The following text message was received by Jonathan from Clare Heaton:
>
> *'Hi John, it's Clare. Sorry Steve isn't able to present the meeting today. He's having a panic attack. I'm worried, to be honest. He has sent it to Ellie who is going to stand in for him.'*
>
> JL cannot recall what he was doing at this particular time 12 months ago and the message was sent at 13:01 but states he could not have seen the message, or he would have responded straightaway. When he did see the message, he could see the situation was in hand and spoke with Steve the following day."

129. In response to the allegation that the claimant was required to work furlough by conducting "sales training", Ms Hobson wrote:

130. JL had conversations about how elements of training were allowed whilst on Furlough and each manager did what training they thought was suitable and would be helpful and beneficial……The government job retention scheme guidelines confirm training could take place whilst furlough was being claimed. Therefore, the Company does not believe the scheme rules were breached.

131. In response to the grievance that during the furlough period the claimant was required to work, the claimant" s letter alleged that all BDMs were asked to keep in contact with their customers and that he as a manager was required to submit information to payroll, deal with customer queries regarding orders in direct breach of furlough rules which had caused him stress, Ms Hobson wrote:

> "The only suggestion for Steve to do in the first lockdown was to keep in touch and check in on his team. It was pointed out this was not generating money for the company and that by doing the occasional phone call he was just showing he cared."

132. Mr Jonathan Littler was asked about this policy in questions from all parties and myself. He said the contacts were to keep in touch/maintain relationships rather than generate an order. There are a number of documents in the bundle evidencing contact between employees and customers one of which (177) is from the claimant himself. It is dated 1 June 2020 and reads:

> "Hi Lynne
>
> There is a salon on Fraserburgh AB43.
>
> You might get a big order over the phone but remember furlough (thumbs up sign).
>
> Steve"

133. I find the policy *was in part* motivated by future profit and orders despite Mr Littler's denials. I assessed him to be somewhat guarded on this point. He did indicate this was a new situation and there was a lack of clarity about the rules. I am not able nor called upon to find he was in breach of the applicable regulations.

134. In response to the grievance that a new CRM system was put into place for the whole team with no training whatsoever for Sales Managers, and that the claimant was then subjected to an awfully assumptive email from Anton about a BDM "not being trained by myself, I had asked all the team to send me an email agreeing they had been trained. No apology was received", Ms Hobson wrote:

> "Anton Littler states there was no formal training on the CRM system as the CRM system was very easy to use."

135. In response to the grievance that in June 2021 the claimant was subjected to a disciplinary investigation and hearing due to alleged complaints raised by existing members of his team, these complaints were not raised formally by team members but the claimant was still subjected to a disciplinary, the response was:

> "Issues between members of the sales team and their Sales Manager were brought to our attention at the exit interviews. At this point these members of the team felt they could speak freely without repercussions about the alleged treatment they had received. Further investigations were conducted at the time and a fair and proper process was followed including an appeal process. The process followed is in line with the company procedure. Unfortunately, we have learnt of further matters of concern from other team members that

> need to be investigated with Mr Heaton when he is well enough to return back to work."

136. In response to the grievance that, "at my appeal meeting I was asked by Kim if going back on the road was an option, Anton said that JL had offered me a BDM role. However, when I told him the remuneration package, he was very surprised and indeed said 'it was less than you joined', I said no, it's fine and not to bother, that was an insult", Ms Hobson found:

> "Steve was offered 12k above the usual pay structure and an extra guaranteed period of time to allow him to build the area. JL had previously discussed the role and opportunity with Steve and explained that his preferred outcome would be for him to return to his current position, however if he did not want to do this then he would be put on a package together for the Blackpool and Lancaster areas. JL thought the offer was fair under the circumstances."

137. Ms Hobson concluded there were insufficient grounds to substantiate the grievance and informed the claimant of his right to appeal within five days.

Grievance Appeal

138. The claimant exercised his right of appeal by way of a letter dated 9 September 2021 (267-269). The letter stated his "main point" was that his grievance had not been dealt with in a fair manner, principally due to Ms Hobson undertaking the grievance which related to the conduct of directors within the business. The claimant did not feel she was able to be an independent or impartial decision maker in respect of the grievances. He complained that a number of assumptions had been made which could have been clarified if he had been spoken to about his grievance. He stated he had been and remained open to discussing these points with the respondent and to provide any clarification in writing. He did not consider his request for the matter to be dealt with in writing would stop the respondent being in contact or all or that it would have gone on to issue the decision without raising the points requiring clarification. He considered this illustrated a flippant attitude towards his grievances and his employment as a whole. He raised several issues that had caused him further examples of stress and anxiety, including disappointment that directors of the business had no recollection of his serious health condition, expecting these in such serious incident to (a) be remembered, and (b) to be noted within his HR records. The claimant considered that there were contested facts which should have been considered more fully or reinvestigated to understand his version of events, and that it had simply been the situation that Ms Hobson had taken the directors' word and made a general conclusion not to substantiate his grievance, again illustrating a lack of investigation and impartiality.

139. On 15 September 2021, the respondent wrote to the claimant (272) informing him that an impartial consultant from Peninsula's face-to-face service would hear his appeal on 21 September 2021. The letter set out and acknowledged the grounds of appeal relied on by the claimant together with his request for the hearing to go ahead with written submissions. The claimant was informed it was important that he notified Ms Hobson in writing in advance of the hearing if he believed the information set out as to the parameters of his appeal were incorrect in any way or if there was anything further, he wished for the consultant to consider and these comments would then be forwarded to the individual concerned. The claimant was told that the face-

to-face consultant would listen carefully to what he had to say regarding the grounds of appeal and ensure that if any further investigations were necessary a note would be made of these to be undertaken afterwards. The claimant was reassured that the representative was impartial and had no prior involvement in this matter and that it was therefore important that any paperwork or other evidence he wished the consultant to consider was provided.

140. On 17 September 2021, the claimant emailed the respondent expressing his dissatisfaction with his attendance being "demanded", failing which a decision would be made in his absence. He complained about the timescale and that he had not been provided with a proper opportunity to respond to the evidence. He felt "unable to attend due to my health" and requested an opportunity to reply to the consultant, suggesting the possibility the consultant posed a number of questions. The claimant requested a more reasonable timeframe than the current "two days" given to do this.

141. On 17 September 2021, (276) the respondent replied informing the claimant that the consultant would be in touch with him on 21 September 2021 by email setting a deadline for his written submissions. It said his appeal would be dealt with in a fair manner and he would be given ample time.

142. On 21 September 2021, (277) Ms Tina Kinson emailed the claimant to introduce herself as the consultant who would be holding his grievance appeal that day via written submissions. She asked him to confirm if he had any further information or written evidence that he wished to add, and that this would need to be submitted by 5.00pm. The email indicated Ms Kinson would be providing her recommendations to the employer based on the evidence and it would then be for the employer to make a final decision on the matter (277-278).

143. At 14:06 on 21 September 2021, the claimant responded:

> "Good afternoon, Tina
>
> This is a little vague to be able to give answers by 5.00pm. One would think the questions would be asked first." (279)

144. Ms Kinson replied that the original meeting was in person hence the time was planned for 11.00am. She stated once this was changed to written submissions it was not necessary to email him at 11.00am so she sent him the email at the start of her working day to introduce herself and afford the time to provide any further evidence or written submissions by 5.00pm on 21 September.

145. On 22 September 2021, Ms Kinson sent an email (285) to the claimant indicating she had reviewed his grievance appeal and asked him to respond to several questions to clarify her understanding of the points raised. These questions related to the main complaint being made by the claimant at that time, which was that Ms Kim Hobson was not impartial and concerning the way the respondent had allegedly treated him whilst unwell. The questions relating to Ms Hobson included questions as to how she was involved in the previous disciplinary, why it was believed she could not be impartial in relation to the grievances, whether he had any evidence to show this was the case and/or what assumptions he believed had been made about him during the grievance process. He was asked to indicate what points he felt he could have clarified to Ms Hobson and what matters Ms Hobson should have investigated further and in what respect. She asked questions about whether

he had informed anyone at the company about his suspected heart attack in March 2019 and whether he informed anyone at the company in October 2016 that he was off with stress. The claimant provided detailed responses at 5.00pm the following day.

146. On 5 October 2021, Ms Kinson produced her report (293-307). This ran to 100 paragraphs. Having summarised his grievances, she went on to state her independent role was to give an impartial service and provide a report and recommendations on the evidence put forward. She clarified she was not a representative of the business and would not dictate what steps the business would take. She certified there was no influence whatsoever upon the Peninsula consultant from the business and she was at liberty to make her own findings and recommendations.

147. Ms Kinson incorporated both the claimant's complaints and the responses from her investigations within her findings. She concluded from these that the claimant had been unable to provide any factual evidence Ms Hobson was unable to be impartial during the grievance process, and that it would have been preferable for the claimant to have been informed about further matters of investigation outside of the grievance outcome. However, on balance she believed that this would have still caused further stress and anxiety, whether discussed verbally on his return to work or in a separate letter. She considered there was no evidence to prove that Ms Hobson had not been impartial during the disciplinary process and that it was her role as HR Manager to have supported as notetaker in the disciplinary and disciplinary appeal process.

148. Ms Kinson reviewed the contract and employee handbook in terms of the complaint of payment towards sick pay and noted the absence of the records and referenced the absence of any recent records of absence nor any pre 2017 records of absence as these were recorded separately from the HR system. She found the claimant's original grievance letter was very detailed and considered that Ms Hobson had all the information she required to deal with the matter.

149. Ms Kinson considered the points made by the claimant regarding his previous health conditions and his perception that several issues raised in the grievance outcome had caused him further stress and anxiety (paragraphs 52-81). Her conclusion was that she considered these matters point by point but concluded that whilst the claimant had been suffering from stress and anxiety, she did not feel the company had intentionally meant to cause further stress and anxiety as alleged and that they had followed process and responded to the grievance raised, albeit the outcome was not to his satisfaction.

150. The claimant's overarching grounds of appeal that the grievances were not dealt with in a fair manner and that the grievance had failed in process, scope and to be adequately investigated and impartial, was also considered and rejected.

151. Ms Kinson therefore recommended that the grievance appeal be dismissed in its entirety.

152. Ms Kinson noted that there was damage to the employer/employee relationship and that this was causing disturbance to the workplace and therefore recommended they consider workplace mediation to build a professional workable relationship between both parties.

153. On 7 October 2021 (pages 310-311), Ms Hobson wrote to the claimant attaching Ms Kinson's report. The letter went on to say:

> "Having carefully considered the report of their findings and recommendations it is my decision to uphold the decision made in the appeal report for the following reasons: an independent impartial consultant has been appointed to oversee the appeal process and we agree with their decisions and recommendations."

154. Ms Hobson indicated that as a result the company would re-send a consent form for the claimant to attend an Occupational Health assessment that would help the company identify any adjustments that may be needed to assist in his return to work, and added the company was willing to appoint an independent mediator to oversee mediation between the parties to help build back the professional working relationship.

155. It was put to Mr Jonathan Littler that he had not followed the grievance policy at paragraph 4 which provided that a person making a grievance would be "invited to a meeting at a reasonable time and location at which the grievance will be investigated fully". Mr Littler responded that the claimant effectively dispensed with that policy by asking for the matter to be dealt with in writing. Mr Littler agreed he had provided "a lot of input" on every point and considered Ms Hobson to be impartial but the company had decided to use an independent person to deal with the appeal to address any concern raised that Ms Hobson was not independent. Mr Littler said in relation to the grievance appeal he just answered questions that were put to him and conceded that it would have been better to have had both Anton Littler and Tina Kinson as witnesses. Insofar as these answers provided factual content, I find it to be true.

156. Mr Littler was pressed by Mr Jones as to who made the decision, suggesting that Ms Hobson had in effect dismissed an appeal against her own decision. Mr Littler accepted, he had input into the decision as well, which I find to be the case.

157. On 19 October 2021 (312-313), the claimant wrote a letter to Ms Hobson entitled "Resignation with immediate effect". The letter acknowledging the findings of Ms Kinson was sceptical about her impartiality and noted areas for investigation were conspicuously unresolved. The claimant felt her outcome was simply an endorsement of the position taken throughout the process rather than a truly objective assessment of the numerous and varied issues and concerns that he had raised. The letter concluded that he felt the company did not value him as an employee and so due to the appalling treatment he had received he had lost all confidence in the company as his employer. He considered the situation untenable and therefore had no choice but to resign his position with immediate effect.

Submissions

158. I received both initial and supplemental written submissions from each party and considered all the arguments set out in those documents. Mr Jones relied upon his three "key strands" to the constructive dismissal claim set out above submitting that any single or a combination of them would enable it to succeed.

159. As to the claim for unlawful deduction of wages, it was submitted that the claimant was entitled to be paid company sick pay because that was the established custom and practice or because of the parties conduct.

160. Mr Jones sensibly argued it would make sense to determine the issue of wages properly payable to the claimant before considering the claim of constructive unfair dismissal.

161. The respondent, basing its submissions on the original pleaded case, argued that there were no fundamental breaches of contract and the grievance appeal could not be a final straw trigger, which meant the claim was bound to fail because the claimant had affirmed any prior breach of contract.

162. I will record the significant arguments made by the parties in the discussion and conclusions section below. I considered all the submissions made in the written documents, these being matters of record, which can be referred to if necessary.

Discussion and Conclusions

Unlawful Deduction from Wages 9 June 2021 to 19 October 2021

163. The claim for unlawful deduction of wages overlaps with that part of the constructive dismissal claim which alleges that the respondent, without reasonable cause failed to pay full company sick pay entitlement. It was submitted that the evidence was supportive of the claimant's assertion that from the outset Mr Jonathan Littler committed to "looking after his best people" and paying company sick pay.

164. The decisive question here is what sum was "properly payable" to the claimant. It was variously submitted that his legal entitlement was one based on an implied term of the contract, the parties' conduct, on custom and practice and as a discretion that was invariably exercised in the claimant's favour.

165. These arguments over-complicate things. Had the claimant proved Mr Jonathan Littler orally agreed to pay full sick pay as part of his package when joining the company, this would have been an *express* term of the contract and his claim would have succeeded.

166. Having found that agreement was not made, it follows the claimant's true contractual entitlement is the one contained in his original contract of employment and the 2014 written statement of terms of conditions of employment, which is for statutory sick pay only.

167. That express term, when set alongside my factual findings that the claimant did not notify his absences nor obtain any authorisations for full sick pay, leave no scope for arguments as to implied terms, custom and practice and so forth.

Constructive Dismissal

168. The key question is whether the claimant's resignation on 19 October 2021 should be construed as a dismissal. This engages the **Malik** test and requires him to prove that the treatment from the respondent (1) was treatment for which there was no reasonable and proper cause; and that (2) when viewed objectively it was serious

enough to be likely to destroy or seriously damage the relationship of trust and confidence.

169. I will consider each individual strand of the claimant's argument as well as the cumulative position if it arises.

Failure to Pay Company Sick Pay for the period 9 June 2021 until 31 October 2021

170. As to this allegation, which lies at the heart of the constructive dismissal claim, the inevitable consequence of my factual findings and conclusions as to unlawful deduction of wages above is that there **was** reasonable and proper cause for the respondent to pay SSP and not Company Sick Pay.

Issuing a Disciplinary Sanction Without Reasonable and Proper Cause

171. On behalf of the claimant, it was submitted there was no proper investigation and that in any event the parting employee's claims were laughed off at the investigatory meeting. It was argued that the claimant could not possibly prepare a defence in circumstances where he was neither provided with any evidence to support the allegation nor even scant detail that may have afforded him an opportunity to respond meaningfully. It was said a Performance Management process would have been a more appropriate method of dealing with the issues that had arisen. The fairness of the process was criticised, and complaint made about the "invisible man", Mr Anton Littler, who determined the appeal but did not appear as a witness. Summarising the list of issues, it was argued that the commencement of an investigation, the disciplinary hearings that followed leading to the written warning the appeal was one which no reasonable employer could have reached, and that there was a failure to give due consideration to the matters raised by the claimant throughout. It also referenced the supposedly improper exploration by Mr Jonathan Littler of redeployment opportunities with the claimant and that he had pressurised him into accepting a lesser role on 25 June 2021, post disciplinary hearing.

172. The respondent's submission was that there had been an investigation and disciplinary process following allegations concerning the claimant's behaviour towards members of his team. It was submitted that the respondent was entitled to look at what were potentially serious issues raised by the employees about the claimant and that the process followed was fair and reasonable and in accordance with the respondent's disciplinary process. It said the allegations that stemmed from exit interviews were detailed and referenced not just bullying but (especially in the case of Mr Breslin) allegations of failing to manage and maintain a relationship with the team and controlling by fear as alleged. The respondent contended the investigation, disciplinary process and appeal were conducted fairly and the decision to give a written warning was reasonable. It was denied the allegations could have been dealt with through a Performance Management process as the matter was too serious. It was strenuously argued that this procedure was neither a breach of the claimant's contract let alone a fundamental breach.

173. I do consider there was merit in some criticisms made of the process by Mr Jones. The claimant should have been provided with more information and

documentation concerning the allegations relating to failure to manage and maintain strong relationships with the team and failure to carry out management instructions. Although these were in some way alluded to in the exit interviews, they lacked detail and as Ms Hobson accepted in evidence, more could and should have been done to provide the claimant with fuller reports and documentary evidence of the allegations even in a redacted form.

174. However, the claimant *did* have a proper opportunity to respond to what in my view were the most serious elements of the misconduct alleged, those of bullying and belittling behaviour. Whilst these were not in signed witness statement format, they were specific and contained precisely the same level of detail as one would expect to see in such documents. He was accompanied at his disciplinary hearing and was able to put his case. The outcome was reasonable based on the evidence and circumstances and the penalty, described as "lenient" by Mr Littler reflected the clean record and otherwise positive contribution made by the claimant over the years.

175. The respondent's decision not to call Mr Anton Littler resulted in some prejudice to the claimant as Mr Jones was unable to put legitimate points in cross examination including what, if any, further investigation was carried out by him and what discussions or interactions there had been with Mr Jonathan Littler, his brother who had conducted the original disciplinary hearing. Mr Jones was deprived of the opportunity to explore the conduct of the appeal hearing and this made it difficult for me to evaluate whether there was any bias or predetermination. On the face of the documents, I consider it likely the appeal was not a rehearing but a consideration of the grounds of appeal.

176. As to the appeal, the Tribunal did have the claimant's appeal letter setting out his grounds, the invitation letter confirming the grounds, the notes of the appeal meeting and the decision letter with its reasoning.

177. For the reasons above and by reference to my findings of fact on this subject, I am unable to accept the wider criticisms made by Mr Jones in his submissions and his List of Issues that the shortcomings of the disciplinary process (including its outcome) amounts to a repudiatory breach of contract. I remind myself I am not dealing with a conventional unfair dismissal claim and conclude the issuance of a disciplinary outcome was not at all based on a lack of reasonable and proper cause.

<u>Failing to provide the claimant with a reasonable opportunity to redress his grievance</u>

178. In his pleaded case, the claimant averred that the grievance appeal outcome letter was "the last straw" in a series of actions of the respondent dating back to 2014.

179. The claimant now contends that this aspect of the constructive dismissal claim is a fundamental breach in its own right or cumulatively with the other strands identified above.

180. By reference to the List of Issues the allegations are that the respondent failed to promptly and reasonably investigate the concerns outlined in the claimant's grievance and that the respondent failed to deal with that grievance in a fair manner by appointing Ms Kim Hobson to determine the grievance who was not independent

and providing an outcome without further reference to the claimant following the original grievance being submitted.

181. In regard to the appeal, the allegations are of a failure to promptly and reasonably investigate the claimant's concerns outlined in his grievance appeal and reaching a conclusion that no reasonable employer could have reached in rejecting the grievance and appeal.

182. The claimant indicated he was content to have the grievance dealt with in writing.

183. I reject the argument it was unfair or inappropriate to appoint Ms Hobson to deal with the grievance. It is true she had to "investigate" the actions of her immediate superiors. However, a great deal of the work involved researching company records and payroll. Ms Hobson was not "independent" of the company but she was well placed to undertake the necessary enquiries, knowing in the light of her professional role that what she did could well end up being scrutinised externally.

184. It would clearly not have been realistic to ask the Littler's to investigate themselves. *Anyone* from within the company would necessarily be junior to them. The steps taken by Ms Hobson throughout to diligently investigate the records and the steps she took to accommodate the claimant, suggested a professional approach. She conceded more could have been done to document some aspects of the disciplinary investigation. I have already found her to be a careful and credible witness and consider it acceptable she did not seek any further information from the claimant prior to the grievance because she did not see the need to do so.

185. The most important elements of the grievance were the non-payment of company sick pay during the claimant's period of absence and the disciplinary outcome. This is reflected in the required outcomes of (i) confirmation the decision has been set aside and(ii) confirmation of back sick pay.

186. Prior to the grievance, both these contentions had already been thoroughly investigated by the respondent and found to have been without merit. The grievance proceedings *and* these Tribunal proceedings have then scrutinised those same matters by considering the very documents Ms Hobson had. I have heard evidence and made detailed findings, not only on the issues that go to the heart of the matter but also as to background, including the March 2019 suspected heart attack and the allegation of working under furlough, where I considered they may be some grounds to criticise the respondent's policy.

187. There were some issues I did not directly consider, such as the 2014 and 2016 matters, where I was not called upon to make any factual findings. However, these are set out in Ms Hobsons's report and follow the same methodology as appears throughout.

188. From this, I am satisfied that Ms Hobson dealt with all aspects of the grievance in a proper and fair manner. Her conclusions were objectively sound.

189. As far as the appeal was concerned, the respondent accommodated the claimant's request to have the matter dealt with externally but Mr Jones had no

opportunity to cross examine Ms Kinson about her investigation and the reasons for her conclusion.

190. Ms Kinson should have been called as a witness. This would have enabled Mr Jones to explore whether *she* was truly independent or as suspected by the claimant, hand in glove with the respondent in some way.

191. On the other hand, Ms Kinson's *reasons themselves* are thoroughly documented and based on her interactions with Mr Jonathan Littler and Ms Hobson, who both gave evidence to the Tribunal. A central cog of the claimant's argument on the grievance appeal was that the grievance was not conducted fairly and that Ms Hobson was not independent. This tribunal has considered that point and found to the contrary.

192. I remind myself that until the outset of these proceedings, it was never suggested the grievance outcome was a fundamental breach of contract but a "last straw." Given I have found the first two "strands" of the constructive dismissal claims have not been made out, the only way his claim can now succeed is if the grievance outcome *alone* amounts to such a breach.

193. In the light of my findings and conclusions thus far, I am satisfied, despite the absence of oral evidence from Ms Kinson, that her appointment was appropriate and that she properly investigated the matter. Her recommendation to dismiss the grievance was proper.

Conclusions-Constructive Dismissal

194. I remind myself of the serious nature of the action an employer would need to take to fundamentally breach a contract in terms of the test laid out in **Malik.** I do not conclude any of the respondent's actions breach this term and consider there *was* reasonable and proper cause for the respondent's actions. There was no single (or cumulative) repudiatory breach.

Notice Pay

195. This claim did not feature in Mr Jones' written submissions. However, the position is the claimant resigned without giving notice and has no contractual entitlement to it.

Employment Judge Ganner
Date:16 May 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
25 May 2023

FOR THE TRIBUNAL OFFICE

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