EMPLOYMENT TRIBUNALS

Claimant: Mr J Johnston

Respondent: Plus Dane Housing Limited

Heard at: Liverpool **On**: 2-6 October and 9-10 October 2023

Before: Employment Judge Barker

Representatives
For the claimant: in person
For the respondent: Ms Quigley, counsel

JUDGMENT having been sent to the parties on 23 October 2023 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Preliminary Matters and Issues for the Tribunal to decide

1. The claimant was employed by the respondent as an engineer from October 2014 until his resignation on 16 July 2021. He commenced ACAS early conciliation from 16 March 2021 until 19 April 2021 and lodged his claim form at the Tribunal on 18 October 2021.

2. There were a two prior case management hearings in these proceedings, which were both before Employment Judge Buzzard on 14 March 2022 and again on 12 May 2022. As a result of this case management, the claimant's claim was clarified as only being for breach of contract leading to constructive unfair dismissal. Furthermore, claims brought by two of the claimant's former colleagues, Mr. Robinson and Mr. Brooks, were withdrawn and were dismissed on withdrawal by Judge Buzzard in a judgment of 12 May 2022.

3. The respondent pursues a counterclaim against the claimant, for what the respondent alleges to be breaches of contract, in that the claimant worked for a third party whilst maintaining that he was off sick and submitting fit notes to the respondent stating he was unfit for work. That counterclaim is to be determined in these proceedings.

4. At the outset of the hearing, the Tribunal administration had provided a full panel to hear the claims. This was an administrative mistake, on the basis that it was understood that the claim may include a complaint that the claimant had suffered a detriment connected with the respondent's alleged breaches of health and safety. It became immediately clear that this was a mistake, because the case management record from 12 May 2022 left no room for doubt that the only complaint brought by the claimant was constructive unfair dismissal. Following an explanation to the parties and a discussion with the Tribunal panel to clarify this, the hearing continued with the Tribunal composed of a judge sitting alone.

5. Before the Tribunal could begin to hear evidence, there were a number of case management issues to resolve. The claimant had made a lengthy application for witness orders dated 22 September 2023. The claimant requested seven witness orders and provided a detailed explanation as to why each witness was needed. The claimant's reasons for making this application so close to the final hearing was that he only received the respondent's witness statements "*two weeks ago*". The Tribunal notes that the issues in the case were clarified at the hearing on 12 May 2022. Correspondence on the Tribunal file from the respondent's solicitor indicated that the parties agreed to exchange statements on 8 September 2023. The Tribunal retired to read the witness statements that were already admitted in evidence and the accompanying documents from the Tribunal bundle. The parties were told that a consideration of the claimant's application for witness orders would happen after the Tribunal had done its reading.

6. The claimant also told the Tribunal that a zip file containing a large number of documents submitted by him had not been included in the hearing bundle. The respondent's counsel told the Tribunal that her understanding was that they were in the bundle, albeit in a different format to that supplied by the claimant. The claimant also sought to introduce a number of additional documents on the morning of the hearing which he labelled as "Evidence 39 to 43" For ease of reference the Tribunal will adopt the same labelling. The respondent did not object to these further documents being added. The Tribunal permitted the claimant to add documents "Evidence 39 to 43" to the bundle.

7. The respondent raised with the Tribunal that the claimant sought, in his witness statement, to give evidence on a number of matters that had clearly been identified as being without prejudice in that they were subject to litigation privilege. The respondent told the Tribunal that the references to such discussions in the bundle were redacted but the claimant had referred to settlement conversations in a number of paragraphs in his witness statement.

The Tribunal asked for context so that the redacted pages in the bundle could be read and some determination reached on this issue without reading the paragraphs themselves. This was provided by the respondent's counsel and the claimant, following a discussion with the judge.

8. In terms of when litigation became a prospect between the parties, it was not in dispute that the claimant had indicated that he would litigate over his complaints with the respondent as early as January 2021 even though he remained in employment until July 2021.

9. The claimant sought to argue that the discussions that he wished to refer to were not clearly identified as being "without prejudice" and so therefore no privilege would apply to that information.

10. The Tribunal retired to read and consider the preliminary applications and decided as follows.

11. In terms of the matters said to be without prejudice, it was clear from the respondent's case that some settlement discussions had taken place in January and February 2021. These were also referred to in very broad terms in the claimant's evidence. Therefore, the paragraphs in the claimant's witness statement that referred to these in very broad terms, that is without discussing the contents of the settlement negotiations, could be admitted in evidence before this Tribunal. This related to paragraphs 31, 33 and 35 of the claimant's witness statement. In relation to paragraph 42, which referred to a period some months later, it was clear from the context of the surrounding paragraphs in the witness statement, that this paragraph was likely to contain information about more detailed aspects of the settlement discussions and therefore ought to not be before the Tribunal. Paragraph 42 of the claimant's witness statement was therefore struck out as it was subject to litigation privilege.

12. In terms of whether documents provided by the claimant were already in the agreed hearing bundle, following the Tribunal's reading and review of the documents provided by the claimant, it took a number of further discussions with the claimant for him to clarify what these missing documents were. It was then clear that all of the claimant's disclosed documentation was in the bundle save for three documents that were on the face of them referring to detailed aspects of settlement discussions and so had not been included in the bundle and were not read by the Tribunal. Otherwise the Tribunal was content that the claimant's requested documentation had been included.

13. In relation to the claimant's witness orders, following a discussion with the Tribunal it became clear that some of the witnesses requested by the claimant such as Fletcher Bradley would not be willing to provide evidence in favour of the claimant and therefore could not be classed as his witness. Mr. Brooks and Mr. Robinson (who were formerly claimants in these proceedings) had not agreed to participate and appear as the claimant's witnesses. It was not at all clear that they would give evidence in favour of the claimant given that the

claimant had indicated that they had “radio-silenced” him and said that they were consulting lawyers if he attempted to reach them to ask if they would give evidence on his behalf.

14. The evidence of Mr Mossman was found to not be of assistance to the Tribunal, the claimant agreed to dispense with his request for Mr Powell and therefore only Mr Merrigan, who was a gas engineer for the respondent, remained on the claimant’s list. The Tribunal discussed with the claimant the fact that applying to introduce a witness statement for Mr Merrigan at the start of the final hearing when case management was set in May of the previous year, was likely to derail the hearing timetable.

15. No witness statement had been prepared by Mr Merrigan for the purpose of these proceedings and it would take time for one to be produced and for the respondent to consider it. The respondent’s counsel indicated rebuttal evidence might be sought and further witnesses introduced such as Mr Bradley to deal with any new issues in a statement from Mr Merrigan. It also became clear that Mr Merrigan's presence was requested to confirm a number of matters that the claimant raised in his witness statement and which had been documented and considered by the respondent during the five separate internal grievance processes brought by the claimant during his employment.

16. The Tribunal understood that Mr Merrigan had been interviewed by Mr. Kelly who conducted the claimant’s grievance appeal. Mr Kelly's interviews with witnesses appeared to the Tribunal from its reading to be detailed and thorough. It then transpired, on a search of the bundle, that Mr Merrigan's statement to Mr Kelly had been omitted from the Tribunal bundle, for which the respondent’s counsel apologised and expressed embarrassment.

17. Mr Merrigan’s statement to Mr Kelly was provided to the claimant overnight by the respondent’s solicitor and given to him to consider. The claimant was allowed time by the Tribunal during the hearing to adjust his cross-examination questions for any of the respondent’s witnesses to take into account Mr Merrigan's statement to Mr Kelly. The Tribunal expressed the view that allowing the claimant to rely on Mr Merrigan's statement to Mr Kelly's investigation was a proportionate way of ensuring that his evidence was before the Tribunal without introducing him as a witness, given the disruption to the timetable that it would cause and given the prejudice to the respondent and given the delay that it may then cause to all parties. The claimant accepted that this was a proportionate way forward, although expressed his view that the respondent had omitted Mr. Merrigan’s statement from the bundle on purpose.

18. There was also some discussion about the admissibility of a covert recording that the claimant had made involving Mr Merrigan. The Tribunal determined that Mr Merrigan would have a reasonable expectation of privacy in relation to this issue, as was argued by the respondent and that although the claimant had sent a copy of this recording to the respondent it was reasonable for the

respondent not to put it in the bundle. The covert recording was not admitted in evidence, as it was not proportionate or necessary to admit it.

The Claimant's request to admit a revised list of issues

19. As part of a discussion about information that may or may not be missing from the bundle, the claimant told the Tribunal that he had sent an updated list of issues to the respondent along with the documents he said were sent two weeks ago. This discussion arose in the context of a conversation about the list of the claimant's complaints and the list of those incidents that he says were breaches of trust and confidence or cumulatively amounted to a breach of trust and confidence. The Tribunal told the claimant that although the list that was attached to the case management orders of 12 May 2022 included claims from the claimants who had since withdrawn, the Tribunal considered the list to still be fit for purpose as it was clear which of the claims related to the claimant and which had been withdrawn.

20. The Tribunal noted that by 10:50 on day 2, case management was still being discussed and expressed concern over how proportionate it was to spend further time discussing these issues when no evidence had been heard. Neither the respondent nor the Tribunal was able to find the updated list of issues that the claimant said he had sent. It was the respondent's submission to the Tribunal that in fact these had not been sent. The decision was taken to swear the claimant in so as to avoid any further delay and for the claimant to identify where the updated list of issues was to allow the Tribunal and the respondent to consider them.

21. The list of issues arrived overnight and was before the Tribunal and the respondent on the morning of day three. It was dated 3 October 2023 and the respondent's counsel noted that it contained a number of issues that the respondent did not understand were matters that the claimant was going to rely on before the Tribunal to argue that the respondent had breached trust and confidence, such as payments for overtime. It was clear from the original list that the claimant's complaints had only been about call-out fees and not payments for overtime. The respondent said that it had tailored the presentation of the evidence to fit in with the claimant's original list and did not have any evidence before the Tribunal relating to overtime payments, for example. The respondent's counsel told the Tribunal that this amounted to an amendment application midway through the claimant's cross examination.

22. The respondent's counsel also noted that some of the new issues were clearly in response to matters that have been raised in cross examination with the claimant on day two. The Tribunal took time to go through with the claimant each of the allegations in the new list. Where an allegation was a clarification of an allegation that was already before the Tribunal it was permitted. Where it was entirely new this was not allowed, given the lateness in the day and given that it was clear that neither the respondent or the Tribunal had seen this list before and given that the claimant had told the Tribunal the previous day before

cross examination started that the table was simply clarification. It was prejudicial to the respondent for new issues to arise at such a late stage. It was not in the interests of justice to allow the claimant to amend his claim part way through the hearing. The claimant had received clear case management instructions from Employment Judge Buzzard in May 2022 that if the table that was attached to the case management orders did not reflect the complaints that he wished to bring that he should write as soon as possible and correct the table. He did not do so. To do so at this point was too late.

The List of Issues

23. Following this decision and discussion with the claimant, the claimant's list of issues for the Tribunal to determine, as being actions that breached the mutual duty of trust and confidence and led to his decision to resign are:

    i. A dispute over changing terms and conditions relating to call out from January 2019 to December 2019;
    ii. The implementation of an emergency rota on 23 March 2020 which the claimant describes as a unilateral change to terms and conditions and the removal of call out pay using COVID as an excuse. This rota was implemented on 25 March 2023;
    iii. On 27 March 2020, the claimant was told that it was unlikely that his request for PPE would be granted;
    iv. On 14 April 2020 when the claimant returned from a period of isolation, PPE was not ready for him and he returned home as he didn't feel safe. The claimant will say that between March 2020 in July 2021 there was a “lack of PPE, risk assessments, policies and procedures”
    v. April 2020 - negligence and disregard for vulnerable tenants and gas regulations. Barry Callow threatened to evict tenants, the respondent bullied tenants who were shielding and clinically vulnerable, forcing them to have someone in their home against government legislation and Gas Safe regulations; the claimant will say that from March 2020 to July 2021 the respondent put staff and tenants’ lives at risk against legislation and guidance from Gas Safe and the government
    vi. The claimant raised safety concerns on 17 April 2020 to director Dennis Lally and was ignored
    vii. The claimant will say in April 2020 he was targeted by a productivity e-mail by Barry McKie and that he had also been put on a “mundane work stream as punishment”
    viii. The claimant will say in September and October 2020 that his grievance investigation and outcome failed to interview the relevant people and was not done in accordance with the ACAS Code of Practice
    ix. The claimant will say that in November and December 2020 his grievance appeal investigation and outcome failed to interview

tenants, failed to provide him with agreed notes and was not in accordance with the ACAS Code of Practice

x. The claimant will say that he reported the issue of vulnerable tenants being bullied to the group chairman Sir Peter Fahy but that the whistleblowing investigation was flawed as he was never interviewed as part of the whistleblowing investigation and it was "brushed under the carpet"

xi. A team leader told colleagues that the claimant had put in a grievance and therefore breached a duty of confidentiality in early 2021

xii. The claimant and two colleagues lodged a collective grievance on 3 March 2021 which was not properly conducted and failed to comply with the ACAS Code of Practice

xiii. Barry Callow told the claimant that he was "getting a disciplinary" by telephone on 30 April 2021. Despite that, Mr Callow was "part of the active grievance in breach of GDPR and ACAS Code of Practice"

xiv. The claimant will say that the final straw was that the collective grievance was not upheld, the investigation disregarded evidence and failed to acknowledge problems.

24. The respondent will say that their counterclaim is based on the claimant having been employed during working hours from the end of January 2021 by a third party, PH Jones, to deliver gas engineering services to British Gas whilst reporting to the respondent that he was off sick and entirely unable to work due to stress. The respondent will say that the claimant deliberately misrepresented the position both in the occupational health consultation of April 2021 and via his GP in numerous fit notes which stated that he was unfit for work in any capacity. They will say that the claimant lied when Mr Callow contacted him to discuss this in April 2021 and denied working for British Gas. The respondent will say that this was fraud, would amount to gross misconduct if the claimant had remained in work and was a fundamental breach of the duty of trust and confidence.

25. The Tribunal heard evidence from 8 witnesses which were the claimant, Mr Callow who was the former director of repairs at the respondent, Mr McKie, the planned maintenance manager at the respondent, Mr Lally who is head of planned delivery at the respondent and Mr McKie's line manager. Mr Callow was Mr Lally's line manager. The Tribunal also heard from Mr Moretta who was head of income at the respondent, Mr. Kelly who was head of programmes Performance and Improvement and Procurement at the respondent, Ms Horner who is director of Governance and Assurance at the respondent, Ms Grundy who is Head of Customer Experience at the respondent and Ms Johnson who was a self-employed HR consultant engaged by the respondent to consider the claimant's collective grievance brought with Mr Brooks and Mr Robinson, who had also been claimants in these proceedings.

26. On the conclusion of the evidence, the parties made closing submissions. The respondent's written submissions were emailed to the claimant and he was

given time to read them and given the opportunity to ask clarification questions of the Tribunal. He declined to do so. The claimant provided his own written submissions and was given the opportunity to speak to them.

27. The claimant's closing submissions included a complaint that the respondent's witnesses were in the Tribunal hearing room during the hearing, and that he felt intimidated and outnumbered. This had been raised with the Tribunal by the claimant at the start of the hearing, but the claimant was reminded it was a public hearing and the respondent's witnesses and legal advisors were entitled to attend. The claimant was reminded that it was possible that members of the press or members of the public would be in attendance. Furthermore, there were a considerable number of the respondent's witnesses in the Tribunal because the claimant had made allegations against them in his claim, or they were individuals who had been involved in the various grievances and other issues that the claimant had raised during his employment.

28. The claimant also complained during the hearing about having to go first with his evidence as this prejudiced him and advantaged the respondent as they could hear what he was going to say first. However, the burden of proof is on the claimant in a constructive dismissal case to prove he was dismissed. Furthermore, the respondent's witness statements had already been exchanged and they did not know what questions the claimant was going to put to them in cross-examination. The order of events in the Tribunal was in line with the ordinary course of constructive unfair dismissal proceedings and there was no reason to alter this in the circumstances.

Findings of Fact

29. There was a large amount of evidence before the Tribunal, not all of which was directly relevant to the issues that the Tribunal had to decide. If any of these findings of fact are silent in relation to some of the evidence that was before the Tribunal, it was not that this evidence was not considered, but that it was not sufficiently relevant to the issues for the Tribunal to decide for it to be included in the final judgment. The Tribunal also notes that there was cause to doubt the reliability of the claimant's evidence, in that on a number of occasions it was apparent that he exaggerated or overstated what had happened or exaggerated or overstated what had been said.

30. The respondent is a housing association with over 13,500 homes in Merseyside and Cheshire. The claimant was a gas engineer who attended the respondent's tenants' homes in Merseyside to install, repair and service gas appliances.

<u>The changes to the rota, call-out and loss of additional pay (issues i and ii)</u>

31. A number of facts are not in dispute between the parties. It is agreed that the respondent recognises trade unions for collective bargaining purposes, including the union Unite, which the claimant was a member of. A JCC conducts collective bargaining relating to pay and terms and conditions on behalf of

members who are part of the relevant bargaining unit. The claimant was part of such a bargaining unit.

32. It is not disputed that the claimant volunteered for and did a considerable amount of overtime and call-out work from the start of his employment until the change to the rota that took effect on 25 March 2020, shortly after the start of the national Covid lockdown. It is not disputed that the claimant lost the additional payments as a consequence of that overtime work not being offered to him and others after 25 March 2020. The claimant puts his losses at about 25% of his regular payments from the respondent and the respondent did not challenge this. It is accepted by the Tribunal that the claimant had become reliant on these additional payments given the period of time over which they were paid. It was the claimant's evidence that this caused disruption to his home life, including buying a house. This is accepted.

33. During 2019, payments for call-out were the subject of a consultation process between staff, unions (including the JCC) and the respondent's management, led by Barry Callow. Following these negotiations, changes were agreed by the union and the respondent. The claimant alleges that there was a "dispute" with the respondent in 2019 over these changes. The claimant alleges that this was a breach of trust and confidence. The claimant accepted that part of the effect of these changes was a pay rise. It was put to the claimant that a pay rise was highly unlikely to amount to a breach of trust and confidence. The claimant told the Tribunal that the breach of trust and confidence was because he considered Mr Callow's changes to the call out and overtime system in 2019 to be a waste of time and a waste of the respondent's money. The claimant took the opportunity during his cross-examination of Mr Callow to remind him that he had told him so during one of the consultation meetings in 2019, saying twice to Mr Callow "*I put you right during that meeting, and you didn't like it, did you?*"

34. The claimant also alleges that it was a breach of trust and confidence to remove call-out payments as of 25 March 2020. It is the respondent's case that these additional payments were not contractual. The contracts applicable to the claimant, of which there were two in evidence, do not show that such payments are owed as part of his contract. It was not disputed by the claimant that during the 2019 consultation process the union and members of staff, including the claimant, used the voluntary status of call-out work as a bargaining tool in the negotiations by threatening to withdraw their labour.

35. Even if such payments had been contractual pre-March 2020, which is denied by the respondent, the respondent's evidence was that there was a valid agreement with the JCC, on behalf of the bargaining unit of which the claimant was a member, to implement an emergency rota as a consequence of the national lockdown due to Covid. The evidence before the Tribunal from Mr Callow, in his answers to cross-examination and the evidence in the bundle from Mr McGowan, a Unite representative who was interviewed as part of Mr

Moretta's investigation into the claimant's first grievance, was that the union agreed to the rota "*as no other options were available due to the circumstances*".

36. The emergency rota was announced on 23 March 2020 and took effect from 25 March 2020. This had the effect of suspending all overtime and call out work, and all overtime and call out payments. It was the respondent's evidence that its programme of planned gas engineering works such as planned boiler installations was suspended. Due to this reduction in work, a 24 hours a day, 7 days per week rota would be implemented and staff rotated around days, evenings and night shifts to allow emergencies to be responded to.

37. The emergency rota was removed in September 2020 and the respondent's gas engineers and other tradespeople returned to a regular working pattern, including payment of call-out and overtime, but the claimant did no work for the respondent as of 20 April 2020 and so was not involved in the return to regular hours and the return of overtime and call out payments.

38. It was the claimant's case that these events notwithstanding, he remained entitled to receive overtime and call-out payments as he had before. He took issue with the union's agreement to the emergency rota and said that it was invalid. He said that no vote had taken place with the members as there ought to have been. He took issue with the involvement of Mr Mossman who was the claimant's team leader and workplace representative. He repeatedly said that Mr Mossman could not be a team leader and a union representative as he had a conflict of interest. This was an assertion by the claimant without any further evidence to support it. The claimant initially told the Tribunal that Mr Mossman was a "manager" but corrected himself when Mr Callow gave evidence was that Mr Mossman was a team leader and not a manager. The Tribunal does not accept, without further evidence, that Mr Mossman's role as a team leader and a union representative amounted to a conflict of interest.

39. The claimant also told the Tribunal that the respondent had used the Covid lockdown as an excuse to remove the additional call out payments that Barry Callow had agreed with the union in 2019. Given that the claimant did not dispute that call-out payments resumed when the emergency rota ended in September 2020, this evidence is not accepted by the Tribunal.

40. The claimant also repeatedly put it to the respondent's witnesses that the respondent was in a stable financial position during Covid and therefore there was no reason why his overtime and call out payments could not have continued. He did not accept, when cross-examined, that the respondent's planned installation workload had reduced due to Covid. The claimant returned on a number of occasions during the hearing to what he believed to be the considerable wealth of the respondent. He questioned some of the respondent's witnesses on the Plus Dane group accounts which he introduced in evidence at the start of the hearing (as part of his documents "39-44") and

identified that the Plus Dane group carries a financial reserve. He asserted that this reserve should have been available to him and others in March 2020 to continue paying his call out and overtime during the national lockdown. The Tribunal pointed out that the accounts were not the respondent's accounts, but those of the group. Mr Callow attempted to clarify why an accounting reserve was not cash that was freely available for the respondent's managers to spend and that housing associations had particular accounting requirements with regard to reserves.

41. Taking all of the evidence on this issue into consideration, including documents in the bundle and the parties' witness statements, I find the following facts.

42. There is no evidence that call out and/or overtime payments were ever an express term of the claimant's contract of employment. The claimant asserts that they were an implied term due to conduct or custom and practice. I do not accept his submissions in that regard, as I note the uncontested evidence that the union and the claimant used the voluntary nature of call out as a bargaining tool in the 2019 negotiations.

43. The claimant's own evidence was that 60% of staff left the call out rota in 2019. Had call out been contractual, this would have been a breach of their contract of employment. There is no evidence that it was considered a breach of contract by the respondent.

44. Even if the claimant's case is taken at its highest, that he did have some form of contractual entitlement to these additional payments, the implementation of an emergency rota in March 2020 temporarily removed the right of all staff such as the claimant to additional payments. The claimant may have strongly objected to the union and the JCC agreeing to such changes with the respondent, but it was within the respondent's right to rely on the union and the JCC's agreement to the changes as being binding on all union members who were part of that bargaining unit. Any complaint by the claimant about the union's conduct in this regard should have been addressed to the union itself and not the respondent. There was therefore no breach of the terms of the claimant's contract as a result of the changes to call-out pay in 2019 or the removal of additional pay and the introduction of the emergency rota in March 2020.

45. The claimant alleges that these are breaches of trust and confidence, in that he feels badly treated by the respondent. Part of the Tribunal's assessment of this issue involves considering whether the respondent had "reasonable and proper cause" for acting as it did. It was the respondent's evidence, which I accept, that the 2019 changes were made to standardise overtime and call-out across various groups of tradespeople. The 2020 Covid emergency rota was, I accept, introduced in order to spread the work so as to mitigate the Covid risk for staff and to allow for flexibility in working hours. Mr McGowan told Mr Moretta during his interview that staff safety was "paramount" and that the union accepted that the rota would also protect against job losses by spreading the work amongst

the team and accepted it on the basis of these issues. The reasons behind the introduction of the rota were also clearly explained to staff, including the claimant, by Mr Callow in his email of 23 March 2020. I find that the respondent therefore had "reasonable and proper cause" for introducing the 2019 changes and the 2020 emergency rota.

<u>The terms of the emergency rota itself and whether the claimant was told to do servicing as a punishment for "speaking out" or otherwise (issue vii)</u>

46. The evidence of the respondent was that the rota was optional. The initial communications to staff including Mr Callow's email of 23 March 2020 did not, I find, make it expressly clear that the rota was optional. However, the end of Mr Callow's email said "*please feel free to talk to your line manager regarding this or come back to me if you feel it appropriate*." The claimant responded to Mr Callow that night and challenged the rota, primarily on financial terms and repeated his point about his contractual right to overtime and call out pay. Mr Callow's response was to email the claimant and inform him that he would "*see that you only work days during this crisis. I don't have the time to address all of your points now, I will pick them up once the global pandemic is under control… we are looking for flexibility and understanding in the most challenging crisis we have had to plan around but as always we won't force people to do anything that isn't contractual. If you believe this is being done to "avoid" paying call out you really don't understand the situation we are facing.*"

47. The claimant was then told that he would be put on day shifts on the rota for the duration of the "crisis" and Monday to Friday only. The claimant then emailed the whole of the Merseyside gas engineers team and informed them that they did not need to work the rota either and that they should all be paid call out pay as usual. From the evidence in the bundle it is clear that he also contacted, either by phone or email, a number of colleagues to inform them that he was not willing to do anything other than his contracted hours and would expect to be paid overtime and call out.

48. I find that the claimant was then put on the rota on days only. The claimant produced a copy of the initial rota to the Tribunal. I accept that this was the case. The claimant attended work on 26 March and 27 March. His evidence was that he was told on 26 March that he was on the rota on days. On 27 March he was telephoned to say he was put on servicing rather than breakdowns, which was a change of rota. The claimant did not attend work from 28 March until 14 April 2020 due to needing to shield at home after exposure to Covid. He worked from 15 April to 20 April 2020 and then went off work sick and did not work again for the respondent.

49. The claimant told the Tribunal that he considers servicing to be unskilled work not suited to his higher level of skills and experience. His evidence was that he believed he had been put on servicing as a punishment for his actions in speaking against the emergency rota. Mr McKie, who was responsible for the rota, told the Tribunal that as the claimant had refused to do weekends on the

rota, it would not be fair to others on the rota who would have had to cover for him. He was therefore moved to servicing which was able to be scheduled during normal working hours. I accept Mr McKie's evidence in that regard.

50. The claimant says that this was a breach of the respondent's duty of trust and confidence. I find that the respondent at the time the claimant was in work from 23 March until 20 April 2020 considered the rota to be temporary and therefore being moved temporarily onto servicing could not be said to be a breach of trust and confidence, even if the claimant was correct in his assertion that it was less skilled work, which the respondent does not accept. I also find that Mr McKie had reasonable and proper cause for moving the claimant off the rota given his refusal to work weekends. In conclusion, the rota and servicing arrangements were matters that the respondent had reasonable and proper cause to implement, that is the changes to the workload because of national lockdown.

Covid risk assessments, PPE and the conduct of contractors (issues iii, iv and vi)

51. The claimant disputes that the respondent provided a safe working environment and a safe system of working, both for him and for his colleagues. He says that the lack of a safe working environment caused him to go off sick and was one of the main barriers for him ever returning to work at the respondent. He says that the respondent's failures were a lack of proper PPE, a failure to provide Covid protocols and risk assessments and a failure to ensure that the respondent's contractors adhered to Covid safe systems of working.

52. The Tribunal notes that the claimant himself only worked during the national lockdown until 27 March and then again from 15 April until 20 April 2020 The respondent reminded the Tribunal, but I have also taken judicial notice, of the fact that in the first month of the national lockdown the information about transmission of Covid, the relative benefits of hand washing and mask wearing, ventilation and hazmat suits was changing. Government guidance changed regularly and often with very short notice.

53. The claimant was personally offered a paper face mask but declined to attend work wearing it and requested a face-fitted "Sundstrom" mask. The list of issues contains an allegation that he was told that his PPE request was unlikely to be granted, but the Tribunal was presented with very little evidence about this specific allegation.

54. The claimant complains of the time taken to obtain the face-fitted mask, as he says he requested it at the end of March but it did not arrive for him to use until he returned to work on 14 April 2020. However, given that he was self-isolating during this period in any event, he suffered no actual disadvantage by the delay. He attended work on 14 April 2020 and there is a dispute of evidence as to conversations he had in the office with the respondent's Health and Safety officer about the mask itself, and the claimant alleges that the health and safety officer made derogatory remarks about his request for a special mask. Given that the government guidance was that mask-wearing was not compulsory at

that time, I find that no criticism can be levelled at the respondent for any remarks that may or may not have been made by the H&S Officer about the mask requested by the claimant. It was provided for him and fitted to him the next day when he returned to work clean-shaven.

55. The claimant alleges that there were unacceptable delays in the respondent sourcing PPE and providing it to its employees. The claimant has not been able to demonstrate that any of these alleged failures affected his ability to do his job. Furthermore, I accept that the respondent did produce Covid protocols and risk assessments and distribute these to staff, including the claimant. Indeed, there is evidence from the claimant himself in the form of an email from 17 April that he followed them. The claimant says these protocols and risk assessments were never provided to him. Mr Callow's evidence was that they were put on "Sway", an information distribution app that I accept was present on the IPad of the claimant and other heating engineers. The claimant said that he had never been trained on Sway. I have taken judicial notice of the fact that Sway is a straightforward tool, much like Microsoft Word or Powerpoint, for presenting information. I also find that as Mr Callow noted, had the claimant called to ask for a copy of these documents they would have been provided to him, but he never did so.

56. I accept that there may have been some delays in the early days of the lockdown in obtaining the full complement of PPE products. There was evidence, for example, that there were shortages of hand sanitiser initially. I also accept that the respondent had opened its offices to allow those engineers visiting tenants in their homes to wash their hands between appointments.

57. The claimant has not been able to demonstrate that the respondent's conduct in this regard breached the duty of trust and confidence to him. Viewed objectively, the respondent was conducting its business in very challenging and uncertain circumstances and had reasonable and proper cause for its actions at that time. Nothing that the respondent is said to have done in relation to PPE or Covid risk assessments appears to the Tribunal to be unreasonable, or without proper cause. It is accepted that this period of time was extremely stressful for those who were not able to work from home and who were being required to carry out essential services, such as the respondent's gas engineers. It is accepted that the claimant will have found this stressful himself. However, he did not attend work after 20 April 2020. He was not reprimanded or subject to any further action for not doing so.

58. The claimant complains that some of the contractors engaged by the respondent were not following Covid safe systems of work and that this put him and others at risk, as well as the respondent's tenants. He says that he raised this issue with director Denis Lally and that Mr Lally "ignored him" and did not respond to his concerns. The Tribunal heard from Mr Lally and has reviewed the email exchange in the bundle. On 16 April 2020 the claimant emailed his team leader, Mr Moore, and Steve Murray who was the respondent's health and safety officer at the time, with a photograph of three contractors standing

near a van to say that they were "*not adhering to government guidelines*". Mr Moore forwarded the email to Mr Lally and Mr McKie. Mr McKie replied twenty minutes later and thanked the claimant for the information and said "*we will contact the company to ensure the engineers are complying*".

59. The claimant replied the next day to ask if Mr McKie had spoken to the company, and repeated his concerns in his initial email. He then added "*have we actually received this company's risk assessments and method statements as this is a minimum requirement to engage a contractor*".

60. Mr Lally replied ten minutes later to say "*Hi Jamie, yes we have spoken with the company regarding social distancing and PPE. We have received their method statements and risk assessments and also shared ours with them*".

61. The claimant responded to Mr Lally a few hours later and expressed his concern for his safety and that of those around him. He reminded Mr Lally "*This is a crisis I don't mean to look like I am causing trouble which is how I feel at the minute my concerns are all valid in line to law and regislation (sic). Hope you and your family are well, enjoy your weekend*".

62. The claimant's complaint to this Tribunal is that Mr Lally did not respond further. The claimant says that he expected some empathy from Mr Lally given that the claimant had told him how he was feeling. He also told Mr Lally during his cross-examination of him that he would have expected Mr Lally to provide him with copies of the contractor's risk assessments and method statements.

63. I find that this is not a reasonable position for the claimant to take. Reading the email exchange, Mr Lally acted promptly and professionally. The claimant's final email did not require a further response. There was no reasonable expectation that the claimant should have been given the contractor's risk assessments and method statements. The respondent's actions in this regard cannot be said to have breached their duty of trust and confidence to the claimant.

64. The claimant also alleges that Sir Peter Fahy, the respondent's group chairman, who he emailed on 15 January 2021 and again on 31 March 2021, did not provide him with an adequate response. Sir Fahy sent both of the claimant's emails to Amy Causley to investigate, who is the respondent's Director of People. Ms Causley subsequently responded to the claimant on his behalf. The respondent considered that the claimant was making protected disclosures and his allegations were eventually investigated by Alison Horner. The fact that Sir Fahy did not personally email the claimant cannot be said to be a breach of trust and confidence by the respondent, in that it cannot be said to be likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

<u>"Regulation 39" (issue v)</u>

65. Mr McKie's evidence to the Tribunal was that in early March 2020, he began to consult with the relevant regulatory authorities such as the HSE and Gas Safe as to what the procedure would be regarding servicing tenants' gas appliances if the country went into lockdown. Mr McKie contacted Gas Safe on 10 March 2020 and there are a number of emails from him in the bundle that demonstrate this proactive approach being taken. The evidence from Gas Safe was conclusive, that the need to service tenants' gas appliances would not be suspended despite the lockdown. Mr McKie took further evidence from Morgan Lambert, an independent regulatory specialist which supported Gas Safe's conclusions about the need to continue servicing gas appliances despite the national lockdown.

66. I accept the evidence from Mr McKie and Mr Callow that there was a balance to be struck between the risk to tenants from catching COVID due to the respondent's engineers entering their houses, and the risk of death to the tenants from an unsafe gas appliance. The respondent understood why the advice was that gas servicing needed to continue. The respondent also understood that its statutory duty remained, and therefore to reduce the risk of being liable for corporate manslaughter, the respondent needed to be able to demonstrate that they had taken all reasonable steps to continue their servicing programme.

67. Mr McKie wrote to engineers on 17 April 2020 and noted that the fact that a tenant may refuse an engineer access to their property did not mean that the process stopped. He wrote that the respondent was obliged to continue to attempt to gain access. I accept that this may have been unpleasant both for engineers and for tenants. However I also accept that the respondent put COVID safe protocols in place such as, for example, while servicing an appliance making sure the tenant was in a different room, wearing a mask, wiping down all exposed surfaces and so on.

68. Mr Merrigan, a colleague of the claimant's, was according to Mr McKie a vocal proponent of the argument that gas servicing could stop during Covid. Mr McKie told the Tribunal that he had had a number of discussions with Mr Merrigan where he disagreed with him about this. The claimant and Mr Merrigan I find repeatedly argued with the respondent and particularly Mr McKie about the correct interpretation of this particular provision of gas safety regulations, referred to as "Regulation 39". Ultimately, I consider that the respondent took reasonable steps to ascertain the position relating to regulation 39 at the start of the pandemic and understood that they needed to continue to document that they had taken efforts to access properties and attempt servicing.

69. I also accept that particularly in the early part of the pandemic, there may have been miscommunication from schedulers in the office to engineers or from tenants to schedulers or from tenants to engineers that caused some individuals to become upset and feel as though the respondent was harassing them in attempting to gain access for servicing.

70. Ms Johnson investigated as part of the collective grievance the number of complaints received by the respondent from tenants regarding COVID and PPE. She found and included in her grievance outcome report that only four out of 257 comments from tenants were complaints about COVID and only 6.6% of complaints from tenants in the same time period referred to PPE.

71. The evidence therefore does not demonstrate on the balance of probabilities that tenants in their great numbers objected to the respondent's approach. Indeed, a number of the interviews from the respondent's engineers that were before the Tribunal in evidence in the bundle acknowledged the difficulties the respondent was facing and noted that after the early weeks of the pandemic matters calmed down and that servicing and access was possible and that tenants understood the reason behind it. I therefore do not accept that the respondent's stance in relation to gas servicing and regulation 39 was in any way a breach of the duty of trust and confidence to the claimant. Indeed, for the short time that the claimant did carry out servicing for the respondent, he appears to have done so relatively without incident.

<u>The respondent's treatment of its tenants, including Barry Callow's alleged comments (issue v)</u>

72. It is also not disputed that some of the respondent's heating engineers found it challenging and stressful to visit tenants' homes during the pandemic. It is also not disputed that some tenants found the presence of engineers in their homes to be also challenging and stressful. What is not agreed between the parties is the scale of the issue. The respondent's evidence in the bundle, as part of Ms Johnson's grievance report, was that as of 2021, therefore some time into the Covid phase, the respondent's heating engineer team had only been the subject of four complaints from tenants over Covid.

73. Mr Callow was alleged by the claimant to have made comments to the effect that he would evict tenants if they did not allow the respondent to access their homes to carry out gas servicing work. The claimant also reported that he said words to the effect that he would "*get a judge on the phone*" to carry out the evictions. A letter from Mr McKie in the bundle that was also alleged by the claimant to have been threatening to tenants.

74. It was not accepted by any of the respondent's witnesses that were interviewed by Ms Johnson that any tenants were threatened with eviction due to not allowing access to their homes because of COVID. The respondent's case was that in theory evictions may still be possible for a failure to permit access for maintenance purposes. Evictions of tenants for rent arrears had been stopped during Covid, but it was clear that evicting tenants for non-cooperation with essential servicing had not been suspended. The Tribunal accepts that this was the case.

75. The claimant told the Tribunal that he would consider himself to be at risk of losing his gas licence or perhaps in some way criminally responsible if such

evictions had been carried out. I find this implausible. I do not accept that this is an accurate reflection of the claimant's responsibility for any theoretical evictions that that might have taken place. He would not have been involved in such a legal process or involved in any way with bailiffs or with accessing properties or any similar action. I do not accept that it was reasonable of the claimant to consider that this was a breach of the respondent's duty of trust and confidence to him. I further accept the respondent's evidence that nobody was evicted for not allowing access to the property during Covid. The allegations are entirely theoretical and appear to be based on somewhat wild speculation by the claimant. There was no evidence before the Tribunal to substantiate the claimant's submissions on the risk to him of any such evictions.

The "Productivity" Email of 17 April 2020 (issue vii)

76. The claimant alleges that an email sent by Mr McKie to six Merseyside gas engineers on 17 April 2020 was a breach of trust and confidence in that it singled him out as an individual to put him under pressure. The claimant was never able, despite a number of opportunities being presented to him, to clarify how an email sent to a group of people was sent with the express intention of targeting him. The claimant alleges that other engineers in the Merseyside region were not contacted. The claimant alleges that other areas of the business were not subject to productivity targets. He also alleges that other engineers were told that they could go home when they had done 6 jobs but he was never told this.

77. The respondent's evidence from Mr McKie, which I accept, was that the six engineers to whom the email was sent were the six engineers on the servicing rota on the day that the email was sent. The claimant's additional evidence numbers 41 and 42 provided a snapshot of the rota on that day which confirmed that the six names in the email matched the six on the rota. I accepted Mr McKie' evidence that engineers elsewhere on the rota on other days may have done some servicing but that they were not regularly on the servicing rota which is why the email was not sent to them as well.

78. The claimant already knew, and there is evidence in the bundle that he was told, that he had a target of 6 services a day. I accept that the target in non-Covid times was 8 services per day, and that contractors who were not directly employed by the respondent had 10 services a day to do.

79. Mr McKie's evidence was that the email was sent not to put pressure on those on the rota but to give them the information about the support that the respondent was putting in place by having those in the office call ahead to tenants and ask Covid protocol questions so that engineers were better able to get on with their jobs. He acknowledged that the email may not have been positively received by all of those on the rota but that this has not been his intention. Mr Kelly, the grievance appeal officer, confirmed that the rest of the business was subject to numerous productivity targets and measured against

key performance indicators contrary to the claimant's allegation that it was just his team that was subject to these targets.

80. In any event, I do not accept that there is any evidence that the claimant himself was singed out in this email, which was sent to 6 people. I accept that the 6 were not identified as "trouble makers" and that there was no evidence that the 6 had caused "trouble" as a group or individually. I accepted that the evidence was that they were simply the six on the rota on that day.

81. Finally, in relation to the allegation that the claimant was never told to go home after 6 services, I accept and the claimant did not challenge that he never in fact completed 6 services for the respondent and this was the reason that he was never told to go home as others were.

The claimant's first grievance (issue viii)

82. The claimant raised a grievance which was investigated by Mr Moretta, the respondent's Head of Income. This grievance was raised on 17 July 2020 and made allegations of poor health and safety practices at the respondent and raised other health and safety concerns, bullying and harassment by managers against the claimant and other colleagues, a failure in what was generally described as a duty of care, detrimental treatment and the consequential impact on the claimant's health, breaches of policies and regulations, concern over the use of subcontractors for Gas Safe works in relation to a lack of health and safety and failure to adhere to risk assessments method statements, unchecked and unsafe levels of productions and workload, lack of concern showed by the respondent's managers in relation to the same and potential unlawful deductions of pay and other unilateral changes to terms and conditions of employment.

83. The claimant was invited to a grievance hearing. The claimant insisted that this hearing be held in person. Mr Moretta's evidence was that he considered that this was somewhat strange given the concerns the claimant had raised around health and safety and exposure to Covid and the fact that he had been absent due to Covid safety concerns since April 2020.

84. The claimant attended the meeting in person on 2 September 2020 with his trade union representative Mr Fisher. Mr Moretta was accompanied by Miss Edgerton who is an HR advisor for the respondent. Mr Moretta told the Tribunal that he had not received any documents from the claimant in advance of the meeting and the claimant attended with a large bundle of documents but without a copy for Mr Moretta or Miss Edgerton. The claimant and his union representative insisted on the claimant leading the meeting and therefore they refused to use Mr Moretta's prepared meeting agenda. Mr Moretta's evidence, which I accept, was that the meeting was disordered and took a lot longer than he had expected it to take. Mr Moretta told the Tribunal that he struggled to understand the evidence that was being presented by the claimant.

85. Following the grievance meeting Mr Moretta was given two weeks to carry out his investigations but extended this time frame because as a result of the claimant's multiple allegations, Mr Moretta needed to carry out multiple interviews and some interviewees were not in work at that time. I accept that this was a reasonable time scale and that Mr Moretta acted reasonably in asking for more time.

86. The claimant disagrees with Mr Moretta's grievance outcome. It is the respondent's case that Mr Moretta's conclusions were reasonable given the evidence before him. Having reviewed Mr Moretta's grievance investigation documents, including his notes and the written outcome I find no evidence, despite the claimant's allegations, that Mr Moretta's investigation was corrupt or perverse. I find that Mr Moretta spoke to a reasonable cross-section of witnesses given the allegations raised by the claimant. Mr Moretta was also provided with witness statements to consider. Some time later, the claimant raised a complaint against Ms Edgerton's involvement and her conduct during the meeting which the Tribunal has struggled to understand the substance of, and which the claimant, despite being given opportunities to do so, has struggled to explain. It is notable that at the conclusion of the meeting with Mr Moretta and Ms Edgerton, the claimant praised their handling of that meeting.

87. I find no evidence from which it could be concluded that the respondent's conduct of the claimant's grievance it was a breach of the duty of trust and confidence. The respondent is not obliged to agree with the claimant. The respondent is obliged to conduct a reasonable investigation and reach a reasonable conclusion on the basis of the findings. This does not require the respondent to carry out an exhaustive investigation, reviewing every possible document or interviewing every possible member of staff that may or may not be relevant.

<u>The claimant's appeal against his first grievance (issue ix)</u>

88. The claimant's grievance appeal was received by the respondent on 27 October 2020. Mr. Kelly, Head of Programmes and Performance Improvement and Procurement at the respondent was asked to deal with the grievance appeal. He was, I accept, an independent person who was not part of the initial grievance investigation.

89. The appeal hearing took place on 24 November 2020. The claimant was represented by Mr Fisher from his trade union and Miss South, an HR advisor, was present to assist Mr. Kelly.

90. On the morning of the appeal hearing, the claimant sent Mr. Kelly almost 90 pages of evidence by e-mail.

91. Mr. Kelly structured the meeting and dealt with each of the claimant's themes in turn which were complaints about the introduction of a new emergency work rota, health and safety concerns, concerns about the use of external

contractors, concerns about the management team and failings in the claimant's initial grievance.

92. Mr Kelly's evidence to the Tribunal was that the claimant did not have realistic expectations of management or the respondent while they responded to the unprecedented situation of the national lockdown. I accept that this was a reasonable conclusion for Mr Kelly to draw in the circumstances. Mr. Kelly also told the Tribunal that several of the claimant's issues were being raised on behalf of other colleagues, without supporting evidence or statements from those colleagues. I accept that it would not be reasonable for the respondent to take those issues any further forward than they did. The respondent's workplace is unionised. In the absence of either a complaint from the union or a complaint from the individual member of staff themselves, I accept that it was not reasonable for Mr Kelly to investigate issues raised on behalf of others in any significant detail.

93. I have reviewed the steps taken in investigating the claimant's appeal by Mr. Kelly and accept that his actions were thorough and reasonable. His interviews, which were of a significant number of people, were thorough and carefully documented. I accept that Mr Kelly reviewed a reasonable amount of relevant documentation.

94. The claimant was sent his grievance appeal outcome on 18 December 2020. Mr Kelly did not uphold his points relating to the new emergency work rota, the use of external contractors, the actions of the management team or alleged failings in relation to the grievance policy. However Mr. Kelly did partially uphold some points raised by the claimant in respect of health and safety concerns and identified that improvements could be made in the communication of health and safety matters for trade teams. He made four recommendations in that regard.

95. He also made further recommendations around working relationships between staff and managers and made a recommendation relating to the people team. I find that even though the claimant's grievance appeal was mostly not upheld, the claimant had no right to insist that it should be. The grievance appeal process was conducted reasonably, fairly and thoroughly.

96. The Tribunal notes that by the time the claimant received Mr Kelly's grievance appeal outcome letter on 18 December 2020, the claimant had already set up his own personal service company at Companies House. In December 2020, the claimant commenced work as a contractor for British Gas carrying out boiler service installations during working hours. The claimant had been absent from work at the respondent since April 2020.

Whistleblowing (issue x)

97. On 15 January 2021, the claimant emailed Sir Peter Fahy, the respondent's group chairman, raising various issues that the respondent understood to be allegations of failures of health and safety. The claimant told Sir Fahy that the

respondent's management had put tenants' lives at risk by exposing them to Covid and alleged that one tenant had died as a result of exposure to COVID from one of the respondent's engineers. These were, I note, extremely serious allegations.

98. Amy Causley, the respondent's HR Director, responded by telling the claimant that Sir Fahy gave instructions for it to be investigated as a grievance. The claimant emailed again on 31 January 2021 with further information to Sir Fahy and Ms Causley about allegations that the respondent was pressurising its engineers to enter vulnerable tenants homes. He also provided a letter from Mr McKie which he said was threatening to tenants.

99. The decision was taken to investigate under the whistleblowing procedure and the claimant was informed of this on 2 February 2021 by Alison Horner, who is the respondent's head of Governance and Assurance. The claimant complained to Ms Horner that he had never been provided with the respondent's whistleblowing policy and was provided with a copy by return.

100. Ms Horner investigated the claimant's allegations and the claimant complains that he was not interviewed or consulted further as part of her investigation. He alleges that this is a breach of the respondent's duty to him of trust and confidence.

101. The claimant received a letter from Mr Dixon dated 8 March 2021 who is the chair of the respondent's Audit and Risk committee. I accept Ms Horner's evidence that she contributed significantly to the drafting of that letter. I also accept Ms Horner's evidence that she did not consider it necessary for the claimant to be interviewed as part of her investigation, as she had understood that he had raised previous grievances and provided a significant amount of information to the respondent which repeated much of what was raised in his emails to Sir Fahy. Ms Horner sent a letter in Mr Dixon's name, which provided a lengthy and detailed explanation as to the conclusions that the respondent reached about the issues raised by him.

102. The claimant complains that this was not dealt with as a whistleblowing complaint at all. He also complains that this was not what he asked for, in that he did not intend to "blow the whistle" and that he hadn't been aware that he was blowing the whistle when he emailed Sir Peter Fahy on those two occasions.

103. However, I find that it was appropriate and reasonable that the respondent investigated it as they did. The claimant raised extremely serious allegations, including that the respondent was responsible for the death of a tenant. I also find it appropriate and reasonable that the claimant was not directly involved in the investigation, given the information that the respondent already had. The respondent's focus as part of that investigation was rightly on the safety of those individuals that the claimant had indicated were being put at serious risk and they prioritised that, and not the claimant.

Breach of privacy regarding the claimant's grievance, 25 January 2021 (issue xi)

104. The claimant alleges that Bradley Fletcher breached the claimant's contract of employment by disclosing in early 2021 to another member of staff that the claimant had lodged a grievance. Given that by this point the claimant had lodged a grievance and a grievance appeal and a number of staff had been interviewed in relation to it at the claimant's request, I find that Mr Fletcher's discussion of this, if any, cannot be said to amount to a breach of trust and confidence. The information would already have been common knowledge at the respondent and amongst the workforce. The respondent investigated this issue and found there to be equal evidence on both sides as to whether it was said or not. I accept that this was a reasonable response to the claimant's complaint, which of itself was not reasonable in the circumstances.

Collective Grievance – Diane Johnson (issues xii and xiv)

105. Ms Johnson is an independent HR advisor. She was asked by the respondent to investigate the collective grievance raised by the claimant, Mr. Robinson and Mr. Brooks on 3 March 2021. The grievance was extensive in scope and raised issues already raised by Mr Johnston, Mr Robinson and Mr Brooks on previous occasions. All of the issues that the claimant had already raised in previous grievances and with Sir Peter Fahy were raised again with some additional points from the other two complainants.

106. Ms Johnson held a grievance hearing with the claimant on 26 April 2021 and provided Mr Johnston with the grievance hearing outcome letter by e-mail on 1 July 2021. Ms Johnson's grievance outcome report is a huge piece of work. I accept her evidence that she reviewed 400 items of evidence and that she interviewed or had meetings with or corresponded with 12 managers and individuals and investigated 24 complaints individual to the claimant and number of collective complaints. The grievance report itself is 80 pages long.

107. Ms Johnson partially upheld some of the claimant's complaints and did not uphold others. She concluded that some further complaints could not be determined by her. The claimant nevertheless complains to this Tribunal that this exhaustive process breached the respondent's duty of trust and confidence to him in that Ms Johnson "disregarded evidence and failed to acknowledge problems". He relies on this as the final straw that caused his resignation.

108. The fact that Ms Johnson placed more emphasis on some evidence and less on others does not mean that she has disregarded evidence or that the collective grievance is flawed. There is no evidence whatsoever that she failed to acknowledge problems raised by the claimant - in fact, her efforts were exhaustive.

109. It was not disputed by the claimant that his grievance hearing with her was five hours long and was a complete rehearing of all grievance matters,

notwithstanding the fact that the claimant had already exhausted all usual internal grievance procedures. The claimant was praiseworthy of Ms Johnson at the time and during his evidence to this hearing, and his evidence therefore contradicted his own complaints. The claimant's allegations appear to be based on the fact that she did not universally agree with all of his complaints. The fact that the claimant did not have all of his complaints upheld is not evidence of whether or not Ms Johnson's investigation was reasonable. I find that it was reasonable.

Barry Callow investigation into the claimant's work for PH Jones and British Gas (issue xiii) and the respondent's counterclaim – did the claimant fraudulently claim company sick pay

110. It is accepted by the claimant that from some time from December 2020 onwards, he worked as a contractor for British Gas via his own personal service company and an intermediary contractor called PH Jones. The Tribunal has seen a payment statement to the claimant's own company, Aqua Heat Property Services Limited, from PH Jones from 10 March 2021 in which 16 separate payments were made for services apparently supplied from 21 January 2021, with a total payment amount to the claimant's company of £3346.00. The claimant was being paid company sick pay at this time of half his salary, having exhausted his entitlement to full company sick pay, and was engaging with occupational health about his stress-related absences and providing the respondent with ongoing fit notes from his GP which certified him as unfit for work in any circumstances. The claimant asserts before this Tribunal both that working for another employer was not prohibited, and also that his need to find further work was the fault of the respondent because of their poor treatment of him.

111. Mr Callow told the Tribunal that he became aware in early April 2021 via an anonymous source that the claimant was working for British Gas carrying out boiler installations, which I accept was similar to the work that the claimant had been carrying out for the respondent before the pandemic. The anonymous source had been told of the claimant's activities by two separate individuals. Mr Callow was told that the claimant had been working for British Gas full time and for some time already. Mr Callow provided a statement about this to the respondent which is dated 19 April 2021. It indicates that both sources said

> "*it is common knowledge and lots of people are aware that [the claimant] is working and talking about the fact that he is doing this with multiple individuals*."

112. The respondent's evidence was that the claimant's fit notes from that time state that he was unfit for work in any capacity. The Tribunal accepts that the claimant's GP did not qualify the statement that the claimant was unfit for work in any way.

113. The claimant repeatedly sought to persuade the Tribunal that the fit notes were evidence that he was only unfit for work with the respondent and not unfit for work generally, but this is not supported by the wording of the fit notes and I do not accept his evidence in this regard.

114. The respondent obtained an occupational health report for the claimant dated 11 January 2021. It notes that the claimant reported being "*still very anxious about returning to work, especially given the current situation with the new strain of virus*". I find it was entirely misleading of the claimant to say this to the occupational health advisor at the time. The claimant had already set up his personal company and was, on the balance of probabilities, already working for PH Jones.

115. By the claimant's second occupational health visit on 30 April 2021, the claimant had already completed a significant amount of work for British Gas via PH Jones. However, I find that he actively misled the occupational health advisor as to his situation at the time. On 30 April 2021 he informed the occupational health advisor that he was

> "*spending time carrying out some DIY work as well as seeing his social support network. As described above he is not carrying out his normal activities such as regular exercise*."

116. The occupational health advisor also says that the claimant described himself as

> "*in a permanent level of distress at the present time. He is not able to carry out activities he previously enjoyed such as regular exercise… Mr Johnston's fit note expires today and he is going to approach is GP for a further extension. Mr Johnston is of the opinion that his ongoing symptoms prevent a return to work*."

117. I find that the advisor was clearly not given accurate information by the claimant, who at the time was carrying out work in the homes of members of the public on what I accept was a regular and at times full-time basis.

118. The claimant told the Tribunal when being cross-examined that returning to work had positively affected his mental health. He suggested that the occupational health advisor had advised him to get a job elsewhere for the purposes of his mental health recovery and he had done so on their advice and that he was entitled therefore to do what he did. I do not accept that the occupational health advisor suggested or authorised the claimant to work elsewhere and claim sick pay from the respondent at the same time.

119. The claimant was telephoned by Mr Callow during working hours on 29 April 2021, who left him a voicemail message. The following day Mr Callow rang again and the claimant returned his call. I accept Mr Callow's evidence that the claimant refused to discuss the matter with him but said only that the allegations

were not true. I also accept that the claimant ended the call by saying that as Mr Callow was involved in his ongoing collective grievance, he would report him to the respondent for having contacted him, and that he subsequently did so.

120. The claimant was invited to an investigatory meeting by email by Jess South, one of the respondent's HR advisors on 4 May 2021.

121. The claimant's email response on 4 May 2021 at 11pm can be characterised as furious. He declined to attend the investigatory meeting and accused the respondent of bullying him and of intimidation. He refuted the allegations and made counter-allegations about a member of staff who he believed had reported him, that this individual had worked through shielding. He made multiple unspecific references to "ACAS Code of Practice" being breached and demanded that Mr Callow and Ms South not contact him again.

122. The respondent told the Tribunal that as a pragmatic step, Mr Callow was removed from the investigation and replaced with Ms Biggs, who was Director of Housing at the respondent. However, the claimant objected to her appointment also and made allegations about Ms Biggs breaching confidentiality at unspecified social occasions.

123. Ms Biggs interviewed Mr Callow about the allegations on 7 June 2021. Mr Callow told Ms Biggs that the matter was common knowledge on the gas engineers' WhatsApp group and that an acquaintance of the claimant was in the gym and heard a mutual acquaintance of theirs say "*Jamie must be doing alright at British Gas as he's just bought another house*."

124. On the balance of probabilities, I find that the claimant did work for British Gas via PH Jones while off sick and claiming sick pay from the respondent. The claimant was on half sick pay during the period being claimed for by the respondent.

125. I find that the claimant misrepresented his mental and physical health to a number of people in order to do so – to his GP for the purposes of his sick notes, to occupational health and to the respondent. I also find that the claimant, despite his submissions to the Tribunal, knew that this was dishonest and that this was not the same as doing casual work outside of normal working hours when not claiming sick pay (that is, working as what is colloquially referred to as "a foreigner").

126. The claimant also alleges that Mr Callow's telephone calls to him on 29 and 30 April 2021 amount to a breach of trust and confidence. Mr Callow had reasonable and proper cause to investigate the allegations. The claimant, I find, knew those allegations to be true and has admitted the same to the Tribunal. Mr Callow did not breach trust and confidence with the claimant.

127. The respondent continued to investigate the allegations against the claimant. He was contacted several times to update him on the process, given

that he had declined to participate in it. He continued to supply the respondent with fit notes, including in May 2021 and June 2021.

The claimant's resignation

128. The claimant resigned on 16 July 2021, to Sir Peter Fahy, the group chairman. In the context of what the claimant now admits to, in relation to his work for British Gas, the letter of resignation is remarkable. It is four paragraphs long and repeats many of the claimant's broad and unsubstantiated allegations about corruption, bullying tenants, public endangerment, harassment, and threatens to contact "*ACAS, Court, Media, [and] MPs*". It also reserves criticism for Sir Fahy personally, describing his response to the claimant's email on 15 January as "*bland*" and also, somewhat confusingly, accusing him of a failure to respond.

129. The claimant was written to by Ms Biggs on 23 August 2021 with the outcome of the investigation. The claimant was told that British Gas had confirmed that the claimant had been working for them as a contractor since December 2020 and that had he still been employed by the respondent this would have resulted in him being subjected to a disciplinary procedure. I accept the respondent's submission that this would have been classified as an act of gross misconduct.

The Law

130. The ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) states that, in relation to grievances, an employer is advised to:

a. Hold a meeting with the employee to discuss the grievance;
b. Allow the employee to be accompanied at the meeting;
c. Decide on appropriate action, without unreasonable delay;
d. Allow the employee to take the grievance further if not resolved. An appeal should be dealt with impartially and, wherever possible, by a manager who has not been previously involved in the grievance.

131. In section 95(1)(c) of the Employment Rights Act 1996 it is said that a constructive dismissal occurs where "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

132. In ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221***, the Court of Appeal held that an employee would only be entitled to claim that he or she had been constructively dismissed where the employer was guilty of 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'. It was not sufficient that the employer was guilty of unreasonable conduct - he must be guilty of a breach of an actual term of the

contract, and the breach must be serious enough to be said to be 'fundamental' or “repudiatory”.

133. For an employee to succeed in their claim for constructive dismissal four conditions must be met:

a. There must be a breach of contract;
b. The breach must be fundamental and capable of entitling the employee to repudiate the contract;
c. He or she must leave in response to the breach
d. He or she must not delay too much otherwise the breach will be deemed to have been waived.

134. The burden of proof is on the claimant to show that on the balance of probabilities there has been a fundamental breach of contract, including a breach of trust and confidence.

135. Whether or not there has been a breach of contract, including of the duty of trust and confidence, is an objective test. That means that the Tribunal will decide for itself whether there has been a breach or not. It is irrelevant that the claimant subjectively believed there to be a breach.

136. In ***Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606,*** it was held that;

“The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee”

137. For there to be a breach, it is not necessary that the employer intended any repudiation of the contract: the issue is whether the effect of the employer's conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it (***Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666.***)

138. Also, the term is only breached where the employer has no 'reasonable and proper cause' for his actions (***Gogay v Hertfordshire County Council 2000 IRLR 703.)***

139. ***Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club) [2017] 3 WLR 1212.*** determined that, when considering what is “dishonest” and whether an individual considered the same to be dishonest, having ascertained the claimant’s state of mind as to knowledge or belief as to the facts, the question whether his conduct was honest or dishonest is to be determined “by applying the objective standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

Application of the law to the facts found – the claim of unfair dismissal

140. It is the Tribunal's job to decide whether, objectively speaking, the respondent behaved in a way that was calculated to or likely to destroy or seriously damage the relationship of trust and confidence between itself and the claimant.

141. The question for the Tribunal is whether the effect of the respondent's behaviour as a whole, judged reasonably and sensibly, is such that the claimant cannot be expected to put up with it (***Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666.***) Looking at all the circumstances of each of the claimant's fourteen allegations, I do not accept that any of them amount either on their own, or taken together, to a breach of the duty of trust and confidence. In a number of cases the respondent clearly had 'reasonable and proper cause' to act as it did (***Gogay v Hertfordshire County Council 2000 IRLR 703.)***

142. Taking each of the allegations in turn and judging reasonably and sensibly the respondent's actions in relation to those allegations, issues i and ii (the dispute over changing terms and conditions relating to call out and the implementation of an emergency rota on 23 March 2020) are not breaches of trust and confidence. It is reasonable for an employer to be able to change working arrangements in response to changing circumstances. Each of these matters was agreed with the recognised trade union. That gave the respondent reasonable and proper cause to make those changes.

143. Issue iii is not a breach of trust and confidence, relating to PPE availability during Covid. The presence of the global pandemic and the unprecedented circumstances that the respondent found itself in meant that, judged reasonably and sensibly, there was an initial lack of clarity as to what PPE was required. The claimant made the assertion that the respondent should have simply followed the protocols relating to working with asbestos, but I find that this was not reasonable and not the national guidance at the time.

144. I not did accept the claimant's submissions on issues iv, v, vi and vii on the balance of probabilities, as is set out above in the findings of fact. PPE was ready for the claimant on his return from isolation in April 2020 and I did not accept that there was a "lack of PPE, risk assessments, policies and procedures" between March 2020 and July 2021, or any "negligence or disregard for vulnerable tenants and gas regulations", or any inappropriate or unreasonable behaviour by Barry Callow. I found that Dennis Lally did not ignore the claimant on 17 April 2020. The claimant was not targeted by a productivity e-mail by Barry McKie or put on a "mundane work stream as punishment" in April 2020.

145. In relation to issues vii, viii and ix, I did not accept that the claimant's grievance or grievance appeal or collective grievance "failed to interview the

relevant people", including tenants, and were not done in accordance with the ACAS Code of Practice. I found that the three processes were conducted fairly and reasonably and within a reasonable time, particularly taking into account the claimant's own conduct, which did not help with the smooth running of the process in relation to the late disclosure of documents at the grievance and grievance appeal stages. It is also to be taken into account that the grievances were large, and grew larger as time went on. The respondent reasonably complied with the recommendations of the ACAS Code, as found above. I accepted that the respondent did not consider it necessary or appropriate to interview tenants. The claimant made criticisms of the notes taken by Mr Moretta. There is no legal obligation to take notes of a particular quality or standard. Taking the grievance process as a whole, the quality of the notes taken did not undermine the reasonableness or fairness of the process and was not a breach of trust and confidence.

146. The claimant was not interviewed as part of the respondent's whistleblowing investigation (issue x). The claimant says that this resulted in the investigation being "flawed" and "brushed under the carpet". The investigation was reasonable and proper, for the reasons set out above, and the respondent did not breach the duty of trust and confidence by not interviewing the claimant.

147. In relation to issue xi, the fact that a team leader told colleagues that the claimant had put in a grievance was not a breach of trust and confidence. This was not "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" (***Western Excavating (ECC) Ltd v Sharp).***

148. In relation to the issue that Barry Callow told the claimant that he was "getting a disciplinary" by telephone on 30 April 2021 and was "part of the active grievance in breach of GDPR and ACAS Code of Practice", the respondent had reasonable and proper cause to investigate that the claimant was claiming sick pay unlawfully. This information had been given to Barry Callow and as a senior member of the respondent's organisation, it was not improper that he conducted enquiries in relation to it. The respondent had reasonable and proper cause to notify the claimant that, if the allegations were correct, a disciplinary investigation would follow.

149. The claimant will say that the final straw was that the collective grievance was not upheld, the investigation disregarded evidence and failed to acknowledge problems. These final allegations are not accepted by the Tribunal. The collective grievance was partially upheld and did acknowledge that there had been some issues between the claimant and the respondent. There was no finding by the Tribunal that the collective grievance process or

outcome unreasonably disregarded evidence so as to undermine the fairness of the process or the outcome.

150. On the balance of probabilities I find that the claimant resigned in July 2021 when it became clear to him that the respondent was not going to abandon its investigation into his work with British Gas. The claimant complains that had this been taken to a disciplinary there would have been no fair process and he would have automatically been dismissed. There is no evidence to suggest that there would not have been a fair process.

151. I find that the claimant resigned. He was not constructively dismissed and there is therefore no unfair dismissal.

Application of the law to the facts found – the counterclaim

152. Turning to the counter claim, having found that the claimant was misrepresenting the fact that he was entirely unfit for work and that he was too stressed to attend work and too concerned about the presence of COVID to work. I find that he misled the respondent and the respondent's occupational health that he was working whilst claiming company sick pay.

153. I accept that this is itself a fundamental breach of contract in that the wages paid to the claimant were not properly payable because of the misrepresentation. He was not entitled to the sick pay that he received. I accept that these were acts of dishonesty by the claimant.

154. I accept that by the test of dishonesty in ***Ivey v Genting Casinos*** is whether something was dishonest "by the standards of ordinary decent people". This is clearly a dishonest act by that standard. I also find that the claimant knew that this was a dishonest act. He justified it to himself in various ways by blaming the respondent for his sickness absence, but this argument is unsustainable. However, even if the claimant's case is taken at its highest and the Tribunal had accepted that he did not know, this does not assist him. There is no requirement that the claimant must appreciate that what he has done is dishonest if ordinary decent people would find that it was.

155. I accept that the claimant was working for British Gas in the period from December 2020 until after his sick pay ran out. He is therefore required to repay the amount that the respondent seeks of £2837.10 which is the sick pay paid to him for the period for which the respondent has evidence of his other earnings. The claimant does not dispute that this is the sum that he received during this period from the respondent. I note that the claimant earned more than this sum from British Gas from 21 January 2021 to 10 March 2021 alone.

156. The respondent is therefore to be paid by the claimant the sum of £2837.10.

Employment Judge Barker

Date: 11 December 2023

REASONS SENT TO THE PARTIES ON

Date: 18 December 2023

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FOR THE TRIBUNAL OFFICE

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