Case number: 2602332/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr D Maciąg

Respondent: Curry's Group Limited

Heard: at Nottingham, in public **On:** 3 – 7 July 2023
And in chambers on Monday 10 July 2023

Before: Employment Judge Clark (sitting alone)

Representation
Claimant: Ms B Perry, Legal Executive
Respondent: Mr S Tibbits of Counsel

RESERVED JUDGMENT

1. The claim of unfair dismissal **fails and is dismissed.**

2. The claim of breach of contract (wrongful dismissal) **fails and is dismissed.**

3. The claim of unauthorised deductions from wages **is dismissed upon withdrawal.**

REASONS

1. Introduction

1.1 This is principally a claim of constructive unfair dismissal.

1.2 Associated claims under the Equality Act 2010 were withdrawn at an earlier hearing and dismissed. A claim of unauthorised deductions from wages remained arising from the pay the claimant received during his sickness absence in the period immediately before his resignation. The factual basis of this was not clear and, after time was given for the parties to explore their positions on the matter, that too was withdrawn.

1.3 The final claim remaining is said to be a claim of wrongful dismissal, or breach of contract related to notice. As there is no dispute that the claimant resigned as a matter of fact, Ms Perry accepted that breach of contract could not succeed on that term although this

claim was not strictly withdrawn. An alternative claim of breach of contract based on the implied term of trust and confidence could have existed but it would be essentially the same claim as the claim of constructive unfair dismissal.

2. Issues

2.1 The issues were identified and set out in the case management order of EJ M Butler of 1 April 2022. For the constructive unfair dismissal claim, the conduct Mr Maciąg relies on as breaching the implied term of trust and confidence is: -

a) In March 2020, upon returning to work after being furloughed, Mr Maciąg was transferred from the Quality Assurance department to the Flat Panel department without consultation and the work in this department was more physical and exacerbated his existing back condition requiring him to take pain killers.

b) In September 2020, he was then moved to work in the warehouse without consultation.

c) In December 2020, a First Line Manager falsely accused him of aggression towards her for which he was suspended before being exonerated at the eventual disciplinary hearing. This caused him to go on sickness absence with work related stress.

d) In April 2021, he was moved again to the Spares Department without consultation where he had to work in close proximity to others when he could have worked in the Quality Assurance department where there were screens for safe working which would have been better for him as he did not wear a mask for health reasons; and

e) His grievance in relation to a number of these matters was not upheld and this was the last straw.

2.2 If there is a breach such that the resignation amounts in law to a dismissal, the respondent avers it is a fair dismissal and relies on the potentially fair reason of some other substantial reason. It avers that: -

a) The Respondent had to comply with protocols which were necessary in the Claimant's workplace at the time due to the COVID-19 pandemic.

b) The COVID-19 pandemic and the Claimant's face mask exemption meant that it was not safe for the Claimant to continue to work in Flat Panel repairs.

c) In the circumstances, a suitable role was found for the Claimant in the warehouse and then in spares.

d) The Claimant was unwilling to carry out these roles and/or was unwilling to work in compliance with the protocols which were necessary in the Claimant's workplace at the time due to the COVID-19 pandemic.

3. Evidence

3.1 For the Claimant I have heard from: -

a) Mr Maciąg himself. He has been assisted by a HMCTS appointed interpreter throughout. He produced a witness statement in his native polish and it has been translated into English with a certificate of translation. At times he gave evidence contrary to the written statement evidence and explained that he believed the English translation was incorrect. The court interpreter confirmed it was an accurate translation.

b) Mr Catalin Purcarea and Mr Arnoldas Karasevas. Both were previously colleagues. Both were dismissed from their employment in April 2021 in circumstances unrelated to those of the claimant or each other. They gave limited direct evidence and, significantly, did not address the events of the exchange between Mr Maciąg and his covering FLM on 23 December 2020.

3.2 For the respondent I have heard from: -

a) Mr Thomas Ayre, Mr Maciąg's first line manager at all material times.

b) Mr Scott Campling, Senior Operations Manager who dealt with Mr Maciąg's grievance.

3.3 I had an agreed hearing bundle running to 527 pages which extended to 542 with the additional agreed documentation.

3.4 Both advocates supplemented their written closing submissions and replied to each other's case orally.

4. Law

4.1 It is axiomatic that in order to claim unfair dismissal, the claimant must have been dismissed. In this context, section 95(1)(c) of the Employment Rights Act 1996 ("the Act") provides the statutory definition of dismissal: -

> ***(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—***
>
> ***(a)…***
>
> ***(b)…***
>
> ***(c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.***

4.2 I have reminded myself of the essential authorities on "constructive" dismissal generally. They start with **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761** on the application of common law principles of repudiatory breach, acceptance and causation as they arise within the context of contracts of employment. I remind myself of the definition of the implied term of trust and confidence set out in **Mahmud v BCCI [1997] UKHL 23** that: -

> ***"an employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage trust and confidence'.***

4.3 Assessing whether that term has been breached is an objective test. (**Leeds Dental Team Limited v Rose [2014] ICR 94**)

4.4 In the context of an employer's right to relocate or vary the work, I have been taken to express contractual terms entitling it to relocate the location or work type within the grade. It is well settled that any term entitling an employer to reorganise the work and location of work must still be exercised in a way that does not offend any other contractual term, in particular the implied term of trust and confidence. This much is clear in the context of an express mobility or relocation clause. (**White v Reflecting Roadstuds Ltd [1991] ICR 733**).

4.5 The case is put on a "last straw" basis. I have had regard to **London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493** on the necessary contribution of a "last straw" event not needing to be a breach in itself but adding something of substance to the character of the overall state of affairs, being more than utterly trivial; I have also reminded myself of **Kaur v Leeds Teaching hospital [2018] EWCA Civ 978** in particular to the 5 step approach to take in last straw cases.

4.6 I must then be satisfied that the breach has not been waived (or, rather, the continuation of the contract affirmed). This may arise explicitly. It may arise by implication, often through the effluxion of time. In that sense the passage of time does not, in itself, provide the answer. What is important is what has happened during that time. Often, the time provides the opportunity for the performance of the new state of affairs for a sufficient time to be able to infer acceptance. What is required is an unequivocal acceptance of the new state of affairs. (**Chindove v William Morrison Supermarkets PLC UKEAT 0201/13**). Working under protest is equivocal. Invoking the internal grievance procedures is not to be treated as an unequivocal affirmation of the contract. (See **Kaur**, per Underhill LJ at para 63)

4.7 As to causation, it is not necessary that the contractual breach is the only reason for the resignation or even that it is the principal reason for the employee's resignation. It is sufficient that the repudiatory breach "played a part in the dismissal" (**Nottinghamshire County Council V Meikle [2004] EWCA Civ 859 [IRLR] 703; Wright v North Ayrshire Council [2013] UKEAT 0017/13)**

4.8 If a resignation amounts in law to a dismissal, the provisions of section 98 of the Act then engage. It is then for the respondent to prove the reason, or if more than one the principal reason, for dismissal and that that reason is a potentially fair reason. The respondent relies on "some other substantial reason'.

4.9 For a reason to be "another substantial reason" so as to fall within the catch all of section 98(1)(b) of the ERA 1996 it has been held that it must meet certain characteristics or qualities (modified as necessary to fit the context of a constructive dismissal): -

a) It must be substantial, meaning it must not be frivolous or trivial, and must not be based on an inadmissible reason such as race or sex (**Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood and ors 2006 ICR 1552**).

b) It need only be genuinely held, it need not be sophisticated. A decision to dismiss cannot be substantial if it is whimsical or capricious (**Harper v National Coal Board 1980 IRLR 260, EAT**),

c) It must be something that could justify dismissal, it is not necessary to consider if it does justify it at the time of the section 98(1) question (**Mercia Rubber Mouldings Ltd v Lingwood 1974 ICR 256, NIRC**)

d) An employer does not have to show that a reorganisation was essential, merely that there was a 'sound, good business reason' for it. (**Hollister v National Farmers' Union 1979 ICR 542**) and it is not necessary that the survival of the business is at stake (**Catamaran Cruisers Ltd v Williams [1994] IRLR 384**).

e) Nor is it the tribunal's concern to measure the extent to which the changes might achieve a business aim. As long as the advantages are clear the employer does not need to show any particular 'quantum of improvement' achieved (**Kerry Foods Ltd v Lynch 2005 IRLR 680, EAT**). This is closely related to satisfying the tribunal that the reason was genuine.

4.10 The reason is the set of facts known to, or beliefs held by, the employer which causes it to dismiss the employee. In a case of constructive dismissal under s.95(1)(c), where it is the employee that brings the contract to an end by acceptance of a repudiatory breach, the focus turns to the employer's reasons for the conduct which entitled the employee to resign and the burden of proving the reason remains with the employer (**Berriman v Delabole Slate Ltd 1985 ICR 546 CA)**

4.11 If the respondent does not establish a potentially fair reason, the dismissal is unfair without more. If the respondent does show a potentially fair reason, I must then consider whether that dismissal was fair having regard to the provisions of section 98(4) of the Act.

5. Facts

5.1 It is not my role to resolve each and every last dispute of fact between the parties. My role is to make sufficient findings of fact on the matters necessary to resolve the issues between the parties and to put those in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

5.2 The respondent is a well-known electrical goods retailer. It provides a customer repair centre ("CRC") at its Newark campus employing around 1100 staff which are split into two shift teams working a rota of 4 days on and 4 days off. The organisation is structured so that each half has its own first line management structure. There are three main teams focused on different devices. (Mobile; Computing - including tablets and laptops; and Flat Panel - basically televisions. Each team has engineers or technicians qualified to repair the particular type of device employed at level 2 or 3. There is a team of Quality Assurance ("QA") operatives employed at level 1 that test the devices before and after repair and transport them between inwards and despatch. The CRC also includes teams in warehouse and spares, wholesale and admin. In short, products come in for repair, are assigned to the

correct repair team, tested by a QA operative, sent for repair by an engineer, QA checked and then sent back to warehouse for despatch.

5.3 The claimant was employed by the respondent as a QA operative. His employment started on 9 October 2016. Prior to that he spent a short spell as an agency worker before becoming an employee. So far as is relevant to this case his terms were: -

a) He was employed in a QA post at level 1.

b) He worked a rota of 4 days on and 4 days off.

c) There was a contractual right for the employer to relocate him both in terms of location and work type. Mr Maciąg, and other QA's, could therefore be redeployed in any team.

d) I find that contractual flexibility included working in any area at level 1 including in warehouse or the spares team.

5.4 I find in all the changes to work location that did in fact take place in this case, there was no effect on pay and conditions.

5.5 From 1 June 2019, the claimant's terms of employment were explicitly changed from "MBQA operative' to that of a generic QA operative. That change applied to all QA operatives and reflected a restructure to make the QA functions a single function. It effectively removed the contractual reference to a base team, albeit there had always been flexibility in the employment contract meaning that he could be assigned to any level 1 role.

5.6 I find the claimant was trained in various aspects relevant to this case. That included both health and safety and other core compliance training and, later, specific training on covid safety. I also find he had undertaken training relevant to all the teams of the repair service. I am satisfied that the training record put before me is accurate and drawn from both the local and central databases of training records. There is no dispute the claimant was a competent worker in his role.

5.7 The claimant has two conditions in his medical history relevant to the claim. He has intermittent lower back pain following an accident in 2017. This had manifested in occasional absence from work when working in the mobile department. He also had bronchitis as a child which I find did not raise any issues for him in adulthood and certainly did not do so at the material time.

5.8 The implications of the Covid pandemic began to take hold in March 2020. From 17 April 2020 the claimant was placed on voluntary furlough. This was in contrast to those who had some health condition placing them at a particular risk. I find Mr Maciąg was not clinically vulnerable in the sense that phrase meant in the UK during the covid pandemic.

5.9 During his absence on furlough, on 7 May 2020 the respondent implemented its first COVID-19 safe working practices. I find there to be an impressive document trail of steps and measures taken to manage this unprecedented challenge. It was conducted on both on a

general level for all staff and visitors, and on an individual level where specific issues for a particular employee were identified. As with the rest of the world, the specific rules evolved over time as understanding of the virus improved and sometimes changes to guidance was rapid and frequent. At that early time mask wearing was not mandatory, other measures such as regular touch point cleaning and maintaining the 2m social distancing were also introduced. A compulsory eLearning module was created for those returning to the workplace. At this stage, higher risk activities were identified and assessed. One such task was a 2 person lift as this brought colleagues together within 2m. For this task, the guidance at this time was that it should be undertaken either by wearing a mask and eye protection, or just a face visor.

5.10 The claimant returned to work from furlough on 7 June 2020, having completed the covid safety eLearning module.

5.11 Coinciding with his furlough was the culmination of an unrelated organisational change. Since 2019, I find the business had been anticipating the need to make changes to the mobile team based on a marked reduction in business. I find this was in part as a result of the closure of stand-alone Carphone Warehouse stores and the commensurate reduction in devices needing repair generally. The mobile team in which Mr Maciąg worked had been consulted on this at various briefings in 2019. It was known to all that the number of staff would reduce. Although that could have potentially amounted to a redundancy situation, the respondent also made clear it was its intention to retain all its employees. There was work across the other QA teams, agency workers could be stood down and the terms of employment permitted redeployment. Eight members of the mobile team were affected by this change and needed a new team. There were five on Mr Maciąg's shift and three on the opposite shift. Mr Maciąg was one of the five. I find all, including Mr Maciąg, were selected to move to the flat Panel (FP) team after a management exercise reviewing the skills matrix and showing their suitability for the work, relevant training record, past record of flexibility, ability to learn quickly and an absence of any other indicators suggesting it was not an appropriate move.

5.12 Whilst I find the prospect of this change happening was known to Mr Maciąg, I accept he was not aware of the implementation directly affecting him prior to his return to work on 7 June 2020. I find the respondent took the view that the terms of the then brand-new coronavirus job retention scheme meant it could not engage with its furloughed employees during furlough for anything other than welfare and arranging return dates. It took the view that a consultation about redeployment would offend the terms of the scheme. However, it arranged to meet with Mr Maciąg as the very first engagement upon his return to the workplace. He was met by Mr Ayre, the first line manager for the FP team, who I find spent time with him undertaking both a return from furlough exercise, updating him on developments during his absence and, of course, the rational for the change of work base from Mobile to the FP team. I find: -

a) Mr Maciąg was warmly welcomed into the flat panel department and was impressed with Mr Ayre's optimism and enthusiasm for him joining the team.

b) There were no changes to his pay or terms of employment.

c) The notes of the meeting documenting the return from furlough meeting are brief and at first do not appear to reflect a c.30-minute meeting. However, there were 4 substantial documents to work through in that time and I find, based on the evidence of Mr Ayre's practice at other stages of this case, that he is an accurate note taker who records important matters.

d) I accept Mr Ayre's evidence that Mr Maciąg did not raise any objection to the change of roles. He did not suggest or enquire about any alternatives. He did not raise any limitations with his back. In respect of that, that was clearly an issue that arose from time to time triggered by matters outside of work as he had had time off work for it when working in the mobile department. Mr Maciąg also says that he did not have previous experience in the FP department. Those two matters point towards it being less likely that he would raise an issue about his back.

e) In any event, I find whatever hesitation Mr Maciąg may have privately held about the change in role evaporated quickly as he found he was able to do the work and was good at it.

f) So far as this meeting was the only consultation about the change of role, it concluded with apparent understanding and express agreement to the change and no further consultation was therefore necessary.

g) Over the following months, I find the claimant was happy to work in the FP team and this is confirmed in various interactions over the period, including his mid-year review.

h) I find the claimant wore a face visor, in line with the initial covid general risk assessment.

5.13 From 30 July 2020 the respondent implemented further guidance on specific issues concerning COVID-19, furlough and those at risk. I find the possibility of voluntary furlough was no longer available after the initial wave, but those with particular vulnerability or shielding needs could be placed on furlough. Mr Maciąg did not qualify for furlough on this basis.

5.14 The claimant was absent from 10 September due to toothache. It is not in dispute that this required dental treatment which would take place over the coming weeks in Poland. The specific chronology is: -

a) On 10 September 2020, Mr Maciąg sent a text message to Mr Ayre to notify his absence. The reason for absence was toothache.

b) From 16 September, the reason for absence changed into lower back pain, suggesting the onset was triggered by something other than the workplace.

c) The text messages between the two show an exceptionally positive working relationship with Mr Ayre who showed genuine support and concern throughout.

d) A fit note was required due the duration of the absence. This was provided for the period between 16 and 29 September.

e) Mr Maciąg then took a trip to Poland for the dental treatment from Monday 28 September 2020.

f) He returned to the UK at a time of national public health restrictions and was then required to self-isolate for two weeks.

g) Throughout all of the exchanges between Mr Maciąg and Mr Ayre, there is no hint of any criticism about the transfer to FP or of any health issues relating to the lower back pain.

5.15 The claimant returned to work on 26 October 2020. This being the first of a 4-day rota lasting until 29 October. On 26 October, Mr Ayre conducted a return-to-work meeting with the claimant which was documented. Again, I find no issues were raised about area of work or lower back.

5.16 The claimant then had a period of 4 days off rota. During that time, on 30 October 2020 the respondent published a revised general risk assessment concerning covid safety in the workplace. The significant and material change for present purposes was that masks wearing became mandatory. Other measures remained in place and the Health and Safety team reviewed the list of identified tasks that could not be undertaken whilst maintaining social distancing. Those tasks now required mask wearing and other control measures. As before, one such activity was the two-person lift. This was core part of the QA operatives work in the FP team due to the size of many televisions and directly affected the claimant.

5.17 Some people sought exemption from wearing a mask. The claimant's first day back at work after the change was 3 November when he would have learned of the change in policy. I find on 4 November 2020 he self-declared as someone who could not wear a face mask. That would inevitably mean an individual risk assessment would become necessary to explore alternative working arrangements which would likely mean a move to another team. I find Mr Ayre did not challenge such self-declarations or require evidence of health conditions or exemptions, he simply accepted the position, documented it and put in place the necessary adjustments. Individuals who were mask exempt were required to wear a specific Hi-Viz vest stating so. From this date Mr Maciąg did not wear either a face mask or, curiously, even the visor that he had been wearing until then.

5.18 I find this self-declaration against the new covid measures was the reason for the individual risk assessment that took place on the same day. I am satisfied that is the day of the self-declaration as I accept Mr Ayre's account of being anxious to address any such declarations immediately. I find Mr Maciąg was the only QA Operative in Mr Ayre's team to declare as mask exempt, although he was one of about 30 across the entire CRC. At the individual risk assessment meeting , I find both Mr Maciąg and Mr Ayre worked through the

form together and Mr Maciąg signed it. I find in the course of the risk assessment the claimant explained that he had had bronchitis as a child but stated that he did not have any health risk factors for COVID 19 at this time. This was duly noted by Mr Ayre. The fact that the two-person lift was such a core part of QA role in FP meant that it was now not safe for Mr Maciąg and his colleagues for him to continue to work in the FP team whilst not wearing a mask. An alternative solution was necessary to enable Mr Maciąg to carry on working safely. I find they discussed the process of exploring with HR "longer term redeployment into another role".

5.19 The principal COVID control mechanism available for the claimant and others declaring as mask exempt was to maintain the two-metre social distancing. This was not possible in certain areas including the FP team, but it was possible in the low contact areas occupied by the warehouse, spares and wholesale/home screening teams due to their physical size. As a result, Mr Ayre spoke with the senior management team to try to find an alternative placement decision was to redeploy the claimant.

5.20 An early informal discussion with the claimant about options took place the next day on 5th November. Whilst it may be putting it too high to say there was express agreement from the claimant, I find there was no objection or any hesitation from Mr Maciąg. In every other respect he appeared to be happy with the proposal as a way forward to allow him to continue to work. No alternatives were suggested by the claimant. I find it was clear this was a temporary measure and that the employer would be looking to a longer-term solution.

5.21 A role was identified in the warehouse from 11th of November 2020. So far as Mr Maciąg's case is based on his employer trying to find a way to get rid of him, I firmly reject that contention. The evidence is in fact firmly to the contrary. As part of the senior management team attempts to find an alternative role, an Operations Manager, Mr Moxon, had written to the head of warehouse explaining the implications of the mandatory mask for Mr Maciąg and stating: -

> ***"…I was wondering if you had any warehouse opportunities he could fulfil, I promise he is not a problem and I do not want to lose him but I really can't keep him in the department".***

5.22 I find a three-way discussion took place between the claimant, Mr Ayre and the first line manager in the warehouse, Mr McFarlane. Mr Maciąg agreed that Mr Ayre's account of the discussion was accurate. During that it was agreed that Mr Maciąg would take units from outside the boundary of FP to the warehouse dispatch by waiting at the door on collecting units at a distance from colleagues. That way colleagues were not putting each other at risk. I find Mr Maciąg was happy with this understood and accepted this was because it was a less risky role. Mr Maciąg was told he had to adhere to the rules in place. It was agreed that Mr Ayre would remain his FLM for all employment matters but that Mr McFarland would give directions for his day-to-day duties.

5.23 Again, I find no issues were raised by Mr Maciąg. The high point appears to be when Mr Maciąg observed to Mr McFarland in passing that changing depts would mean he was exposed to different "bubbles", that is teams of staff. Maintaining bubbles was a part of the

covid control measures. I accept Mr Maciąg may have made such an observation, but I do not accept they were put in the context of a challenge or complaint to his deployment. In any event, all the control measures were a balance or compromise, including the 2m distancing, and could not be maintained absolutely. I find Mr Maciąg did not raise any potential alternatives such as returning to furlough or working in a different role or department.

5.24 Permeating throughout this period, I find Mr Maciąg held a dismissive view of covid and the associated public health measures being imposed. He expressed his view to Mr Ayre in their conversations that it was a conspiracy or a hoax and that the public were being indoctrinated. It is a position that is inconsistent with his assertions now that his health was being put at risk by the employer's changes to his base.

5.25 I do not accept that the claimant spent nearly two weeks working in two departments. The way his 4-day rota landed; he worked one more day in FP before commencing he redeployment to the warehouse on 11 November 2020.

5.26 The working arrangements for work in the warehouse and particularly collecting from FP in a safe manner meant the claimant should not have been entering the FP QA area. He did not adhere to this. There is no dispute that on 5 December Mr Ayre spoke to him to relay that he had received verbal complaints from colleagues that Maciąg was frequently breaching social distancing and undertaking duties which he was not to perform. I find Mr Ayre took him to one side to raise this informally with him. The claimant was reminded of the severe consequences to breach distancing and H&S practices, one of which was the possibility of disciplinary. He was asked not to approach colleagues and that he must wait by the QA entrance and collect units and perform running duties. I find the claimant apologised and accepted this direction.

5.27 I find this event was on 5 December 2020, not 5 November as the claimant put in his witness statement. The error in the date could be a mere typo but the way the claimant sought to justify this against surrounding facts that, because of the error cannot have been correct, further undermines his contention that the employer was looking for a reason to get rid of him. Moreover, if there had been such a desire to get rid of the claimant, the gross misconduct disciplinary process that took place would surely have been the opportunity to achieve such an aim. That not only did that not happen, but the employer's response to it demonstrated a particularly fair and balanced approach to the allegations to which I turn now.

5.28 So far as Mr Maciąg sought to justify before me his attendance in areas and locations where he was not permitted, he suggested it was necessary for him to do so to access a computer terminal. I accept that having access to a terminal was an essential part of his role in order to perform basic admin, check emails and access intranet or payslips etc. However, I do not accept this meant he could go anywhere. I find Mr Ayre had made provision for him to enter areas subject to his prior permission (which was not obtained on the occasions Mr Maciąg did it) and that in any event, that should not be necessary as there were sufficient computer terminals in the open areas in the warehouse.

5.29 On 23 December 2020 Mr Ayre was on leave. The FLM for the notebook team was his cover partner. He would cover for her during her leave, she was covering for him on this occasion. She was someone who was clinically vulnerable. She had been on furlough due to her clinical state due to a compromised lung functioning. She was mask exempt also but chose to wear a face visor. She was keen to work and after her extended furlough, a plan had been put in place for her to return to work safely.

5.30 On 23 December 2020 she encountered the claimant in circumstances where he was believed again to be breaching the health and safety rules. In response to her challenging him, she described how he acted aggressively and was intimidating and threatening towards her. He squared up, punched his fist into his palm and came close to her in an intimidating way, he then approached her for a second time. I find she genuinely did feel threatened and intimidated by his conduct. As a result, she referred his conduct for a disciplinary investigation. An investigation was launched immediately and the claimant was suspended.

5.31 Mr Maciąg accepted that faced with this allegation, the respondent was obliged to treat it seriously, to investigate it and to consider the matter at a disciplinary hearing. Between 24 and 30 December 2020 the matter was investigated by a Ms Carter. Information was sought from witnesses and those that understood the implications of the covid rules to Mr Maciąg's mask exemption, including Mr Ayre who provided information concerning the limitations and boundaries on the claimant's role and the fact he had had to speak to him at the beginning of December about covid safety breaches.

5.32 Mr Maciąg criticises the investigation and who was and was not spoken to. I reject those criticisms. The process provided an opportunity for all witnesses including Mr Maciąg to identity other relevant witnesses. Mr Maciąg did take that opportunity but did not identify two individuals he now says should have been spoken to. The two he did identify were spoken to as a result of being identified. The two he did not identify have given evidence to this tribunal and nothing that they said in their evidence would lead me to conclude the allegation against the claimant was false. Similarly, I do not accept the criticism that the covering FLM took steps to find negative evidence about the claimant. I find she was entitled to check out the background of someone that she did not know well but did know had been subject to previous complaints from colleagues about breaching social distancing. Those enquiries were part of a natural and reasonable steps an acting FLM might take before deciding whether to take matters to a formal disciplinary. So far as it is alleged she instructed a colleague called Oliver to find out information about the claimant, I am unable to make a finding of fact that she did this, even if Oliver did in fact make enquiries of others about Mr Maciąg.

5.33 The result of the investigation was such that on 31 December 2020 the claimant was invited to attend a disciplinary hearing. The nature of the allegations potentially amounted to gross misconduct. The hearing took place on 15 January 2021. The claimant was represented and a case was put very well on his behalf. It identified that the informal discussion that had set out the boundaries of his duties was not as detailed as it might have been, that English was not Mr Maciąg's first language and that he got frustrated when he

could not express himself fully, that she may have misunderstood his intentions and that he apologised for how she felt as that was not his intention.

5.34 The outcome was that no further disciplinary action would be taken. However, I find that the internal decision did not find the FLM to have made a false allegation against Mr Maciąg. It recommended the role was clarified but unfortunately, this was not directed to Mr Ayre who was otherwise not kept informed of the detail about the disciplinary beyond the fact it was happening.

5.35 I find the claimant returned to work on or around 19 January 2021. He and Mr Ayre had a discussion on his return. The work in the warehouse had not changed. There was no complaint by Maciąg and no reference by him to the recommendation to clarify the boundaries of the role. Mr Ayre was left with the belief that Mr Maciąg was content to continue in the warehouse role.

5.36 On 2 February 2021, Mr Ayre was forced to hold a further informal discussion with Mr Maciąg. Mr Maciąg had been captured on CCTV once again breaching the two-metre distancing rule without wearing a mask. This was again treated informally although, unlike the discussion on 5 December 2020, Mr Ayre now felt it appropriate to document the interaction in this way. Mr Maciąg signed the note but stated that he disagreed with him breaching social distancing. The claimant again referred to his view of covid and his disagreement was in the context that Covid was “bullshit”. In respect of him noting on the form, I find that is supportive of the notion that if there was a point of challenge in any of these meetings, he would not simply sign the notes as he had on other occasions. That again suggests to me that the other notes are an accurate reflection of the meeting.

5.37 I find the operations managers and FLM’s kept these temporary positions under review throughout the period and against their FTE staffing requirements which changed over time. The warehouse role had always been a quick fix and could not accommodate Mr Maciąg longer term. On 18 February 2021 a potential new role for the claimant was identified in the spares department which would be available after 31 March 2021 and for which his skills and training “mapped”.

5.38 On 3 March 2021, Mr Ayre met with the claimant to discuss this role. I find the notes of that meeting to be accurate. This meeting did little more than explain the need for relocation and the role that had been identified. Mr Maciąg’s first working day in the role was planned to be 4 April 2021.

5.39 A few days later on 6 March 21. Mr Ayre conducted a further individual risk assessment for the claimant in that new role. He noted how: -

> ***“Transfer has now become available in spares function FTE which will allow safe transfer, accommodating Daniel’s medical mask exemption. The role falls within the same work level grade and maps accordingly. No effect on Daniel’s responsibilities and abilities, pay and the transfer offers temporary solution until restrictions are amended/changed/removed. No changes to terms and conditions of Daniel’s contract”***

5.40 Mr Maciąg signed the form. I find no objections or concerns were raised by the claimant during the risk assessment meeting nor were any alternatives raised such as furlough or work in any alternative role or department. To the extent that it is now said that the claimant feared an adverse effect on his pay, I find there could be no reasonable basis for any such fear when the pay and terms had explicitly been stated as not changing and against the background that they had not changed over the previous 9 months on the move to FP or the move to warehouse. Had any concern been raised by the claimant, I am satisfied Mr Ayre would have noted it and dealt with it. I am confident in that finding as the two met again on 13 March 2021 for a further documented informal meeting to discuss the move. In that meeting Mr Maciąg did raise a concern about the move albeit in vague and generalised sense. I find that fact that he was not able to articulate what those concerns were is further support for any such concerns not having been raised previously. This is a somewhat bizarre response, particularly as these two had an exceptionally personal and supportive relationship. I find the reluctance to give details is more about the fact that the claimant was being advised by this time by third parties. Mr Ayre closed the meeting agreeing that "Daniel will set out his concerns in an email". Mr Ayre also agreed to Mr Maciąg taking a period of unpaid leave from 19-22 March 2021.

5.41 I find Mr Maciąg asked for Mr Ayre to set out the position in writing. He expressly asked for this in a hard copy letter and not an email and Mr Ayre obliged. On balance, that was for convenience in giving it to others advising him.

5.42 At this point there was about 2 weeks before the change was due to take place. I find there remained time to explore Mr Maciąg's concerns and potentially resolve them, including looking for alternatives to the move to the spares team. That did not happen and Mr Maciąg would in fact never move to Spares or any other department. After his period of unpaid leave, he took sickness absence and would never return to work for the respondent.

5.43 Mr Maciąg says he sent email to Mr Ayre on 14 March 2021. I have seen a draft of such an email. I find it was not sent to the respondent. The draft I have seen was not addressed to Mr Ayre or anyone at the respondent and seems to be part of an email exchange with his solicitors. There is overwhelming evidence that Mr Ayre always engaged with his staff and had this been sent to him, I have no doubt it would have been addressed.

5.44 From 25 March 2021 Mr Maciąg commenced his final episodes of sickness absence for the reason of "stress at work". On the same date, I find he sent a grievance to the operations manager, Scott Campling. However, I also accept Mr Campling did not receive it or become aware of it for some weeks. The two conclusions can be reconciled for five reasons. First, although headed grievance, Mr Maciąg's email address carries a different name of Daniel South. Secondly, and related to that, it was an external email, not part of the Currys' email system. Thirdly, the Currys' IT system clearly shows how it generates a warning in respect of opening external emails. Fourthly, Mr Campling was on notice to expect it and I find would have been looking out for it and fifthly, the speed and manner in which Mr Campling did in fact respond as soon as he later became aware of it suggests he would have responded in that same way whenever he first saw it.

5.45 Further, the grievance finally came to his attention largely due to the actions of the employer. On 20 April, Mr Ayre and Mr Campling exchanged text messages in which Mr Ayre chased whether he had heard anything about the anticipated grievance. There is no reason for Mr Campling not to be honest in his private response to Mr Ayre that he had not received anything yet. On 1 May 2021, Mr Ayre had the first of three long term sickness absence review meetings with the claimant. In that meeting, Mr Maciąg referred to how he was waiting a response from the operations manager to a grievance he had raised. Mr Ayre agreed to check further establishing that it had not been received. A further copy was sent by the claimant on Saturday 1 May 2021 and immediately actioned by Mr Campling.

5.1 The grievance itself made what Mr Campling understood to be 10 complaints. They were: -

a) That he had been relocated from mobile QC to flat panel without consultation.

b) That two previous absences for the back pain were not considered as part of the move.

c) The incident that took place in December 2020 where he was unfairly accused of intimidating behaviour towards the covering FLM.

d) That due to this incident his good reputation was in danger.

e) That the covering FM gave permission to one of the colleagues “Oliver” to go around with the lab with a piece of paper to ask colleagues if they had an issue with him and then write it down.

f) That when he came back to work, he was sent to the warehouse for his safety as he was faced mass exempt and wasn't offered an alternative.

g) That to his knowledge he was the only face mask exempt employee being treated that way.

h) That in the beginning of March his FM said that from the beginning of April he would be transferred to spares, when he asked if there were any options he said this was the only one, and asked why can't he go back to mobile QC.

i) That he wasn't informed of COVID cases among our co-workers.

j) That he was feeling victimised pushed around and not wanted by the company.

5.2 On Monday 3 May 2021, Mr Campling responded to the claimant in writing. He sought to make arrangements for the conduct of the grievance complaints. He invited Mr Maciąg to schedule a meeting for this purpose. The claimant responded saying he was unable to attend a meeting due to a medical appointment. As a result, on 7 May 2021 Mr Camping wrote again and offered the claimant an option of meeting or him considering the grievance on the information available in writing.

5.3 I find there was no material response to that communication by the claimant. Mr Ayre was not involved in the substance of the grievance but did continue to hold monthly long-term absence reviews with the claimant. In the course of those he enquired about progress of the grievance and the obstacles to Mr Maciąg's return to work. The single issue that Mr Maciąg stated as preventing him from returning to work was the outstanding grievance. I find throughout the review meetings, the only reason why the grievance meeting had not yet been arranged or an alternative paper exercise commenced was because of difficulties the claimant was having with arranging his trade union representation or, later, his independent legal representation. I find Mr Maciąg made no attempt to progress the grievance or respond directly to Mr Campling at this time but did keep Mr Ayre informed of these problems he was having with representation.

5.4 This led to something as a stalemate after around three months of absence. I find Mr Campling discussed the matter with Mr Eyre, who told him that the claimant's position was that the continued absence was related to the grievance outcome. It needed to be dealt with in order to facilitate a return to work.

5.5 On 13 July 2021 the company did receive a response from the claimant who set out his desired outcome from the grievance process was a return to work in the QA mobile team and an apology for the false accusations. That communication did not deal with whether he wanted his grievance explored at meeting date or the manner in which the grievance was to be determined. In view of the delay and the fact the grievance was said to be the only obstacle to a return to work, I find Mr Campling then explored options with his HR adviser and they decided that sending an initial informal response to the grievance was the best option to progress matters. In doing so, they sought to preserve the claimant's right to escalate it to a formal grievance, should he then wish, an option Mr Maciąg agreed remained open to him. Mr Campling then investigated the complaints based on his understanding of the points raised in the written grievance.

5.6 There is another similar conflict of evidence as to whether an e-mail, said to have been sent on 28 July 2021, was in fact sent to Mr Campling. I find it was not. On its face, it does not appear to be addressed to Mr Campling but instead to Barbara at DCK Solicitors, his current legal representatives. However, Mr Maciąg did email Mr Campling on 5 August 2021 asking for a response to his letter of grievance and what his position will be when he comes back.

5.7 The grievance outcome was sent by email on 6 August 2021. It attached a detailed letter under the heading "informal grievance outcome" and addressing each of the 10 points raised by the claimant in his grievance. For each, Mr Campling summarised the background, the history, the respondent's rationale for the actions and the result of his investigations into the point as was relevant. Each point was rejected and the grievance dismissed. The reasons for each point being rejected follows closely to the findings I have made about the events in the chronology. I find Mr Campling was entitled to reject the points on the basis of the facts he had before him.

5.8 Mr Maciąg had until then been providing regular fit notes to support his absence. The last note expired on 1 August 2021, before the outcome was known. This issue was chased

by HR on 3 August with Mr Ayre and again on 18 August who, I find, followed up with Mr Maciąg. No further fit notes were provided. Mr Ayre exchanged text messages with the claimant on 10 August 2021 in his customary supportive tone. In response the claimant wrote: -

> ***Hi Tom. I have finally received an e-mail from Scott with a long delay. I will contact with you tomorrow evening or the day after tomorrow at latest as today I have an appointment with my lawyer and tomorrow I go to the hospital with my wife. Thank you for understanding Tom.***

5.9 On 18 August 2021, Mr Maciąg telephoned Mr Ayre. The purpose was to let him know he was resigning, that he had been working in the Prezzo restaurant where his wife was an assistant manager while he had been off sick and that he would forward a resignation letter. Mr Ayre expressed his regret at that decision and was sorry to lose him.

5.10 Mr Maciąg's resignation letter was sent on 18 August giving notice of his termination with immediate effect. It identified the grievance handling as the last straw (although it is the outcome itself and not the handling of the grievance which has been relied on in the claim before me). It then sought to reply to some of the conclusions reached by Mr Campling. They were limited to his limited past experience of FP, whether he had raised medical objections to the work, the issue over the accusation by the covering FLM and his subsequent suspension before Christmas.

5.11 Mr Ayre then had exchanges with HR about how to treat the resignation. The respondent operates what it calls a resignation in haste letter. This was explored and suggested but in the event not sent and an acceptance letter sent on 19 August 2021.

6. Analysis and Conclusions

6.1 Whilst the whole episode has to be seen in context, the case of Kaur requires me to focus initially on the last straw event.

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation ?

6.2 The last straw event is put on the basis that "*His grievance in relation to a number of these matters was not upheld"*. It was confirmed before me that the issues identified by EJ M Butler are correctly articulated in that it is the decision to reject his grievance that is the conduct, and not the handling of the grievance. (Despite the way the resignation letter is put)

(2) Has he affirmed the contract since that act ?

6.3 This act occurred on 6 August 2021 and the claimant became aware of it the same day. The resignation was communicated on 18 August 2021, 12 days later. There remains some measure of uncertainty in the evidence about what was actually going on during this time. I have noted how the claimant failed to submit his further fit note required from 1 August 2021 which might suggest something other than a continued employment relationship was already in mind. However, the main points are that the delay between last straw and resignation is less than two weeks. That may be sufficiently short enough not to infer

affirmation from someone who was at work but in this case the claimant was absent on sick leave and there is nothing from the surrounding circumstances that would properly lead me to infer an unequivocal acceptance of the continued employment relationship. This is a point which the respondent all but conceded. In summary, I conclude he had not affirmed the contract during the intervening period.

(3) If not, was that act (or omission) by itself a repudiatory breach of contract ?

6.4 Although the case is put as a last straw case, **Kaur** reminds us that a last straw event may in itself be a sufficiently serious breach of contract to amount to a repudiatory breach on its own. That is the first question that must be asked but, in this case, I am not satisfied that rejecting the grievance is a breach of the implied term in its own right.

6.5 The first consideration is whether an employer rejecting a grievance can amount to conduct capable of seriously damaging trust and confidence. In the vast majority of cases I am satisfied it could simply because if it is important enough to form the subject of a grievance, then the rejection of that grievance is likely to be sufficient to seriously damage trust and confidence. Moreover, prior to the development of the implied term of trust and confidence, the law recognised an implied term in contracts of employment that grievances would be addressed. At the other extreme, a grievance may be about any subject matter, some less significant than others, and it may be that in some cases the minor nature of a grievance could mean answering this question may be a matter of fact and degree as to whether a rejection did seriously damage trust and confidence. In this case, however, the nature of the issues raised by the claimant included some which were of a kind that were at the more serious end of the scale. In particular, the issue of the allegations made against him which could amount to gross misconduct. There is no question that the substance of his grievance was sufficient for its rejection to amount to conduct that was likely to seriously damage trust and confidence.

6.6 However, the determinative issue is whether the employer had reasonable and proper cause for rejecting the grievance. In this case I am more than satisfied that it did. The detail of the grievance is answered largely with reasoning which explains why the other alleged acts and omissions said to undermine trust and confidence also fail to amount to a breach of contract, individually or collectively. Mr Campling explained the reasoning behind the moves which, viewed objectively, provided a sound and rational basis for him coming to the conclusions that he did. Mr Campling investigated other allegations, such as the accusation that Oliver was sent to find adverse evidence on the claimant. He took steps to speak with the individuals concerned and drew a conclusion that was objectively open to him that it did not happen. In all respects, his conclusions leading to each point being rejected were based on facts that give that decision reasonable and proper cause.

6.7 For what it adds, were this allegation put on the basis of the *handling* of the grievance, as opposed to the *outcome*, I am still not satisfied that it can be said to be likely to undermine trust and confidence and, in any event, each step was taken with reasonable and proper cause. Although there was substantial delay, the initial delay could not be avoided as the grievance did not get to Mr Campling until 1 May 2021 at which point the process was

engaged promptly and appropriately. Thereafter, the cause of the further delay was down to the claimant and his ability to arrange suitable representation and respond to Mr Campling. The claimant consistently informed Mr Ayre of his own delays during the periodic absence review meetings. The employer did not press Mr Maciąg who was absent due to work related stress but faced with a lack of engagement with its proposals, and it becoming clear that responding to the grievance was the only obstacle to the claimant returning to work, Mr Campling took a decision that was objectively open to him after discussion with HR and on consideration of the current state of affairs, to address the concerns as an informal grievance decision.

6.8 In the course of cross examination, a new line of challenge appeared to emerge that Mr Campling was too close to the history and knew too much about the claimant's circumstances to conduct a fair grievance and he should have recused himself. That is not an act or omission in this claim and no application to amend was made but, to the extent that it might have been, it would have been rejected. Mr Campling was a senior manager with sufficient authority to conduct a grievance. His knowledge of the previous operational issues and covid planning was something any senior manager was likely to be aware of and there was nothing in the ongoing updates he received from Mr Ayre about Mr Maciąg's absences that could reasonably be said to have undermined his ability to fairly and properly deal with the grievance.

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term ?

6.9 In dealing with this question, I keep in mind that the final straw only needs to add something of the same sort of character to the overall conduct said to amount to a breach. I am satisfied, however, that the answer to this question is also negative for the reason that all of the four other acts or omissions were either not made out or, where they are, were done with reasonable and proper cause such that none of them, individually or collectively, can amount to a breach of the implied term.

6.10 The first act or omission relied on is that "*In March 2020, upon returning to work after being furloughed, Mr Maciąg was transferred from the Quality Assurance department to the Flat Panel department without consultation and the work in this department was more physical and exacerbated his existing back condition requiring him to take pain killers"*.

6.11 Ignoring the minor factual inaccuracies in this statement (there was only one QA department of which the flat panel team was one of three teams) I would first reject the absence of consultation. General consultation had started in 2019 with the work force briefings about the reduction of staff in the mobile team. There is clearly reasonable and proper cause for the reduction. This employer sought to avoid that turning into a redundancy situation. I am satisfied that Mr Maciąg was selected for this move as a result of an objective assessment of the skills available amongst the QA operatives in mobile and the ability to find a mapped role elsewhere for him based on his training and flexibility. There were express contractual terms entitling this change. There was then individual consultation conducted by

Mr Ayre on 7 June, the very first workplace interaction after the claimant's furlough ended. Mr Maciąg's own evidence is how he was convinced by Mr Ayre of the attraction of the move, agreed to it and soon found he was a success at it. I do not accept that consultation did not happen or that what did happen was inadequate. To the extent that it happened on the morning of his return, and the plan for him to move was already in place, I am satisfied this timing arose directly as a result of the then understanding of the limitations of employment matters occurring during furlough which, again, provides reasonable and proper cause for the timing.

6.12 As to the work itself, I do not accept the work caused any pain. There is no evidence of him reporting pain or complaining about limitations. The only episode of sickness absence for a lower back pain occurs after a period of 6 to 10 days absence from the workplace (depending on when his off-duty days fell) and followed an absence for toothache suggesting as I found, causes outside the workplace.

6.13 Moreover, I have no doubt that had Mr Maciąg raised concerns with Mr Ayre at any time, they would have been explored in just the same positive and supportive way that Mr Ayre dealt with any of the later issues that did in fact arise. As the respondent put it, one key point in this case is whether the employer ignored complaints and issues raised by the claimant. It did not.

6.14 The second act or omission alleged is that *"In September 2020, he was then moved to work in the warehouse without consultation".*

6.15 I have to say that this allegation is somewhat surprising. There was no need to move the claimant to the warehouse until he self-declared as mask exempt. There remains some doubt about the clinical necessity for that exemption in the evidence, but even where it was necessary, it left the employer unable to deploy him safely in the flat panel team due to the fact that the 2-person lift was such a core element of the role. The respondent respected his declaration but had to do something to find him safe work. There was no option of returning him to mobile team due to the downturn in volumes. No other suggestions were made by the claimant. Reasonable and prompt steps were taken to identify a safe role for the claimant to perform and it is clear that this was done in the context of an employee the employer had positive regard for and did not want to lose. Moreover, this change was not without consultation. As soon as the claimant made his mask exempt declaration, Mr Ayre met with him to review the individual risk assessment in which they discussed the process of exploring with HR longer term redeployment into another role. The respondent's actions are based entirely on a thorough general risk assessment which appears objectively to have balanced the operational needs, individual needs and what was then known of the covid risks. It then undertook an individual risk assessment focusing on the claimant. There were discussions with the claimant about the way forward including the individual risk assessment meeting, the informal discussion and the three-way meeting with the new FLM. The new role identified was explained to him as was the fact that it was temporary. Neither this nor any of the changes had an effect on his pay or terms and conditions

6.16 Seen in this factual context, I don't accept that this move is capable of amounting to conduct likely to undermine trust and confidence. It was something that the employer was contractually entitled to do, ultimately without the employee's agreement, and arose entirely from the mask exempt declaration. Alternatively, to the extent that it is capable of amounting to conduct that was likely to seriously damage trust and confidence I am satisfied that the respondent had reasonable and proper cause for the action it took and the manner in which it took it.

6.17 The third act or omission alleged is that "*In December 2020, a First Line Manager falsely accused him of aggression towards her for which he was suspended before being exonerated at the eventual disciplinary hearing. This caused him to go on sickness absence with work related stress".*

6.18 This may be the high point of the case as Mr Maciąg certainly went through a disciplinary process and period of suspension during which he was at risk of a disciplinary sanction for an allegation of gross misconduct. I am satisfied that is something that is capable of seriously damaging trust and confidence. However, it is important to note that the conduct said to undermine trust and confidence is the allegation made by the covering FLM, and not the employers subsequent conduct or outcome of the disciplinary process that followed, something that Mr Maciąg accepted the employer was bound to do in the circumstances.

6.19 As to that process, it was swift, thorough, well documented and balanced. The investigator interviewed anyone identified as a potential witness. The fact that Mr Maciąg now suggests that if his two witnesses had been interviewed it would have shown the FLM to be lying does not get off the ground. First, neither he nor anyone else identified those two individuals as potential witnesses. Secondly, they have each attended to give evidence at this hearing and say nothing which could lead to that conclusion.

6.20 The investigation resulted in evidence which supported the allegation as well as evidence that mitigated it. Objectively, there was more than enough to proceed from the investigation to the disciplinary hearing as Mr Maciąg accepts. At the hearing, the claimant was represented and it is clear that the points raised on his behalf were what influenced the final decision to take no action. It is important to note that the disciplinary process did not make a finding that the allegations were false or made up or in any way that she did not genuinely feel threatened and intimidated. That is the conduct alleged. I am satisfied that a false allegation by a person in authority such as a covering FLM is conduct that would bind the employer and amount to conduct likely to seriously damage, if not destroy, trust and confidence. However, in the absence of any contemporaneous finding of such conduct in the internal investigation, for the claimant to succeed on this part of the claim he had to prove to me on the balance of probabilities that the allegation was false. He has not done so. In fact, the evidence supports my finding that it was a genuine allegation because the FLM genuinely felt threatened but that he benefitted from a very balanced and fair disciplinary process in the outcome.

6.21 Consequently, the allegation was with reasonable and proper cause because it was her genuine experience at the time.

6.22 Factually, this allegation was not the cause of his period of sickness absence for the reason of work-related stress. That arose in March 2021 after the initial meetings related to the further transfer from Warehouse to Spares.

6.23 The fourth act or omission is that *"in April 2021, he was moved again to the Spares department without consultation where he had to work in close proximity to others when he could have worked in the Quality Assurance department where there were screens for safe working which would have been better for him as he did not wear a mask for health reasons".*

6.24 The first thing to note is that the move never actually happened. Mr Maciąg raised his objections during the consultation that started about 3 weeks before the planned move and in time to have three meetings about it. The highest that this can be put is that it was a proposal. The second thing to note is that alternatives are put in the claim before me but were not raised by the claimant at the time. In none of the meetings with Mr Ayre did the claimant raise the possibility of returning to furlough or moving to another department, including that of an engineer/technician role at grade 2 or simply as a QA operative in another team. In view of the efforts that were made to find a suitable alternative, I am satisfied this was never an option as a matter of fact. Had it been, I am satisfied it would have arisen from the internal measures taken to find alternatives. The proposal does not amount to conduct that was likely to seriously damage trust and confidence. It was known all along that the warehouse role was temporary and at the time the warehouse could no longer support the role, the risks posed by the claimant's mask exemption continued as they had the previous November. Alternatively, to the extent that it does amount to conduct likely to seriously damage trust and confidence those reasons provide the reasonable and proper cause for the proposal.

6.25 For all those reasons, none of the matters alleged as conduct likely to seriously damage trust and confidence amount to, or contribute to, a breach of the implied term of trust and confidence.

(5) Did the employee resign in response (or partly in response) to that breach ?

6.26 This is academic in light of my conclusions so far. For completeness, I have no evidence to suggest there were other reasons for Mr Maciąg deciding to resign other than the situation in the workplace. Had that amounted to a breach of the implied term the claim would have been made out. I have considered the matters I have already referred to in respect of his failure to provide a further fit note and the reference to the work in a restaurant but it seems to me that there remains sufficient in the evidence to conclude that the resignation was at least in part as a result of the grievance outcome. The timing supports that, the content of the resignation confirms that and the other evidence which case a question over it does not get beyond mere caution. Were the other matters made out, I am satisfied that the causation point would be made out.

Affirmation Generally

6.27 Beyond the answer to question 2, the issue of affirmation would only arise in circumstances where I might have concluded some, but not all, of the acts or omissions were made out. That is not the case and this remains academic but, for completeness, I am satisfied that the claimant unequivocally affirmed the contract of employment after the first, second and third matters of conduct complained about. There was either express agreement or continued performance of a sufficient duration and circumstance to infer affirmation. Were they the only acts or omissions made out, the claim would in any event fail as a result of affirmation.

6.28 Conversely, I am not satisfied that the claimant affirmed the contract after the 4th act, although there are aspects of that which are not made out as the most that can be said was that the move to Spares was a proposal as it did not ever come to light. The claimant was absent from work throughout on sick leave and was pursuing a grievance at the time. There is not enough to properly conclude an unequivocal affirmation in those circumstances.

6.29 The overall position is, therefore, that the claim of unfair dismissal fails on the basis that the claimant has not shown his resignation to be a dismissal in law. It is neither necessary to consider the question of fairness nor can it properly be performed in the absence of any identification of the circumstances that lead to a dismissal.

7. Wrongful dismissal / Breach of contract

7.1 Strictly speaking, this claim wasn't withdrawn and it is necessary to briefly set out my analysis. It was defined as a common law claim alleging breach of contract. The contractual term said to be breached is the notice the employer is required to give the employee when terminating the contract. In this case the respondent did not terminate the contract as a matter of fact and was not, therefore, obliged to give any notice. What is alleged, within the unfair dismissal claim, is that the respondent acted in a way that entitled the employee to accept the repudiatory breach of contract by resigning and treating himself as released from any ongoing contractual obligation he may have to the employer. In the context of constructive dismissal claims, that ongoing contractual obligation will typically be in respect of the notice period that the employee would otherwise be obliged to give to the employer to bring the contract to an end. The question of contractual notice from the employer to the employee does not therefore arise.

7.2 It is not uncommon to see a claim of wrongful dismissal tagged onto a claim of constructive unfair dismissal. The confusion may stem from the operation of section 95(1)(c) of the Employment Rights Act 1996 which does two things. First it modifies the common law of repudiatory breach of contract in the context of employment cases by permitting an employee to resign by giving his contractual notice without the performance of that contractual notice term amounting to an express affirmation of the contract (which it otherwise would). The second and more pertinent thing it does is to deem that resignation to be a dismissal in law for the purpose of a claim of unfair dismissal. Section 95 is explicitly stated to apply "for the purposes of this part", that is part X of the Act dealing with unfair dismissal. It does not modify the common law and it does not apply to part IX which otherwise deals with certain rights during notice.

7.3 For those reasons, there is no claim for breach of contract in respect of notice, irrespective of the outcome of the unfair dismissal claim. To the extent one is alleged, I dismiss it for those reasons.

7.4 That does not mean to say there could not have been a breach of contract claim relating to the breach of the implied term of trust and confidence but that is not the claim that has been brought. Such a claim might have the feel of a claim for notice pay as the measure of loss would be subject to the 'least onerous principle (or the "minimal performance principle") where the contract could have been lawfully terminated by giving the contractual notice period. Were such a claim before me, it would necessarily stand or fall with the constructive unfair dismissal claim. The only practical differences between it and a claim of constructive unfair dismissal that I can see would be in respect of any statutory adjustments to unfair dismissal compensation and the application of the recoupment provisions, neither of which would apply to damages for breach of contract.

7.5 However, even if that was the breach of contract claim that was before me, as the constructive unfair dismissal claim has failed, so too would this claim have failed.

EMPLOYMENT JUDGE R Clark

DATE 27 July 2023