EMPLOYMENT TRIBUNALS

Claimant: **Mr D Long**

Respondent: **Arrow Precision Manufacturing Limited**

Heard at: **Reading by video** **On:** **6 & 7 November 2023**

Before: **Employment Judge K Hunt**

Representation
Claimant: In person
Respondent: Mr Brudenell Bruce (Managing Director of Respondent)

JUDGMENT having been sent to the parties on 21 December 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondent as a CAD/CAM Designer and Machinist with continuous employment from 6 December 2004 until 19 January 2022, when his employment ended following his resignation. The Respondent notified the claimant of a period of lay off in October 2021 to which the claimant objected. The claimant raised a grievance objecting to the lay off which he said was in breach of contract, relying on a contract of employment described as the 2005 Contract. The Respondent investigated the grievance, which was not upheld and in laying off the claimant relies on a contract of employment described as the 2018 Contract which contains a short time working and lay off clause and/or relies on custom and practice. The claimant brings claims for constructive dismissal and loss of wages of 4 weeks' pay between 18 October 2021 and 15 November 2021.

Claims and Issues

2. The claimant brings a claim for constructive dismissal and a claim for 4 weeks' loss of wages when laid off, which he claims is in breach of contract.

3. The issues were identified and agreed at the outset of the hearing.

Constructive dismissal

4. Did the respondent do the following things:
    i) lay off the claimant for 4 weeks from 18/10/21 to 15/11/21?
    ii) fail to consult the claimant prior to the lay off?

iii) by laying off the claimant was the respondent in breach of the 2005 Contract that the claimant relies on?

5. The respondent defends the claim and relies on the 2018 contract and an express term with the right to lay off and/or relies on custom and practice.

6. Did laying off the claimant breach the implied term of trust and confidence? The Tribunal will need to decide: i) whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and ii) if so, whether it had reasonable and proper cause for doing so.

7. Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

8. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

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

10. If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract?

11. Was it a potentially fair reason?

12. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Breach of Contract

13. The claimant claims for loss of 4 weeks' wages (during the lay off) which the claimant says was in breach of contract.

14. Did the respondent lay off the claimant without pay?

15. If so, was this in breach of contract?

Procedure – documents and evidence heard

16. At the outset of the hearing, it was noted that the correct respondent was Arrow Precision Manufacturing Ltd as determined by previous order. The claimant represented himself and Mr Brudenell-Bruce, managing director of the respondent, represented the respondent

17. The above list of issues was agreed at the outset of the hearing.

18. I had before me a bundle of documents of 92 pages and witness statements for the claimant and for Mr Brudenell-Bruce and Mr Dean Holloway for the respondent. There was also produced a recording of the first grievance meeting on 10 November 2021 and the tribunal was directed to one passage of the recording in the claimant's witness statement, which I listened to during reading time.

19. There was a discussion as to whether the respondent wanted to rely on a second recording of the second grievance hearing, which was not included in the papers or produced at the hearing. Mr Brudenell-Bruce explained that it was no longer available on their server, so I did not have it before me.

Fact-Findings

20. I set out the following findings of fact which I determined as relevant to the issues. I am not making findings of fact on all the points in dispute between the parties, only those that are relevant to the issues in the case as now identified.
21. The claimant was employed by the respondent as a CAD/CAM Designer and Machinist with continuous employment from 6 December 2004 until 19 January 2022, when his employment ended following his resignation.

22. In 2019 the respondent restructured its business and made redundancies and Mr Brudenell-Bruce confirmed in evidence that the old company closed, and some staff moved to another existing company, including the Claimant. This was not a matter raised by either party in the claim or response or otherwise at the hearing. Mr Brudenell-Bruce confirmed in oral evidence that there may have been a letter issued at the time and that all employees' terms and continuity were honoured. The claimant did not dispute this and accepted that he had agreed to moving to the new company, when this was put to him in evidence.

23. The Respondent is a manufacturer in the Paintball industry and has faced various financial difficulties (through recessions and Brexit) and has seen a reduction in business reducing from a staff of 50 when the claimant joined to less than 10 people when his employment ended. Due to these difficulties and the seasonal nature of the paintball industry, the respondent has on occasion had to lay off staff or implement short time working over the years and there was evidence of this in the bundle (pages 28-31 and 71 –79).

24. In October 2021 there were financial difficulties caused by a lack of income and the need for staff cuts and reductions in working hours. At the time, due to a delay in the electricity supply following machinery being moved, there was a delay in returning to full production and no work for the Claimant.

25. The Respondent wrote to the claimant by letter dated 12 October 2021 informing him of the need for a temporary lay off to start on 18 October 2021, asking him to agree to this by signing and returning the enclosed letter and informing him that he would be entitled to a statutory guarantee payment of £30 per day for 5 days. The letter was sent by post and email (at 3.59pm) and received by the claimant that evening at 6pm.

26. In his evidence at the hearing Mr Brudenell-Bruce explained that where only one person was affected, he did not believe there was a need to consult because the action to be taken only applied to that one person. However, rather than just invoking short time working or lay offs, the practice was that he always wrote to staff explaining the situation. Therefore, as there was no work for the claimant, he was asked to agree to a lay off. Mr Brudenell-Bruce accepted he made an error in counting a week's notice and only gave 6 days' notice.

27. The claimant replied by email the same evening at 6.18pm stating that he did not agree to being laid off and referred to the terms of his contract dated 1 March 2005 ("the 2005 Contract), which did not allow for short hours or lay offs, asserting that he should be paid full salary during any lay offs or short hours unless he agreed otherwise.

28. The respondent replied by letter dated 14 October 2021 and referred to the new contract issued in 2018 ("the 2018 Contract"), which had been supplied to the claimant and all staff. The respondent noted that on issuing the 2018 Contract, the claimant had asked for corrections relating to holiday entitlement, paid breaks and flexitime and had accepted the 2018 Contract, which contains a short time working and lay off clause. The respondent also referred to previous occasions when the claimant had agreed to reduced working in 2009 and 2012 and further lay offs and short time working in 2016 and 2017. The respondent stated that even if there was no short time working and lay off clause in the contract, there was a custom and practice of using these measures repeatedly to ensure the financial viability of the company as temporary measures during short term difficult periods. The respondent confirmed that the lay off would commence on 18 October 2021.

29. The claimant replied on 14 October 2021 by email at 19.19 confirming that he still did not agree to the lay off and that the 2018 Contract was never signed and agreed, that it had been returned to Dean (his line manager) and that he had been chasing for a final version for 2 years. Therefore the 2005 Contract was his current contract. He also disputed that the previous occasions amounted to a custom and practice and that he would attend work on Monday unless a mutually beneficial agreement was reached in the meantime.

30. On 15 October the claimant raised a grievance by letter about the 'new contract' and the proposed lay off and that his trust and confidence in the Respondent had been destroyed, setting out his complaints relating to the new contract, which he said contained fundamental errors, previously raised with the works manager and that he had been continually asking for a revised contract and was still waiting and had been working under protest ever since. He also repeated his objection that lay offs and short hours were not custom and practice.

31. The respondent replied by letter dated 15 October to the claimant's email and grievance letter, confirming that they would investigate his complaints and hold a grievance hearing and enclosing a copy of the claimant's marked up 2018 Contract (page 34-44 of bundle), which was relied on at clause 7.3 in respect of the temporary lay off as well as custom and practice. The claimant was advised that if he attended the workplace before being asked to return to work, he would not be paid.

32. The claimant replied by email on 15 October 2021 that he would not attend work on Monday but that he was doing so under protest.

33. The claimant was invited to a grievance hearing by letter dated 1 November 2021, enclosed with the letter were various documents gathered during the investigation into his complaints.

34. The grievance meeting was held on 10 November 2021 and heard by Mr Brudenell-Bruce, the managing director. The claimant was advised of the right to be accompanied.

35. The claimant was also provided with a letter dated 9 November 2021 delivered by hand (on 10 November 2021) and by email, advising that the lay off would end on 12 November 2021 and he was required to return to work on 15 November 2021.

36. The Claimant replied by letter dated 10 November 2021 stating that he would return to work on 15 November but did so under protest until his grievance had been satisfactorily resolved.

37. The grievance hearing took place on 19 November 2021. There were no notes or transcript of the hearing in the Bundle. I was provided with a recording and referred

to one section of the recording by the claimant in his statement, relating to a comment made by Mr Brudenell-Bruce during the grievance meeting, that when making lay offs, there was no requirement to consult with people who are not being considered for lay offs. This was referenced as supporting the claimant's evidence that there was no custom and practice of lay offs and that based on this comment, there was no way of him knowing about lay offs based on or through custom and practice.

38. Following the meeting the respondent carried out further investigation into the claimant's grievance and his email regarding 'custom and practice'. The Claimant was sent further documents from the investigation and invited to a meeting on 25 November 2021. There were no notes of the hearing in the Bundle and no recording provided.

39. On 20 December 2021 the claimant submitted his resignation, stating that "after recent events, he felt that there was no alternative but to resign from his post and that he was still expecting a satisfactory outcome from his grievance. He thanked the respondent for the last 17 years and stated that in general he enjoyed his time and was disappointed that it had ended like this. He gave one month's notice and confirmed his last working day would be 19 January 2022.

40. The respondent accepted his resignation by letter dated 23 December 2021, noting that contractually he was required to give two months' notice but accepting one month.

41. The claimant's employment terminated on 19 January 2022.

Grievance Outcome

42. The Respondent wrote to the claimant by letter dated 20 January 2022 with the outcome of the grievance and apologising for the delay. The letter summarised the claimant's grievance as being that the respondent did not have the contractual right to lay off the claimant because he had not signed the 2018 Contract. The grievance was not upheld and the respondent set out the reasons for this in the letter (pages 83-84). Briefly this included that the claimant received and reviewed the terms of the 2018 Contract, that the queries he raised were resolved and he raised no further objections; that he later requested a further amendment to not work on Fridays, which was agreed; that he did not raise any concerns about the contract until he was notified that he would be laid off for a short period, after which he said he was working under the 2005 Contract; that his suggestion he could not object because he had no access to company email was proven not to be the case, as there was evidence that he had access to email since being given the 2018 Contract; that the first time he said he was working under protest was after he was informed of the lay off and that by a course of conduct over almost 3 years prior to the lay off, he had worked under the 2018 Contract without any objection; finally that even if the Company did not have the contractual right under the 2018 Contract to implement the lay off clause there were similar situations in the past and it was custom and practice to lay off staff in times of financial difficulties. He was offered a right of appeal.

43. The claimant appealed by letter dated 24 January 2022, setting out his grounds of appeal. Briefly, including how the grievance had been handled and that it had taken over 3 months to receive the final decision; why he felt the decision was wrong, namely that he had returned the contract for correction and had chased Dean verbally over the last 3 years; that the amends were verbal and of fundamental errors, which he requested before reviewing the contract in its entirety, and that although he had access to email, his 2005 Contract said that concerns should be raised verbally, which he did; that he still believed he was working under his original contract; and that agreeing to short hours to see the

company through a rough patch was different to agreeing to a lay off with no pay; and that in the grievance meeting the respondent had said that unless people were involved they were not told about any layoffs or short working, so how could it be something expected by all and that two lay offs in 17 years, in his view, did not constitute custom and practice.

44. The respondent did not hold an appeal meeting and in his evidence at the hearing, Mr Brudenell-Bruce stated that at the second grievance meeting the claimant had repeated everything from the first meeting and did not add any information, he subsequently left employment and there was no new information and he stated that is why he did not answer the appeal.

The 2018 Contract

45. In or around early 2019, the Respondent updated and issued new contracts to all staff prepared by its legal advisers, who provided a template. In evidence Mr Brudenell-Bruce gave as an example of updating, removing reference to a retirement age.

46. Clause 7 of the 2018 Contract relates to 'Salary and Benefits' and includes at clause 7.3 the following: "I*f there is a reduction in work the Company may temporarily lay you off without pay or reduce your working hours and your pay proportionally on giving not less than one weeks' notice in writing. Depending on the circumstances you may be entitled to a statutory guarantee payment.*"

47. Mr Holloway became the Claimant's line manager in February 2019. In April 2019 the Claimant sent a handwritten note to Mr Holloway raising various matters (page 32) and including a statement 'still no contract'. Mr Holloway replied by letter dated 3 May 2019 (page 33), responding to the matters raised and acknowledging that the claimant had returned his contract unsigned because an additional holiday allowance had been overlooked, and he enclosed amended contracts for him to sign.

48. In his witness statement and evidence Mr Holloway confirmed that he always sent out two contracts, one to be signed and returned and one retained by the employee, he confirmed he had sent out two contracts to the claimant and I accept his evidence on this.

49. A few days later the claimant told Mr Holloway that there were still errors and Mr Holloway asked him to mark it up and return it to him. He returned one copy of the contract with handwritten markings or annotations first at clause 6 re Working Hours, where at 6.1 he marked hours down to '*37.5'* from 40 and marked '*paid*' rather than an unpaid lunch break, with a query re '*tea breaks?*' marked below this. At the end of 6.3 a line was drawn in the margin and '*FLEXITIME*' written below the clause and at the end of clause 10.8 in the margin, it was marked with '*12.1*' and an arrow pointing to the space between the end of *10.8* and beginning of the next clause 11.

50. In evidence the claimant said that he did not recall making that last marking/annotation, it was Mr Brudenell-Bruce's evidence that the marking was in the same writing and the same ink on the original document still on file and on balance, considering the evidence in the bundle, I find that more likely than not to be the case.

51. Mr Holloway recalled that on receiving the marked up copy, he spoke to Mr Brudenell-Bruce about the changes and recalled in his evidence it was most likely the same day or the next day. He was told by Mr Brudenell-Bruce that as the mark

ups related to the claimant's existing working pattern, they were agreed but there was no need to reissue the contract again.

52. Mr Holloway met with the Claimant, which as he recalled in his evidence may have been the next day or was at most within the space of 2 or 3 weeks maximum after he received the contract with markings. In his evidence Mr Holloway recalled that the conversation took place in the office and confirmed in his statement and under cross examination that he explained to the claimant that the details written down by him were accepted that they were not going to reissue the contract again, as they would not be re-writing the contract for minor points about his working patterns but that if he wanted a letter to confirm the working patterns they would provide that.

53. He recalled that the Claimant said he would speak to his wife (who works in HR) but that he never came back to Mr Holloway after that. Mr Holloway said in evidence that this was the last conversation that he recalled about the 2018 Contract and that any conversation after that (the claimant having referred to a conversation he recalled taking place by the Hapse machine) would only have had the same answer. Mr Holloway denied ever saying, as suggested by the claimant, that he told him to 'leave it alone' after re-issuing the contract and could not recall any other conversation where he had said that and I accept his evidence on this.

54. Mr Holloway also said in evidence that when the claimant wanted to change his working pattern again in March 2020, reducing to 4 days a week on the same pay in lieu of a pay rise, this was agreed verbally with him and the claimant did not ask for any amendment to be made nor ask for the reissue of his contract.

55. It was put to the claimant in cross examination by Mr Brudenell-Bruce that he had read the contract and did not ask for any changes, beyond those he marked up. The claimant's evidence was that he had only read the first two pages up to clause 7. On it being put to him that this included at clause 7.3 the short time working and lay off clause, he modified this to say that he had only read his personal details and his salary at the beginning of clause 7 and had not read beyond that apart from possibly the holiday clause, which it is noted is at clause 11. On being further cross examined about the fact that he had read beyond this having marked the contract up between clauses 10 and 11 he said he did not recall doing so. Based on the evidence heard and read in the bundle, on balance I find that it is more likely than not that the claimant did read beyond clause 7.

56. I accept the claimant's evidence that prior to being sent the amended contract by Mr Holloway on 3 May 2019, he had chased and asked for a copy of his contract and complained that he was still waiting, as found at paragraph 49 above. His evidence was that after providing the further marked up copy of his contract, he fully expected to receive a further amended copy for final reading and approval and that he had continually asked Mr Holloway for a revised copy of his contract.
57. I accept Mr Holloway's evidence that at that meeting he made clear that the contract was not going to be reissued again and that 'the contract stood' and I accept as credible his evidence that the claimant responded that he would speak to his wife.

58. From the evidence before me in the bundle and evidence heard from both Mr Holloway and the claimant, who in his evidence did not specify any times or dates in support of his assertion, including no reference to March 2020, when further changes to working times were verbally agreed with Mr Holloway, I find no evidence to support that the claimant continually asked for a revised contract after the meeting with Mr Holloway in or around May 2019 (referenced at paragraphs 54 and 55 above) and also find that he did not ask for a revised contract in March 2020.

59. I find that the claimant did not come back to Mr Holloway or the respondent to request any further amendments or to request a reissued contract for review and find that he continued to work under those terms and arrangements, with amendments as verbally agreed in May 2019 and March 2020. I find no evidence before me that he was working under protest after the amendments on the marked up 2018 Contract were agreed by Mr Holloway in or around May 2019 and in March 2020.

Custom and Practice

60. In the Bundle there is evidence of previous occasions where the respondent had implemented lay offs and short time working prior to issue of the 2018 contract. This includes agreements specific to the claimant in previous years and statements produced for the grievance investigation from staff stating that they were always aware of the possibility of short time working or lay offs at this time of the year (going into winter). Mr Holloway also confirmed in his evidence that he was asked about this every year by production staff, on whether there would be any cuts coming over the winter and that it was widely expected.

61. The claimant in his evidence stated that he had only ever been put on short hours twice and he was not aware of any colleagues being put on short time working or lay offs over the years, as he worked in a different building with fewer colleagues, in isolation from the rest of the workforce.
62. He was asked in cross examination about colleagues and friends that he spoke to regularly in the paint factory or in the office, when he went across to the other building and also about a colleague he worked alongside, who had been laid off. His evidence was that he had never spoken to colleagues about such matters and was unaware of others on being put on short hours or being laid off.
63. The paint factory and the building that the claimant had worked in for the majority of his employment until 2019, were on adjacent sites and approximately 800 yards apart, originally separated by a fence. The fence was taken down to allow free movement of fork lift trucks between the two sites. The office where admin and pay roll were based and timesheets were delivered was in the paint factory. I find based on the evidence heard including from the claimant that the claimant did visit the other site where the office and paint factory were based and speak to colleagues regularly during his employment.
64. Taking account of the evidence in the bundle and evidence from Mr Holloway about the awareness of such measures being used by employees in the business, I find that the claimant's evidence that he was not aware of anyone being put on short time or being laid off or of the use of such measures during his employment, was not credible. I find that it was a measure practiced by the respondent over the years and that it was more likely than not that the claimant was aware of this.

Law

Constructive Dismissal

65. The Employment Rights Act 1996 ("ERA") at Section 95(1) states:

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

66. ERA Section 98(1) states:

"I*n determining ..... whether the dismissal of an employee is fair or unfair, it is for the employer to show (a) the reason (or if more than one, the principle reason)*

for the dismissal, and (b) that it is either a reason falling within subs (2) or some other substantial reason of a kind such as to justify dismissal.....:

(2) *A reason falls within this subsection if it (a) relates to the capability or qualifications of the employee.....(b) relates to the conduct of the employee..... (c) is that the employee was redundant, or (d) is that the employee could not continue to work ..... without contravention ..... of a duty or restriction imposed by or under an enactment.*

.....

(4) ..... whether the dismissal is fair or unfair .....(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case."

67. In *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA* it was established that:
"*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged form any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

68. A claimant may rely on an express or implied term of the contract. In *Malik and Mahmud v BCCI [1997] ICR 606* it was held that the employer shall not*:*

"*Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*"

Contractual changes

69. The courts have been reluctant to find that employees consented to contractual changes without an express agreement to that effect. This is particularly so in the case of terms that do not have immediate effect. In *Jones v Associated Tunnelling Co Ltd 1981 IRLR 477, EAT*, the EAT took the view that implying an agreement to a variation of contract is a 'course which should be adopted with great caution'. It went on to state that 'if the variation relates to a matter which has immediate practical application (e.g. the rate of pay) and the employee continues to work without objection after effect has been given to the variation (e.g. his pay packet has been reduced) then obviously he may well be taken to have impliedly agreed. But where… the variation has no immediate practical effect the position is not the same.'

Breach of Contract

70. The Tribunal has jurisdiction to hear breach of contract claims under the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 ("the Order"). Under the Order, this applies only to claims brought by an employee (not worker) against their employer and to breaches of contract that are outstanding on the termination of employment.

Conclusions

71. In reaching my decision, I have considered the relevant legislation and the brief summary of the law and case authorities included above. I will address each of the agreed issues in the case separately, but each conclusion has been drawn having taken account of the whole of the evidence in the case, both written and oral.

Constructive Dismissal

72. Did the respondent lay off the claimant for 4 weeks between 18 October 2022 and 15 November 2022? Yes, this is not in dispute.

73. Did the respondent fail to consult the claimant? It is not in dispute that the respondent did not consult the claimant in person, before writing to him to notify him of the proposed lay off and seeking his agreement. In the circumstances, I conclude that the respondent did so believing that there was no requirement for wider or general consultation, where only one person was affected and that by notifying the claimant in advance and seeking agreement, the respondent was following the same practice as in previous lay offs and short time working. I conclude that given the financial difficulties, lack of income and lack of production work available at the time and as a small employer, the step taken by the respondent to notify the claimant of the proposed layoff was appropriate and reasonable in the circumstances.
75. Was lay off in breach of the 2005 Contract that the claimant relies on? The claimant says that he never signed and returned the 2018 Contract and under the 2005 Contract there is no right to put him on short time work and/or lay off. The respondent relies on the 2018 Contract issued to and reviewed by the claimant and that contains a short-time work and layoff clause.
76. A key issue is whether the 2018 Contract was accepted by the claimant. Taking account of the brief summary and case authority above and in considering whether the terms of the 2018 Contract, although unsigned, were accepted by word or deed on the part of the claimant, I remind myself that I should be careful in finding implied agreement to the terms, where the term in issue has no immediate practical effect. That said, I note that in the circumstances this was not a case where there had simply been silence or no response to the new contract by the claimant, as set out below.
77. The claimant had twice returned the 2018 Contract seeking amendments, including on one occasion in May 2019 marking up those changes on the face of the contract. On neither occasion did the claimant object to the relevant term relating to short time working and lay off. This was notwithstanding that it was contained within clause 7 relating to salary and benefits (at 7.3), which he had read, though then modifying his answer to only having read the salary and his personal details. I have made findings, in light of Mr Holloway's evidence, that at the meeting in or around May 2019, the claimant was told that the contract would not be re-issued again and 'stood' as drafted with the marked changes agreed. I take note of my findings as to the claimant's response at the time and his intention to speak to his wife, who worked in HR.
78. Based on my findings on the evidence seen and heard, the claimant having twice reviewed and returned the contract seeking amendments, I conclude that he could be expected to have had regard to the full terms and conditions. I also conclude that following the meeting with Mr Holloway, at which he was told that the contract would not be reissued, he could be expected to raise any further queries or objections that he had. Based on his conduct thereafter, in not raising verbally or by email or hand written note any objections, and also taking note of my findings that this was despite a further change to his working arrangements in March 2020 that was verbally agreed, and my findings that he did not request a revised contract at that point, I conclude that the 2018 Contract was accepted by him and that he

did not object to those terms in the ensuing 2 plus years and that he was not working under protest throughout that period.

79. As I have concluded that the 2018 Contract was accepted by the claimant, I conclude that there was no breach of the 2005 Contract by the respondent as this was superseded by the 2018 Contract and that lay off was expressly provided for in the 2018 contract relied on by the respondent.
80. As I have found there was a contractual right to lay off the claimant under the 2018 Contract, I do not need to decide on the alternative issue before me, as to whether there was a custom and practice to implement short time working or lay offs by the respondent. However, if I were to do so, based on the evidence before me, and even though intermittent, I would also conclude that there was a custom and practice of invoking short time working and lay offs by the respondent in times of financial difficulty; that staff were aware of this and also anticipated it at certain times of the year, according to seasonal fluctuations; and that as a long serving employee, it was more likely than not that the claimant was and would be aware of this practice, even though it had only been previously been applied to him on a limited number of occasions.
81. Did the respondent's actions in laying off the claimant breach the implied term of trust and confidence? Having concluded that the right to lay off the claimant was expressly provided for in the 2018 Contract and my findings that notifying him in advance in writing was appropriate and reasonable to the circumstances, I do not find that the respondent behaved in a way calculated or likely to destroy or seriously damage the relationship of trust and confidence for the reasons that follow.

82. The respondent followed the practice previously invoked across the business as short term measures when facing financial difficulties including with the claimant, having on previous occasions notified and sought his agreement to short time working; the respondent did so in reliance on the terms of the 2018 Contract; the respondent fully investigated the claimant's objections to the respondent's reliance on the 2018 contract and/or custom and practice raised by the claimant in his grievance, which was not upheld.

83. In considering whether the respondent had reasonable and proper cause for its actions in laying off the claimant, I conclude that in the circumstances of financial difficulties and there being no production work for the claimant at the time, and in reliance on the 2018 Contract expressly allowing for lay off, it did.
84. Was the breach a fundamental one? Having found that the respondent's conduct did not amount to breach of any express term or the implied term of trust and confidence, I conclude that there was no breach and for the purposes of s.95 ERA 1996 the claimant was not entitled to resign and treat the contract as being at an end or terminated due to the respondent's conduct.

Breach of contract – claim for unpaid wages

85. Based on my conclusions above that the respondent was entitled to lay off the claimant without pay, the claim for 4 weeks' wages during the period of lay off in breach of contract also fails.

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Employment Judge K Hunt

Date 13/02/2024

Case No: 3300459/2022

REASONS SENT TO THE PARTIES ON

28 March 2024

FOR THE TRIBUNAL OFFICE