EMPLOYMENT TRIBUNALS

Heard at:	London South	**On:**	10 to 13 March, and 2 April 2025

Claimant: Mr J Atkinson

Respondent: SGN Contracting Limited

Before: Employment Judge Ramsden

Representation:

Claimant In person

Respondent Miss Quigley, Counsel

WRITTEN REASONS

1. These written reasons are provided on the application of the Claimant.

Background

2. The Respondent is a gas distribution company managing the network which distributes natural and green gas to many homes and businesses in Scotland and Southern England.
3. The Claimant worked for the Respondent from 3 January 2020 until 29 August 2022, latterly in the role of First Call Operative (**FCO**).
4. The Claimant resigned from his employment with the Respondent, and his employment came to an end on 29 August 2022. The Claimant says he resigned in response to a fundamental breach of his contract of employment by the Respondent. The Respondent denies this, and says that the Claimant's employment came to an end by reason of resignation, and that the Claimant resigned to avoid disciplinary proceedings. In the alternative, the Respondent says that it fairly dismissed him for some other substantial reason, that being the total breakdown of the relationship between the parties, and the Respondent's loss of trust and confidence in the Claimant, due to the Claimant's falsely claiming

sick leave and sick pay while working for a competitor (which employment the Claimant agrees commenced on 7 March 2022).

5. Following a period of ACAS Early Conciliation which began on 24 September and ended on 5 November, both of 2022, the Claimant presented a claim to the Employment Tribunal on 5 December 2022 (the **Claim**), which was given the case number 2304651/2022 by the Tribunal.

6. In its Response, presented on 15 February 2023, the Respondent presented a counterclaim, seeking:

    a. Repayment of the sick pay paid to the Claimant by it in the period 7 March 2022 to 29 August 2022. The Respondent says that it offset some of that sick pay against the payment in lieu of accrued but untaken holiday that the Claimant would otherwise be entitled to, so it sought repayment of the balance of £2,746.97; and

    b. The value of its property which it says the Claimant retained, amounting to £5,625.42

    (the **Counterclaim**). This was given the case number 2305010/2023 by the Tribunal.

7. The Counterclaim was served on the Claimant by the Tribunal on 19 September 2023. The Claimant was informed that if he wished to contest it he would need to send a response within the next 28 days (i.e., on or before 16 October 2023).

The complaints

8. The Claimant says that:

    a. He was constructively unfairly dismissed by the Respondent (**Complaint 1**);

    b. He is owed pay in lieu of the holiday that he had accrued but not taken on the termination of his employment (**Complaint 2**);

    c. He was wrongfully dismissed and is owed notice pay (**Complaint 3**); and

    d. The Respondent made unauthorised deductions from his wages, or alternatively breached his contract of employment by the amount he was paid, in respect of a period of sick leave when the Claimant was not paid in full when he says he should have been (**Complaint 4**).

9. The Counterclaim is a breach of contract claim brought by the Respondent against the Claimant, alleging that:

    a. As he was in fundamental breach of his employment contract with the Respondent from the date he started working for Centrica (7 March 2022), the Claimant was not entitled to any sick pay from the Respondent following that date, and therefore the sum of £5,860.75 (paid to him in respect of sick leave from 7 March 2022 onwards) is owed by the Claimant

to the Respondent. Against this the Respondent has set-off the sum of £3,452.70 which the Claimant would otherwise be entitled to receive by way of compensation for annual leave he had accrued but not taken on the termination of his employment. This, the Respondent says, leaves an outstanding sum of £2,408.05 which it is owed by the Claimant (**Complaint 5**); and

b. The Claimant had not returned various items of its property to it, which the Respondent values at £5,625.42 (**Complaint 6**).

In aggregate, therefore, the Respondent says that the Claimant owes it the sum of £8,033.47 by way of damages for breach of contract.

The hearing

Representation

10. The Claimant presented his own case, and the Respondent was represented by Miss Quigley, Counsel.

Adjustments

11. At the outset of the hearing, when asked if either party was seeking any adjustments to the typical conduct of these hearings:

    a. The Respondent confirmed that its attendees did not require any; and

    b. The Claimant said he may need more regular breaks given an ongoing health condition. He accepted that he had provided no medical evidence of that health condition, but the Tribunal also explained that additional breaks can usually be accommodated, and encouraged the Claimant to ask for breaks when he needed them.

12. During the hearing there were instances when the Claimant asked for additional breaks, and times when he was asked by the Employment Judge if he needed a break in light of upset or signs stress he was displaying. Every break requested by the Claimant was accommodated.

The complaints and issues in the case

13. Quite some time was spent at the outset of this hearing discussing the complaints in the case and the issues between the parties.

14. The Employment Judge observed that those matters had been the subject of some discussion in two Preliminary Hearings – the first before EJ Rice-Birchall on 12 June 2023, when a list of complaints and issues had first been compiled, and the second before EJ Truscott KC, when those complaints and issues had been further discussed.

15. The Claimant had discussed with EJ Rice-Birchall that he considered that his Claim Form included complaints of protected disclosure detriment, but she

disagreed and determined that he would require the permission of the Tribunal following an application to amend. This is recorded in the written record of that hearing dated 13 June 2023. Anticipating that the Claimant would then make an application to amend, EJ Rice-Birchall listed a further Preliminary Hearing, which came before EJ Truscott KC on 7 September 2023.

16. An application to amend made by the Claimant was discussed in that hearing. That application was extensive, and included complaints of protected disclosure detriment under section 43B of the Employment Rights Act 1996 (the **1996 Act**) and health and safety detriment (section 44 of the 1996 Act). EJ Truscott:

    a. Permitted some paragraphs of that application to be added to the Claimant's claim, but by way of background only (namely, paragraphs 71 to 93 of the Claimant's document entitled "Expanded Particulars of Claim", which appears in the Bundle). Specifically EJ Truscott recorded that this amendment was allowed "*on the basis that the narrative of events prior to his injury was background and no new claims were being introduced*";

    b. Rejected the remainder of the Claimant's application; and

    c. Recorded that the Tribunal had refused the Claimant's application to protected disclosure detriments to his list of complaints.

    Those decisions are recorded in the written record of that hearing dated 7 September 2023.

17. The Claimant wished to renew his application to amend his claim to add in complaints of protected disclosure detriments on the basis of health and safety breaches within the Respondent's organisation. The Employment Judge refused this, noting that this Tribunal has no authority to reopen a decision of an Employment Tribunal on that matter, and that was a matter that the Claimant could seek to appeal to the Employment Appeal Tribunal. Alternatively, as the Claimant was asserting that there had been judicial bias in favour of the Respondent in either or both of those hearings, those matters could be raised by the Claimant before the Judicial Conduct Investigations Office (the **JCIO**). The Claimant also referred to wishing to amend his claim to include complaints of health and safety detriments under section 44 of the 1996 Act, but he articulated no such complaint, and instead referred to the application to amend he had already made which related to protected disclosure detriments.

18. Some further points of clarification were asked by the Employment Judge, and welcome clarity was provided by the Claimant:

    a. He confirmed that the points he made regarding his being underpaid at the outset of his employment in the period January to September 2020 are made by way of background only, and do not form part of the legal complaints to be considered as part of this case;

    b. The same applies to the period September and October 2020, upon his qualification. Those matters are mentioned by way of background only;

c. He is not pursuing any breach of the Working Time Regulations 1998 (the **1998 Regulations**), save that he says that he should have been paid on the termination of his employment for his accrued but outstanding holiday entitlement; and

d. He understood that this Tribunal has no jurisdiction to determine negligence complaints.

19. The Respondent accused the Claimant of dishonesty on a number of bases. These allegations were plainly put to the Claimant in cross-examination, and the Employment Judge reminded the Claimant of those ahead of submissions. At the Employment Judge's request, at the end of the day before submissions were due to be made, the Respondent specifically listed the points it accused the Claimant of being dishonest about, and the Claimant was given the opportunity to address those in submissions (as well as in evidence).

Strike-out application

20. The Claimant had previously made an application to strike-out the Respondent's "claim". This extant application was dealt with on the first morning of the hearing. The Claimant clarified that his application was to strike-out the Respondent's Response to the Claim and the Counterclaim raised in that Response. The Claimant pointed to 21 numbered points in his letter to the Tribunal of 19 February 2025. Some of these were actually part of the same ground, and in fact the Claimant, in that letter (as expounded upon orally in the hearing) relied upon five grounds when saying that the Response to the Claim, including the Counterclaim, should be struck out by the Tribunal:

    a. The first ground relied upon by the Claimant was that *the Respondent was non-compliant with Tribunal Orders*, namely, the Order to disclose relevant documents, and the Order to prepare the hearing bundle by 8 December 2023 (Rule 38(1)(c) of the Employment Tribunal Procedure Rules 2024 (the **ET Rules**)).

        i. Upon enquiry, it seemed that the material that the Claimant believed the Respondent had failed to disclose comprised various text messages and WhatsApp messages he recalled sending, and having responses to from Respondent personnel, as well as call records and recordings of telephone calls to the Respondent's call centre (the **OCC**), all on 24 November 2021, but he could not produce those as the mobile telephone number he had been using at that time had since broken. The Claimant said those messages and telephone records should be in the possession of the Respondent or its personnel, whom he named as Chris Rymer, Lee King and Mr Jackson, and he considered there may be others as well (the **Averred Undisclosed Material**).

ii. The Respondent's position was that it had conducted a reasonable search and had disclosed all relevant material. Miss Quigley acknowledged that there was one email chain in the Claimant's Further Bundle which was an email chain the latest email of which the Respondent had not disclosed, albeit that the remainder of the chain had been. This, the Respondent said, was an error and was not intentional. Miss Quigley also pointed out that the Claimant's position was that he had this email for over a year and he had not disclosed it, so if anything, she said, this showed non-compliance with Tribunal Orders by the Claimant.

iii. As for the production of the hearing bundle, the Respondent said that the delay in doing so was attributable to the conduct of the Claimant. It outlined the timeline of events as follows:

- On 20 October 2023 the Respondent proposed that the parties exchange lists of relevant documents in their possession – but it received no response from the Claimant;
- On 27 October 2023 the Respondent provided the Claimant with soft copies of its disclosure and asked the Claimant for his;
- On 7 November 2023 the Claimant emailed the Respondent to say that he was unable to access the documents the Respondent had sent;
- On 23 November 2023 the Respondent sent the Claimant a OneDrive folder and checked whether the Claimant could access that folder, and offered to send a hard copy of the material, to which the Respondent received no response from the Claimant;
- On 27 November 2023 the Respondent sent chaser email, offering to send a hard copy of the document to the Claimant;
- Because the Respondent received no response, it made an application for an Unless Order from the Tribunal on 5 December 2023;
- The Claimant then provided his disclosure on 12 December 2023;
- The Respondent sent the Claimant a draft hearing bundle on 8 January 2024 and asked the Claimant for comments on that draft; and
- On 24 January the Respondent sent the Claimant the final version of the bundle, in soft and hard copy formats.

The Claimant did not dispute the above description, but said that the Respondent had failed to mention that there had been a change

in personnel at the Respondent's solicitors working on the matter, and the new solicitor who had made the application for the Unless Order did so on a false basis, as the Respondent held all the documentation.

The Employment Judge explained that the burden of proof in a strike-out application sits with the applicant. Here, the Employment Judge was far from persuaded that there had been a failure by the Respondent to comply with Tribunal Orders, save for the production of the bundle where that failure did not appear to be unreasonable in light of the undisputed timeline of events set out by the Respondent, and the delay occasioned by the Claimant's conduct. Even if there has been delay occasioned by the Respondent, it is clear, in the Tribunal's view, that striking out the Response and the Counterclaim would hinder the overriding objective to deal with cases fairly and justly. There has been no deliberate or persistent disregard of required procedural steps by the Respondent, and nor has the Respondent's conduct made a fair trial impossible (*James*). This ground did not succeed.

b. The second ground relied upon by the Claimant was that *the claim was not actively pursued by the Respondent* (Rule 38(1)(d)). In oral representations to the Tribunal, it was clarified that the Claimant was referring to both the Respondent's resistance of the Claim and its pursuit of the Counterclaim.

   The Tribunal was entirely unpersuaded by this ground. The Respondent has clearly been pursuing its defence of the Claim and the Counterclaim, as correspondence with the Tribunal shows. There has been no intentional or contumelious delay on the part of the Respondent, and nor has there been inordinate or inexcusable delay (*Evans*).

c. The Claimant's third ground was that *the Counterclaim is vexatious and has no reasonable prospects of success* (Rule 38(1)(a)).

   Again, the Tribunal was entirely unpersuaded by the Claimant's arguments here. While he may consider the Counterclaim to be vexatious and have no reasonable prospects of success, that is far from clear on the terms of the Grounds of Resistance which, at strike-out stage, are taken at their highest. The Employment Judge explained that this does not mean that the Tribunal considers that the Counterclaim will succeed – (at the stage of determining the strike-out application) evidence was yet to be heard about it – but it will come down to a testing of the relevant evidence, and is not a matter that is suitable for strike-out (*Ezsias*, *Tayside*, *Cox*).

d. The fourth ground was that *the manner in which the Respondent had conducted the proceedings has been scandalous, unreasonable or vexatious* (Rule 38(1)(b)). The Claimant made four assertions in this regard, that:

i. The Respondent had failed to comply with its duty of disclosure – again, pertaining to the Averred Undisclosed Material;

ii. The Respondent had failed to comply with the Tribunal's Orders pertaining to disclosure;

iii. The Respondent had made a false application, perverting the course of justice and deceiving the Tribunal, when it made its application for an Unless Order relating to the Claimant's failure to disclose material when the Respondent knew the Claimant did not hold any relevant material. This, the Claimant contended, had resulted in judicial bias in favour of the Respondent, which the Claimant says is illustrated by the fact that correspondence and applications made by the Respondent were answered speedily by the Tribunal, whereas the same was not true of correspondence and applications from the Claimant; and

iv. The Respondent had failed to assist the Tribunal in its overriding objective.

(i) and (ii) are dealt with above – the Claimant has not satisfied the Tribunal that the Respondent failed to comply with its duty of disclosure or failed to comply with the Tribunal's Orders (save where that failure was due to the Claimant's conduct).

As for (iii), this appeared to derive from the Claimant's failure to communicate to the Respondent that he had no documents to disclose, which he should have done. The Employment Judge referred the Claimant to the Judicial Conduct Investigations Office, but even if there had been judicial bias in the Claimant's favour (which was not accepted by the Employment Judge), that did not assist in the Claimant's application that the Counterclaim should be struck out on the basis of the *Respondent's* conduct.

In relation to (iv), the Claimant asserted that all Respondent property was returned by him in early September 2022 to the Respondent's Weymouth depot. In addition, the Claimant says that the part of the Respondent's Counterclaim that is in respect of the value of what it says is non-returned personal protective equipment (**PPE**) is in breach of section 9 of the Health and Safety at Work etc Act 1974, as the Respondent cannot reclaim the value of that PPE.

The Claimant offered no evidence besides his say-so that he returned this equipment, and the section 9 of the Health and Safety at Work etc Act 1974 states:

"*No employer shall levy or permit to be levied on any employee of his any charge in respect of anything done or provided in pursuance of any specific requirement of the relevant statutory provisions.*"

It is a matter of interpretation and argument as to whether the PPE that the Respondent sought to have returned to it was provided to him in the course of his duties, and whether seeking to have it returned at the conclusion of his employment offends section 9. It is not a matter that lends itself to strike-out.

This fourth ground does not succeed.

e. The fifth ground was that *a fair hearing was no longer possible* (Rule 38(1)(e)).

The Claimant based this contention on the failure he alleges on the part of the Respondent to disclose the Averred Undisclosed Material, and judicial bias. The Employment Judge was not satisfied either that the Respondent had failed to disclose relevant material in its possession, nor of judicial bias. It is evident that a fair trial is still possible. Ground five also does not succeed.

The documentary evidence

21. The parties had agreed a Bundle of 444 pages. Two working days prior to the commencement of the hearing, the Claimant served additional documents on the Respondent running to 159 pages in aggregate (the **Claimant's Further Bundle**), and informing it that he would be applying to have those documents added into evidence before this Tribunal.

22. The Claimant applied to have each of 29 documents comprising those Claimant's Further Bundle admitted into evidence. The Respondent did not object to the admission of two of those, being:

    a. An email chain between the Claimant and Mr Jackson with the subject "RE New Rota Changeover" (three pages); and

    b. Some WhatsApp messages between the Claimant and Mr Jackson on 25 November 2021 (one page).

    The Tribunal could see the relevance of those documents to the complaints and issues in the case, and admitted those.

23. The Tribunal admitted two additional documents from the Claimant's Further Bundle, those being:

    a. Screenshots of various WhatsApp messages with redacted names, which appear to show some messages exchanged between the Claimant an unnamed others at the time of the Incident (nine pages); and

    b. The Respondent's Code of Conduct (37 pages).

    The first document appeared to be relevant to Complaint 1, and the Claimant asserted that the part of the second document that related to the Respondent providing a psychologically safe workplace was also relevant to Complaint 1.

24. The Claimant handed the Employment Judge, but not the Respondent, a letter he said he sent to the Tribunal on 23 September 2023 by post, though there is no record of any such letter having been sent to or received by the Tribunal. That letter made complaints about the conduct of the Employment Judges who heard the first and second Preliminary Hearings, and the Employment Judge in this hearing reiterated that those would be matters potentially of appeal to the EAT or for complaint to the JCIO – those are not matters which can be dealt with by this Tribunal.

Audio/visual files

25. The Claimant also applied for two video files to be admitted into evidence. Those files had not been shown to the Respondent in advance of the hearing (save for a brief exert of one of them). When the Claimant began to make his application for the Tribunal to admit those files, the Respondent interjected to say that those files were covert recordings of Respondent employees relating to an internal Teams meeting in the Respondent to which the Claimant was not a party, and which relates to a matter which is the subject of an extant Police investigation (a matter referred by the Claimant to the Police). There was an observer in the public gallery, and the Employment Judge Ordered that the hearing proceed in private to deal with this application before returning to a public hearing. This coincided with the lunch break, so lunch was taken and the hearing resumed in private.

26. Over the lunch break on the first day of the hearing, the complete version of those files was shown to the Respondent, and viewed separately by the Employment Judge.

27. Having viewed those files, the Employment Judge was clear that they do not relate in any way to the list of complaints or issues within the scope of these cases, and so those files were not admitted into evidence. The hearing then returned to be a “public” hearing, and the observer returned to the public gallery.

Disclosure

28. The Claimant made numerous complaints that the Respondent’s disclosure was incomplete, referring to the Averred Undisclosed Material.

29. Miss Quigley disputed the Claimant’s contention that the Respondent had not complied with its duty of disclosure, noting that the Respondent had made reasonable searches of documents relevant to the list of complaints and issues.

30. Miss Quigley pointed out that:

    a. The Claimant did not mention Mr Rymer in his witness statement in connection with the Incident;

    b. Mr King is not mentioned in the Claimant’s witness statement at all; and

c. Mr Jackson's position (as set out in his witness statement) is that he was not contacted by the Claimant on the date of the Incident, and therefore there would be no correspondence between the Claimant and him, consistent with the results of the Respondent's search.

31. Miss Quigley also noted that the fact that this material may have at some time existed did not mean that it was in the Respondent's possession or control at the time when it became subject to the duty to disclose.

32. The Claimant indicated that he would look again overnight (on the evening of the first day of the hearing) to see if he had any proof that the Respondent had not complied with the duty to disclose all relevant documents.

33. On the second day of the hearing (after his evidence began on the first day), the Claimant informed the Tribunal that:

    a. He had been sent some messages relevant to what he avers was withholding of his pay in December 2021 (issue 1.1.1.2); and

    b. His previous mobile telephone had in fact been "partially" fixed on the Tuesday before this hearing commenced, but that with all he had to do in preparation for this hearing he had not had the opportunity to pull the relevant records off that device and to disclose them to the Respondent – however, he could see enough on that to know that the Respondent had not complied with its duty of disclosure.

    The Claimant was reminded of *his* ongoing duty of disclosure, and the Tribunal took a brief break for the Claimant to show those messages, etc., to Miss Quigley, and the parties were told that any application to admit new evidence must be made on their return.

34. Upon the parties' return, neither applied for any additional material to be admitted into evidence. The Employment Judge expressly noted this, and the hearing proceeded.

Witness evidence

35. After dealing with all of those preliminary matters (which took nearly all of the first day of the hearing), the following witnesses provided evidence to the Tribunal:

    a. The Claimant, on his own behalf; and

    b. Each of:

        i. Karen Baldwin, who is the Respondent's HR Manager, and dealt with a number of matters relating to the Claimant;

        ii. Clare Smith, an HR Business Partner in the Respondent's organisation;

        iii. Thomas Jackson, who was the Claimant's line manager for the period April 2020 to December 2021;

iv. Simon Spicer, Mr Jackson's line manager while Mr Jackson line-managed the Claimant, and Mr Shaw's line manager while Mr Shaw line-managed the Claimant; and

v. Mark Shaw, who was the Claimant's line manager for two periods of the Claimant's employment with the Respondent: from December 2021 to the end of that employment.

36. The Claimant cross-examined the Respondent's witnesses. He initially appeared to struggle to understand the difference between points he had asserted and points that were accepted between the parties. The Employment Judge had to instruct him to correct questions he put to Ms Baldwin on four occasions because she felt that Ms Baldwin was being misled by the Claimant prefacing his questions by points like "*As we have already established*", followed by a contentious point that was described by the Claimant using his take on that point. The Employment Judge told the Claimant that he must be careful not to mislead the witness, and on the fourth time this happened said that if it happened again, the Claimant would need to supply his questions to the Tribunal for the Employment Judge to check whether the phrasing of question was misleading. A break was then taken for the Claimant to examine his questions to ensure they were not misleading. The Claimant complied and did not ask questions in a misleading way again.

The hearing window

37. The hearing was relisted after the aborted February 2024 hearing for five days beginning on 10 and ending on 14 March 2025. Unfortunately the Employment Judge was not able to sit for five days, and so the hearing length was curtailed to four days. As the Employment Judge explained, approximately one third of any hearing was reserved for deliberation and judgment-writing on the part of the Employment Judge, and so the reduced hearing length did not mean a reduced opportunity for the parties to present their cases in relation to the Claim or Counterclaim, and indeed preliminary matters, evidence and submissions were not completed until lunchtime on the fourth day of the hearing (as would have been the case had five days of Tribunal time been available).

38. In any event, the Employment Judge gave the parties the opportunity to return for oral judgment, rather than a written reasoned judgment being sent to the parties, so this matter was heard and determined over five days in any event.

39. Each of the Respondent and the Claimant made submissions in support of their respective positions.

Facts

40. The Claimant started working for the Respondent on 3 January 2020 as a First Call Operative (**FCO**) – an emergency gas engineer, having entered into a contract of employment with the Respondent on 27 December 2019.

Key provisions of the Claimant's contract of employment with the Respondent

41. Among other provisions, that contract provided that:

    a. Except where varied by the terms therein described, the Claimant's terms and conditions of employment "*were in line with our SGNC Joint Agreement. You will be able to view the SGNC Joint Agreement in detail on our internal intranet when you start, or you can request a paper copy.*"

    b. His working hours were 38.75 hours per week on average, under a rota system which:

        i. Classified Mondays to Saturdays as normal working days;

        ii. Involved working within the parameters of 8am to 8pm; and

        iii. Provided that certain work performed outside of the rota was classed as overtime and paid at a higher rate.

        The contract also provided that: "*To provide certainty and reassurance, we will strive to extend the above rotas as far into the future as possible, and we cannot require you to transfer from one rota to another, or make changes to your agreed rota, at less than 2 weeks' notice (unless otherwise mutually agreed)*".

    c. "*Full terms applying to sick pay are specified in Part F of the SGNC Joint Agreement, but are summarised below*". The summary below indicated that sickness absence for employees who had more than one year's service would be paid at full pay for 13 weeks and a further 13 weeks at half-basic pay.

    d. "*While employed by us, you will be required to comply with all of our policies and other rules and regulations, and as may be amended by us from time to time. There are some key rules that you should make a point of familiarising yourself with… These are as follows –*

        - *Employee Rules*".

42. The SGNC Joint Agreement was updated with effect from April 2021, and included the following:

    a. "*As from 2nd December 2011 (the 'Agreement Date'), this Joint Agreement shall be deemed to be included in all contracts of service between SGNC and employees covered by this Joint Agreement in entire substitution (except where specified elsewhere within this Joint Agreement) for any other individual or collective agreement (whether written or oral) in force for those employees at the time.*" (A.1.b)

    b. "*We reserve the right to deduct from employees' remuneration any sums due to us, including, without limitation, any overpayments*…". (D.2.g)

    c. Sick pay provision for employees whose period of service exceeded one year as "*15 weeks at Full basic pay, 13 weeks at half-basic pay*". (F.1.e)

43. The Employee Rules document, updated in December 2021, provided:

"*Never knowingly compete against, or divert business away from the Company. Obtain the Company's express permission before undertaking work for or on behalf of another employer, organisation or person(s) for your own personal gain.*"

The Rota Matter, 14 to 15 November 2021

44. For the period April 2020 to December 2021, the Claimant was line-managed by Mr Jackson.

45. The accepted position is that, particularly in November 2021, the Respondent's FCOs were stretched. FCOs perform safety-critical work, and for that reason the Respondent requires that certain shifts are covered with pre-set numbers of staff. At the time with which this Claim is concerned, the Respondent issued rotas for the Claimant's team every six months.

46. A new rota was introduced for all the FCOs in the Claimant's division in October 2021. On 1 November 2021 Mr Jackson wrote to the Claimant to advise him that, due to the new rota changeover, the Claimant was scheduled to work on a day shift between 08:00 and 16:15 on Sunday 14 November 2021 (on the old rota), but was also scheduled to work a night shift starting at 23:45 on that same day (pursuant to the new rota). Working both of those shifts was incompatible with the Respondent's requirements for FCOs to have rest time, and would take the Claimant above 38.75 hours for the week. The night shift was a safety-critical shift – the Respondent did not have sufficient FCOs scheduled to work it – whereas the day shift could be removed from the Claimant without difficulty.

47. Mr Jackson asked the Claimant whether he would prefer to work a different shift, on another day, instead of the 14 November 2021 day shift, to which the Claimant replied, on 3 November, that:

"*I would rather work a longer shift on the Sunday and then have my two rest days.*

So eg: 0800-2345."

48. Mr Jackson replied a few minutes later to the effect that that would mean working 24 hours, which was not permissible, so the Claimant would need to have the Sunday day shift off. The Claimant replied, a few minutes after that:

"*No what I mean is not to do the night shift, as that's what I thought your message meant.*

It makes more sense for me not to do the night shift from a fatigue standpoint and do a longer shift Sunday with 2 days rest.

That way I do not lose money and I am not fatigued."

49. Mr Jackson replied a few days later on 8 November 2021, copying in a trade union representative, saying that:

"*Unfortunately we cannot accommodate both shifts being 0800-1615 on the 14th and then 2345-0800 for 14th into 15th.*

We can either:

- *Remove 14th 0800-1615 then give you a day off on 18th/19th/20th or 21st to level the hours for 38.75 over the two weeks*
- *Remove 0800-1615 and put in place a standby then give you a day off on 18th/19th/20th or 21st to level the hours for 38.75 over the two weeks.*

We need you for the night shift due to the company requirements of network coverage...

Please let me know which option you'd like to take before end of play Thursday and I'll resolve from there."

50. There is no further response from the Claimant in the Bundle.

51. The Claimant worked the double-shift on 14 November (into 15 November) 2021, and subsequently submitted his timesheet to that effect.

52. The parties agree that the Claimant submitted the timesheet for that period three times, and Mr Jackson refused to approve it on each occasion. Mr Jackson's evidence was that, in order to reject a timesheet, he had to comment on it to say why, so he says that the Claimant was clear on the occasion of each rejection as to the reason why, although no copy of those timesheets with comments was included in the Bundle.

53. This matter forms the basis for the following of the Claimant's complaints:

    a. That the Respondent breached his contract of employment by withholding his pay in December 2021 and refusing to sign off his timesheets to allow for the pay to be processed (this is the second alleged breach of contract which the Claimant relies on in relation to Complaint 1, and corresponds to 1.1.1.2 in the List of Issues); and

    b. That, in communications with the Respondent's HR team about this matter, the Claimant felt he was ignored in his requests for his pay issues to be resolved, resulting in the Claimant having to wait until January/February 2022 for the issues to be resolved (this is part of the third alleged breach of contract which the Claimant relies on in relation to Complaint 1, and corresponds to part of issue 1.1.1.3 in the List of Issues).

54. The Claimant emailed Ms Baldwin on 17 November 2021, with an email entitled "Timesheet Rejection Issue", which included:

"*I have tried to resolve this with my manager Tom Jackson.*

I worked as per my rota hours 0800-1615 on Sunday 14.11.21 on the old rota.

I was asked to do my nightshift which fell on the 14th as well.

I initially refused then offered several suggestions which were not agreeable.

I was then given ultimatums and told that I have to work the night shift as it's a business requirement…

I relented and said I would work both shifts so as not to cause problems…".

55. Ms Baldwin replied 41 minutes later: "*Can you forward your time sheets in another way as I cannot open them*".

56. The Claimant says that he replied to this email, but there is no such correspondence in the Bundle nor in the Claimant's Further Bundle, and Ms Baldwin states that she did not receive a reply from him. In cross-examination the Claimant for the first time said that he spoke to Ms Baldwin around this time to apologise for not being able to send his timesheets to her in any other way because he did not have access to them. This conversation was not referred to in the Claimant's written witness statement, and the Respondent avers that the Tribunal should not accept this part of the Claimant's account.

57. Two days later on 19 November 2021, Ms Baldwin was in correspondence with Mr Spicer about the matter.

58. The Claimant emailed Mr Jackson on 22 November 2021, copying Ms Baldwin and the trade union representative, asking:

"*Could you please update me on whether my timesheet issue is likely to be resolved, as my timesheet has been rejected 3 times now…. I worked the hours so need to be paid*".

59. The Claimant emailed a member of the payroll team on the same date, seeking assistance with getting the payment resolved, and received a response the next day from that member of the payroll team, which included:

"*I have gone through the 5 timesheets included in your November '21 salary against the Joint Agreement and found no issues with payments processed.*"

60. Ms Baldwin escalated the matter to a more senior member of her team, Ian Thurston, on 24 November 2021, and this prompted Mr Jackson to enquire of the Claimant on the same day about what is missing from his pay. Mr Jackson received no reply from the Claimant.

<u>The Incident, 24 November 2021</u>

61. On 24 November 2021, the Claimant was working alongside a public road, when a driver mounted the pavement. The Claimant took evasive action by jumping out of the way, and fell and caused damage to his wrist. This matter is referred to in this judgement as the "**Incident**".

62. The Claimant describes the Incident in his witness statement and in his oral evidence to the Tribunal as an "*attempted assault*". His witness statement says that "*a driver with 3 other passengers, purposely mounted the pavement, drove*

straight at me, and then tried to run me over. I managed to dive out the way but was injured in the process." The Claimant reported the matter to the police.

63. The Incident relates to the Claimant's complaints in the following ways:

    a. The Claimant says that the Respondent failed to provide support after multiple requests, via the call centre and escalated to on-call management (the on-call repair manager and the EMS manager, one of whom was Tom Jackson) and was not truthful about the support which was available (this is the first alleged breach of contract which the Claimant relies on in relation to Complaint 1, and corresponds to 1.1.1.1 in the List of Issues); and

    b. The Claimant says that in his communications with HR and the managers in question (he refers to Mr Jackson's line manager, who was Mr Spicer) he felt that he was ignored as regards his request for support (this is the other part of the third alleged breach of contract which the Claimant relies on in relation to Complaint 1, and corresponds to part of issue 1.1.1.3 in the List of Issues).

64. At the time, the Respondent had the following information about what happened to the Claimant:

    a. The information the Claimant gave when he messaged the OCC twice seeking relief support – of which there is no record;

    b. The information he gave the OCC when he telephoned for relief support – of which there is no record;

    c. The email the Claimant sent his line manager, Mr Jackson, in the early hours of the following morning: "*I was injured earlier when a car mounted pavement on a job, and I hurt myself getting out of way. C Rymer made aware. Been reported to police and have incident number. Got shooting pains up whole of arm and is swollen, also back, neck, knee and shoulder now hurting. Won't be in tomorrow*"; and

    d. The information the Claimant gave Mr Jackson via WhatsApp message exchange later on 25 November 2021, which Mr Jackson said in oral evidence was consistent with the email he received from the Claimant. Mr Jackson said that he did not understand the Incident to have been an assault, but an accident, from the information he received from the Claimant.

65. The Claimant says that the Respondent maintains logs of messages and calls to the OCC, and that the Respondent has failed to disclose the messages and calls he made to it, which would support his contention that the Respondent failed to provide support to him after the Incident.

66. Whilst the allegation described in paragraph 1.1.1.1 of the List of Issues refers to Mr Jackson as one of the people to whom the Claimant requested the support,

the Claimant accepted in evidence that Mr Jackson was not working that evening, and he did not speak to Mr Jackson. He instead now says that he spoke with Chris Rymer and with Lee King, but he is not sure if he spoke to anyone else.

67. The Claimant says that he had proof of the messages he sent and the calls he made on his work mobile telephone, and that he forwarded that to his personal mobile telephone, but that the latter has since been damaged by water, and while he has "*been attempting to get this fixed*" at the time of writing his witness statement he had not yet succeeded.

68. The Respondent says in reply:

    a. It has made a reasonable search, and does not have OCC message and call logs from that date;

    b. If the Claimant sent those messages and made those calls, he would have had a record of those on his work mobile telephone, which is one of the pieces of Respondent property that the Claimant did not return to the Respondent on or following the termination of his employment;

    c. The Claimant has failed to identify when the requests were made, who refused them, and what was untruthful about the responses he received. While in oral evidence the Claimant named Mr Rymer and Mr King, he did not name those individuals in the Preliminary Hearings when the List of Issues was discussed, nor in his witness statement, and so the Respondent has not made enquiries of those individuals;

    d. The Respondent can only provide relief if the resource is available, and while the Claimant has criticised the Respondent for being consciously under-resourced, he does not accept that that could have been the reason why relief was not sent to him before he drove himself home. The Claimant's contract required him to stay and finish the job, and the Respondent was not contractually obliged to provide relief;

    e. The Claimant evidently was not so injured that he could not drive himself home, as that is what he did; and

    f. There is no evidence of any dishonesty on the part of anyone at the Respondent.

69. The email the Claimant sent to Mr Jackson on 25 November 2021 referred to Mr Rymer being aware, and Mr Jackson's witness statement records him as having asked Mr Rymer for his recollection. Mr Jackson's statement records that he emailed Mr Rymer to ask him for information regarding the Incident, and while he does not recall how that query was resolved, "*I would likely have had a conversation with Chris as it is standard procedure for the standby manager to handover to the daytime manager*".

70. The Tribunal finds:

a. The burden of proving the facts on which he relies sits with the Claimant. The Claimant has not proved that the Respondent breached his contract of employment by not sending relief, nor that anyone at the Respondent was untruthful about the support available when he engaged with them. The contractual breach the Claimant alleges in paragraph 1.1.1.1 of the List of Issues is not supported by the evidence, and the Claimant's account was vague and his responses to relevant questions on the matter evasive.

b. Similarly, the breach the Claimant avers in issue 1.1.1.3 relating to the Incident, that in the communications he had with HR and managers he felt that he was ignored as regards his request for support is not evidenced. The Tribunal cannot conclude that this allegation is made out.

<u>The Claimant commenced a period of sick leave on 29 November 2021 until the end of his employment on 29 August 2022</u>

71. The Claimant then commenced a period of sick leave on 29 November 2021 due to the injury to his wrist.

72. The Respondent's sick pay policy in the SGNC Joint Agreement provides that:

    a. An employee with more than one year's service is eligible to be paid in full for up to 15 weeks' sickness absence, followed by a further up to 13 weeks paid at half pay; and

    b. Employees who have been assaulted while on duty are eligible to be paid full pay for up to 12 months' sickness absence.

73. The Claimant was paid in full for 15 weeks, beginning on 29 November 2021 and ending on 17 March 2022, after which he was paid half-pay until 16 June 2022, from which date his sick leave was either unpaid or paid at the Statutory Sick Pay rate only (that is a point of dispute between the parties that does not need to be determined as part of this case).

74. The sick pay paid to the Claimant is relevant to four of the issues in the case, namely:

    a. The Claimant's contention that there was a delay on the part of the Respondent's HR department in communicating with him over his requests for full sick pay during his sick leave, and refusing to engage with the Claimant about these issues (issue 1.1.1.4, and the fourth allegation the Claimant makes of the Respondent's conduct breaching his contract of employment, and is part of Complaint 1);

    b. The Claimant says that, by halving his pay and failing to engage with him when he requested his sick pay to be reconsidered, the Respondent breached his contract of employment and forced him to take a second job (issue 1.1.1.5, and the fifth breach of contract the Claimant alleges by the Respondent, and forms part of Complaint 1);

c. The Claimant says that, by paying him half pay for the period 18 March 2022 to 16 June 2022, and no company sick pay from 17 June 2022 onwards until 29 August 2022 when his employment with the Respondent terminated, the Respondent made unauthorised deductions from his wages, or breached his contract of employment (issue 5.1 and Complaint 4); and

d. The Respondent avers, as part of the Counterclaim (Complaint 5), that the Claimant's claiming for and receiving sick pay from the Respondent in the period 7 March 2022 to 17 June 2022, while he was working for Centrica, was a fundamental breach of the contract of employment between them, and that the Claimant fraudulently claimed sick pay from the Respondent in this period and is liable to repay that as damages for that fundamental breach of contract.

75. These disputes are discussed in more detail below, under the heading "The Claimant commenced new employment with Centrica".

<u>The Rota Matter continued, December 2021/January 2022</u>

76. The Claimant's line manager changed in December 2021, from Mr Jackson to Mr Shaw.

77. On 19 December 2021 at 21:44 the Claimant emailed Mr Shaw and Ms Baldwin:

a. Supplying them with a copy of a Statement of Fitness for Work (**Fit Note**) from his General Practitioner. That stated that from 29 November 2021 to 7 January 2022 the Claimant was "*not fit for work*" due to "*Wrist injury*";

b. Asking for an update from Ms Baldwin on the timesheet rejection matter; and

c. Stating that he had been underpaid because of the timesheet rejection matter and had "*not heard anything*", and that he had "*followed up with emails/calls which have not been responded to*".

78. On 20 December 2021 Ms Baldwin replied. She stated that she had asked him, on 17 November 2021, to send her through his timesheets in a different format, as she could not open them, but she had not yet received them. Ms Baldwin copied Mr Jackson seeking an update on the query with the Claimant's pay.

79. By way of reply, on 20 December 2021 Mr Jackson forwarded the email he sent the Claimant on 24 November 2021, asking what was missing from his pay, to Mr Spicer, noting that he had had no more contact with the Claimant as he went off sick.

80. Mr Spicer emailed the Claimant on 20 December 2021, and said that he had found what was missing from the Claimant's pay, and that he would arrange for payment to be made to him as soon as possible. Mr Spicer emailed the Claimant the next day to ask the Claimant to send him a copy of his recent payslip to show

the Claimant's hourly rate, noting that he would send payment through as soon as that was received from the Claimant.

81. On 26 December 2021 the Claimant emailed Mr Spicer seeking an explanation as to why the payment had not been made.

82. Mr Spicer replied on 29 December 2021, noting that as he had not received a copy of the Claimant's payslip with his hourly rate, he could not arrange payment. He apologised, and repeated that "*As soon as I get this I will arrange a BaCs payment*".

83. The Claimant replied on the same day, stating that he did not have access to his payslips currently, and requesting that payment be made. Mr Spicer replied to him, copying Ms Baldwin, also on 29 December 2021:

"*I do not have access to the hourly rate of all individuals within SGN, Your manager at the time (Tom Jackson) declined your timesheet due to too many core hours booked, and confusion of days worked/agreed over the rota transition period… As soon as I found out you were not paid I arranged to [pay you for the hours]… but I need your hourly rate for that and I thought the easiest option would be to ask you.*"

Mr Spicer asked Ms Baldwin to ask payroll for the Claimant's hourly rate so the payment could be processed.

84. Ms Baldwin replied two hours later with that information, and the payment was processed the next day, and paid to the Claimant on 7 January 2022.

85. As noted above, the Claimant avers that:

    a. The Respondent withheld his pay in December 2021 and refused to sign off his timesheets to allow for the pay to be processed; and

    b. The Respondent's HR team ignored communications from him about this matter, resulting in the Claimant having to wait until January/February 2022 for the issues to be resolved,

and that these matters each breached his contract of employment.

86. It is plain from the evidence described above that:

    a. The Respondent did not "withhold" pay for the Claimant. Rather, the Claimant knowingly acted against a management instruction by working the day shift on 14 November 2021, and the pay for that shift could not be authorised by Mr Jackson because it breached the Respondent's rest break requirements. Nonetheless, the payment was ultimately authorised by Mr Spicer when he became aware of it and was provided with the requisite information.

    b. Neither the Respondent's HR team nor the Claimant's managers ignored communications from the Claimant about this matter. Rather, it was the

Claimant who ignored communications from them, and that was the cause of the delay in his receiving the payment.

87. Neither of these matters breached the Claimant's contract of employment, and nor could he possibly have considered them to do so at the time. These breaches alleged by the Claimant in relation to Complaint 1 (corresponding to issues 1.1.1.2 and part of 1.1.1.3 in the List of Issues) are contradicted by the evidence and do not succeed.

<u>The Claimant's sickness absence continued; the Claimant commenced new employment with Centrica, 7 March 2022</u>

88. The Claimant commenced new employment with Centrica on 7 March 2022, while still employed by the Respondent – this much is not disputed by the Claimant. The Respondent says that it did not learn of this fact until 5 August 2022; the Claimant says that the Respondent was asked by Centrica for a reference concerning him ahead of his commencing employment with them, and so it was aware of his new employment. Whilst he has disclosed no documentation in relation to his new employment or his recruitment into that role, the Claimant has told the Tribunal that he was contracted to work for Centrica from 9 am to 3:30 pm each weekday.

89. In the meantime, the Claimant and the Respondent were engaging about the level of sick pay he was receiving from the Respondent. On 21 March 2022, the Claimant emailed Ms Baldwin, saying that he had received a letter from HR regarding his sick pay being halved. The Claimant said that was incorrect, and he believed he should be paid in full for up to 12 months because he had suffered his wrist injury as a result of an assault while on duty. Ms Baldwin replied the next day:

    a. Expressing hope that the Claimant is well;

    b. Asking if they could arrange a visit to the Claimant's home to:

        i. Discuss his concerns around pay;

        ii. Get an update on his health situation; and

        iii. Give him an update on the workplace;

    c. Noting that this would be an opportunity for them (her and Mr Spicer) to collect any equipment the Claimant has "*to enable us to have it updated*";

    d. Reminding him of the Employee Assist program; and

    e. "*In the mean time I will refer you to occupational health, the contact number I have for you is your work one, please can you keep this on in readiness to take their call.*"

90. On the same day Ms Baldwin made a reference in respect of the Claimant to the Respondent's occupational health provider. Also on that date, the occupational health provider contacted Ms Baldwin to say that they were having trouble getting

hold of the Claimant, but they had provisionally given him an appointment for 31 March. Ms Baldwin forwarded that email to the Claimant, and asked him to confirm with them that the appointment was suitable.

91. Also on 24 March 2022 the Claimant replied to Ms Baldwin's email about a home visit. In that email the Claimant:

    a. Asked Ms Baldwin to confirm why his pay was being halved as soon as possible;

    b. Said that he would confirm with occupational health a suitable date for an appointment once he understood why that was required;

    c. Referred to the provision in the contract of employment whereby it states that an employee who has suffered an assault at work would receive full pay for up to 12 months;

    d. Queried why the Respondent's equipment needed to be collected; and

    e. Objected to the fact that someone had attended his property without his permission and attached stickers to the Respondent's van on his driveway that referred to an SGN recruitment exercise.

    In that email the Claimant attached a further Fit Note for the period 17 March 2022 to 26 April 2022, stating that he was "*not fit for work*" due to a "*Wrist injury*".

92. The Claimant would not agree to meet with occupational health, and so the appointment provisionally made for him was cancelled.

93. Ms Baldwin emailed the Claimant on 31 March 2022, replying to his queries/complaints as follows:

    a. His entitlement was to up to 15 weeks' full pay and then to up to 13 weeks' half pay;

    b. Explaining that the Respondent wished for him to see occupational health to "*allow us to gain an up to date report on your current health situation and advise us of support and adjustments we can put in place to enable you to return to work, occupational health will also advise the company if you are not fit for work in any capacity*";

    c. Noting that she had spoken with the Respondent's Safety, Health and Environment (**SHE**) team, and that the Council was asked for any CCTV evidence of the incident, but there was none. Informing the Claimant that his absence does not fall within the sick pay provision for an assault at work;

    d. Informing him that his van was due an MOT; and

    e. Stating that equivalent recruitment stickers were placed on all vans to generate recruitment.

94. The Claimant replied the following day (1 April 2022) in forthright terms that:

a. His injury was sustained while at work, and a car was deliberately aimed at him. The Claimant disputed that he was not entitled to a further period at full pay;

b. "*I have been available and contactable throughout my absence and have previously stated that the best way to contact me is via email or letter. I have also remained in touch via Whatsapp with Mark Shaw*";

c. The reasons given for coming on to his property to attach a recruitment sticker to his van were not acceptable; and

d. The issue of his sick pay rate should be escalated.

95. The matter was escalated to Clare Smith, Ms Baldwin's line manager, on 4 April 2022.

96. Mrs Smith emailed the Claimant on 7 April 2022 with her conclusions on the matter of the Claimant's sick pay entitlement. Mrs Smith:

a. Apologised for the delay in getting back to the Claimant (due to annual leave and seeking legal guidance);

b. Noted that, after a review, the Respondent did not consider the circumstances of the Incident to be an "*unprovoked assault*" within the meaning and spirit of the policy – which is intended to cover deliberate personal violence, not a driver losing control of their vehicle;

c. Reiterated the reasons why the Respondent wanted to refer him to occupational health, and asking him to consent to this; and

d. Expressing regret that the placement of the recruitment sticker on his van made him feel targeted, and stating that she would arrange for an apology to be made to him.

97. From the Claimant's initial query of 21 March 2022 to Mrs Smith's response described above on 7 April 2022 there was a period of 17 days. The Tribunal finds that there was no unreasonable delay on the part of the Respondent's HR department in communicating with him over his requests for full sick pay during his sick leave, and no refusal to engage with him about these issues. His complaint in issue 1.1.1.4 of the List of Issues is not made out – there was no breach of his contract of employment by the Respondent's conduct in this regard.

98. The Claimant also avers, in issue 1.1.1.5, that the Respondent halved his sick pay and failed to engage with the Claimant when he requested that that decision be reconsidered. This is the fifth breach of his contract of employment that he alleges on the part of the Respondent. It is evident that, while the Respondent did halve his sick pay, that could not be a breach of his contract of employment, as the Claimant had commenced work with Centrica on 7 March 2022 before that reduction to his sick pay occurred on 18 March 2022. If he was well enough to work for Centrica, he was clearly not "*not fit for work*", and so the Respondent cannot be breach of his contract by in fact paying him for further sickness

absence. Moreover, it is abundantly clear that the Respondent did engage with him about whether his sickness absence from 18 March onwards should be on full pay or half pay, and so this alleged breach is not made out either. Significantly, the Claimant was not forced to take a second job by the Respondent's failure to continue to pay his sick leave in full, as his email of 21 March 2022 indicated that he had recently received a letter from HR about his sick pay reducing to half pay, and he had commenced employment with Centrica on 7 March 2022. There was no breach of his contract of employment by the Respondent in relation to these matters.

99. There was no breach of contract, or unauthorised deduction from the Claimant's wages, by reason of the Respondent paying the Claimant less than full sick pay from 18 March 2022 onwards. The Claimant was not entitled to be paid any company sick pay by the Respondent from at least 7 March 2022 onwards. Complaint 4 therefore fails.

100. However, as the Respondent contends, the Claimant was clearly in fundamental breach of his employment contract when he commenced work for Centrica whilst still employed by the Respondent. This is for several reasons:

a. While it is unclear whether Centrica and the Respondent are competitors so as to offend the quoted section of the Employee Rules above, incorporated into the Claimant's contract of employment, the Claimant evidently could not both work for the Respondent 38.75 hours per week between the hours of 8am to 8pm six days a week (Monday to Saturday) and work for Centrica Monday to Friday 9 am to 3:30pm. He was in breach of the duty of fidelity he owes the Respondent, and of the express terms of his contract of employment which required that he would be available to work shift patterns between 8am and 8pm six days a week; and

b. The Claimant patently was not unfit for work if he was able to work for Centrica. The Respondent and the Claimant agree that Mr Shaw endeavoured to explore options of adjustments to the Claimant's duties so as to enable him to return to work. Even if that had not occurred, the Claimant was fraudulently claiming company sick pay from the Respondent on the basis that he was unfit for any work, and that was obviously not the case given he was simultaneously working for Centrica. That is obviously a fundamental breach of his contract of employment with the Respondent.

101. Moreover, it is clear to the Tribunal that the Claimant was aware of this fact, for several reasons:

a. When giving his evidence, he initially said that he had never received a copy of his contract of employment. He later said that before he commenced employment with Centrica he checked his contract of employment to ensure it was not breached by undertaking that second job;

b. It is clear that the Claimant's refusal to engage with occupational health, or to meet with Ms Baldwin and Mr Shaw at this time, was because he was already undertaking work for another organisation, and he was concerned that occupational health would see his ability to do so, and that attending appointments with the Respondent and with occupational health were incompatible with his commitments to his new employer, Centrica; and

c. The Claimant is an intelligent man. He knew what he was doing when he was claiming sick pay from the Respondent (and complaining about its reduction) whilst also working for Centrica. He knew that dual employment with overlapping work hours was fraud against one or both of those organisations. The Tribunal finds it was as against the Respondent, though no evidence has been presented from Centrica itself about its state of knowledge (albeit that Ms Baldwin's evidence was that, in her correspondence with Centrica, Centrica was unaware that it could be committing the tort of inducing the Claimant to breach his contract of employment with the Respondent).

The Claimant has unashamedly attempted to mislead the Tribunal about these matters.

102. Matters came to a head on 4 August 2022, when Ms Baldwin received reports from at least one colleague of the Claimant's that the Claimant had been seen driving around the locality in a Centrica van. The Respondent emailed Centrica to enquire about this.

103. Centrica replied to the Respondent on 5 August 2022, confirming that the Claimant had started working for it on 7 March 2022, and that it had understood that the Claimant had resigned from the Respondent's employment.

<u>The Claimant resigned from the Respondent's employment, July/August 2022</u>

104. On 23 August 2022, the Respondent received a hard copy letter from the Claimant resigning from his employment, and that letter was purportedly dated 26 July 2022. The Respondent says that it found this method of communication to be strange, given that previous correspondence with the Claimant had been by email.

105. The actual date of the Claimant's resignation makes no difference – he was in fundamental breach of his contract of employment with the Respondent from 7 March 2022 onwards.

106. The Claimant's employment with the Respondent terminated on 29 August 2022.

The Respondent's treatment of the Claimant's entitlement to notice pay and pay in lieu of accrued but untaken holiday on the termination of his employment, 31 August 2022

107. The Respondent sent the Claimant a leaver's letter on 31 August 2022, which:

a. Stated that the Claimant's accrued holiday pay would be offset against the payments made to him by the Respondent since 7 March 2022; and

b. Sought the return of various pieces of equipment belonging to the Respondent.

108. The Respondent regarded the Claimant as in fundamental breach of his employment contract with it, and therefore as not entitled to notice pay. In any event, his sick pay from the Respondent had been exhausted by this time, and the Claimant never returned to work for it, so no further payment would have been made in respect of any notice period in any event had his contract continued for that period in.

109. The Claimant says that he did not receive this letter, which was sent by the Respondent by ordinary post to his home address.

The Respondent's property in the Claimant's possession

110. Early Conciliation between the Claimant and the Respondent began on 24 September 2022 and ended on 5 November 2022.

111. The Claimant in his witness statement and in oral evidence to the Tribunal says that he returned all of the Respondent's property to its Weymouth Depot, placing those items in a secure locker near the calibration machines in early-to-mid September 2022. The Claimant says that no one was present when he did this, and therefore he did not receive a receipt for having returned those items. He says that he did this because he had received no instructions from the Respondent as to how those items should be returned. At one stage in submissions the Claimant also referred to the fact that he notified someone at the Respondent that he had returned that property after he took it to the Weymouth Depot, but when asked about it he seemed to contradict that statement, saying "*I don't think it was ever picked up in my mind to write – I don't think I ever did that*".

112. The Respondent denies this, saying that the Claimant has retained:

a. A Cat4, which it values at £879.49;

b. A Gatech, which it values at £2,100;

c. A hydrogen bottle for the Gastech, which it values at £252;

d. A Gascoseeker MK2, which it values at £1,027;

e. A laptop, which it values at £1,107;

f. A laptop case, which it values at £95.57;

g. A mobile telephone, which it values at £159.54; and

h. A mobile telephone case, which it values at £4.82,

which amounts, in aggregate, to property worth £5,625.42. The Claimant has not challenged the valuation of those items.

113. The Respondent says that:

a. Property that belongs to it is normally the subject of an offboarding process with the individual's line manager. In this case, Mr Shaw ceased line-managing the Claimant before the Claimant's employment terminated, but this was completed by Richard Moody, who recorded, in the offboarding he did in respect of the Claimant on 23 August 2022, without the Claimant being present as he remained on sick leave, that:

"*The van was brought back by Mark Shaw and Rich Moody. Some tooling was not in the vehicle when checked. The missing items are a Gascoseeker, Gasteck and Cat .*

The phone has not been unlocked due to the absence of the employee so the gmail account has not been disabled or a voicmail left advising that Jamie no longer works for SGN. The laptop has not had an out of office message for the same reason";

b. It does not know how the Claimant would have accessed the Weymouth Depot in September 2022, as his access pass would have been deactivated on the termination of his employment;

c. Mr Shaw does not recall there being secure lockers in the Weymouth Depot. Moreover, he described the process of entering the Weymouth Depot as requiring both a key and an alarm code; and

d. All of its equipment is given a serial number, so that the Respondent is aware of who has what, and who they need to contact when that equipment needs to be updated or recalibrated. Even if the Claimant had managed to return the property to the Weymouth Depot, the serial numbers on that equipment would identify it as having been held by the Claimant, and therefore the system would know that he had returned it. The Respondent's system still records these items as in the Claimant's possession.

114. The Respondent wrote to the Claimant again on 20 November 2022, seeking the return of its equipment which it said the Claimant had not returned. The Claimant says that he did not receive that letter (again, sent to his home address by post), and that is why he did not respond to it.

115. The Tribunal prefers the evidence of the Respondent. Notably, Mr Shaw's evidence about the fact that all of its property is identifiable by way of serial numbers was considered critical evidence by the Tribunal. Even if the Claimant had returned the property to its Weymouth Depot and someone else had picked

up that equipment without realising that it was property returned by the Claimant, the serial numbers would have communicated to the Respondent that the Claimant no longer held its property. That has not happened. The Tribunal finds that the Claimant did not return those items of the Respondent's property that it alleges, and therefore that the Claimant owes the Respondent the sums sought by way of compensation for that retained property. In so finding, the Tribunal has reminded itself that the fact that it has already made a finding that the Claimant was dishonest about one matter (knowingly claiming sick pay from the Respondent whilst undertaking employment for Centrica) does not mean that he was dishonest about this one – but still he is found to have been dishonest in his assertion that he returned the property.

The presentation of the Claim, 5 December 2022

116. The Claimant presented his Claim Form to the Tribunal on 5 December 2022. The Claim Form identified three respondents: the Respondent, Southern Gas Networks Plc, and Scotia Gas Networks Ltd. The claim against the latter was rejected by the Tribunal on 18 January 2023 because the Claimant had not complied with the requirements relating to ACAS Early Conciliation in respect of Scotia Gas Networks Ltd.

The presentation of the Counterclaim, 15 February 2022

117. When it presented its Response on 15 February 2023, the Respondent raised the Counterclaim.

Preliminary Hearings before the Employment Tribunal

118. A Preliminary Hearing for Case Management took place on 12 June 2023 before EJ Rice-Birchall. The written copy of the Orders made at that hearing, dated 13 June 2023:

a. Noted that: "*By consent, the respondent's name is amended to SGN Contracting Limited*";

b. Noted that the Counterclaim had been made and would now be served on the Claimant, and he would be asked to file a defence to that Counterclaim;

c. Set out a list of the complaints brought by the Claimant, and a list of issues between the parties;

d. Recorded that the Claimant had indicated that he may be making an application to amend his claim to include complaints of detriment on the ground that he had made a protected disclosure, and set out some information relating to matters to which the Claimant had referred in the hearing; and

e. Included an Order that the Claimant provide some further and better particulars by 11 July 2023.

Those Orders noted the sole respondent as being the Respondent.

119. On:

a. 19 July 2023 the Claimant challenged the failure to include Southern Gas Networks Plc, and Scotia Gas Networks Ltd as respondents in those Orders; and

b. 28 July 2023 the Claimant provided some of the further and better particulars sought, but not all.

120. A further Preliminary Hearing for Case Management was held by EJ Truscott KC on 7 September 2023, at which the Claim and the Counterclaim were discussed. EJ Truscott KC:

a. Noted that the decision as to whether the respondent had been correctly identified was an administrative decision, and his consent to the current employer was recorded in the Orders of EJ Rice-Birchall – and those were matters for appeal and would not be changed by him;

b. Allowed the Claimant's application to amend his claim to include further narrative background;

c. Refused the remainder of the Claimant's application to amend. While EJ Truscott KC's Orders did not record the content of the Claimant's application to amend, a copy of that was included in the Bundle for this hearing, and that application included complaints of protected disclosure detriment and health and safety detriment; and

d. Ordered that the Counterclaim be served on the Claimant.

Service and Response to the Counterclaim

121. The Counterclaim was served on the Claimant on 19 September 2023, and the Claimant was given 28 days to respond to the Counterclaim (i.e., the deadline to do so was on or before 16 October 2023).

122. On 10 October 2023 the Claimant wrote to the Tribunal: "*The document regarding the counterclaim is not clear on its intentions or content. The ET3 is also blank. I also request to see a copy of the information given to the Respondents counsel, following the Preliminary hearing in regard to the decisions made by the Judge*".

123. The Respondent had been copied on this 10 October email, and so replied to the Claimant: "*I attach a copy of the Respondent's ET3 and Grounds of Resistance, where the particulars of counterclaim are pleaded. These Grounds been shared with you already because there are copies of this document in the preliminary hearing bundle(s).*"

124. The Tribunal replied on 12 October 2023, attaching a copy of EJ Truscott KC's Orders of 7 September 2023 and a blank ET3 form, noting that: "*The ET3*

Form is blank and is for you to complete and return to the Tribunal as the Claimant has made a counter claim against you".

125. On 15 October 2023 the Claimant wrote to the Tribunal saying that was not aware of the contents of the Counterclaim, and seeking an extension of time to respond to it.

126. The Tribunal Clerk who replied to the Claimant on 17 October 2023 had clearly misunderstood the relevant file, and the response included: "*it appears the Respondent has not yet returned the Response form to the Tribunal. The deadline for submission was 16 October 2023. It is possible the form has been received, but not yet actioned. If received, you will be sent a copy of the Response once it has been actioned*".

127. The Respondent sought to clarify the position by an email of the same date as the Tribunal's, stating that: "*In reference to the Claimant's email of 15 October, we've sent a copy of the Particulars of Counterclaim (which were contained in the Respondent's ET3 and Grounds of Resistance) to the Claimant. We attach a copy of that correspondence.*"

The original listing of this Final Hearing

128. The Claimant wrote to the Tribunal on 31 January 2024, noting that he had been unwell, suffered a bereavement, and a close family member had suffered a heart attack, and requesting a postponement of the Final Hearing of this matter which had been listed for 12 to 16 February 2024.

129. The matter came before EJ Hart on 12 February 2024, who postponed the final hearing due to the Claimant's ill health, noting that any application for costs due to that late postponement application by the Claimant was to be addressed at the conclusion of the final hearing. EJ Hart relisted the final hearing for 10 to 14 March 2025.

The immediate run-up to this hearing

130. On 18 February 2025 the Claimant requested a further Preliminary Hearing to:

a. Deal with ongoing issues of case management;

b. Deal with an application to relocate the venue for the final hearing to an alternative one nearer to his home in Dorset;

c. Deal with the Claimant's application to strike-out the Respondent's response and the Counterclaim; and

d. Complaints he makes regarding the conduct of the Respondent's solicitors.

131. The following day the Respondent objected to that request:

a. Noting that it was unaware of any ongoing issues of case management;

b. Observing that while the Claimant had previously made an application for a change of venue, he had withdrawn that application;

c. Denying that there were any grounds to strike-out the Respondent's response and Counterclaim; and

d. Disputing the Claimant's complaints about the conduct of its representatives.

Law

Strike-out

14. Rule 38 of the ET Rules provides:

"*(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds-*

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out).

(2) A claim, response or reply may not be struck out unless the party advancing it has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) *Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 22 (effect of non-presentation or rejection of response, or case not contested).*

(4) *Where a reply is struck out, the effect is as if no reply had been presented, as set out in rule 22, as modified by rule 26(2) (replying to an employer's contract claim).*"

15. The effect of a strike-out is to terminate the claim or the part of the claim that is the subject of the order. It is a draconian jurisdiction, and the relevant case authorities underlie its exceptional nature.

16. The application here is made under sub-categories (a), (b), (c) and (e) of Rule 38(1) of the ET Rules. There is some overlap between these categories.

(a) No reasonable prospect of success

17. In relation to the argument that the Respondent's Response and the Counterclaim have "*no reasonable prospect of success*", plainly, on the wording of the Rule, the threshold for the Claimant to meet is a high one.

18. The Court of Appeal in *A v B* [2010] EWCA Civ 1378 equated this test with the applicant needing to show that the prospect of success is no more than "*fanciful*". Because the applicant in that case could not meet that threshold, the Court considered that the application failed.

19. The cases of *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330, *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] IRLR 755 and *Cox v Adecco Group UK & Ireland* [2021] ICR 1307 indicate that it would be wrong to make a strike-out order where there is a dispute on the facts that needs to be determined at trial.

(b) The Respondent's conduct of proceedings has been scandalous, unreasonable or vexatious

20. The relevant authority for this ground for strike-out is *James v Blockbuster* [2006] EWCA Civ 684, where Lord Justice Sedley observed that the two conditions for the Tribunal's power to strike-out for the manner in which a party has been conducting its side of the proceedings are:

"***<u>either</u>*** *that the* ***unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps****,* ***or*** *that* ***it has made a fair trial impossible****. If these conditions are fulfilled, it becomes necessary to consider whether, even so,* ***striking out is a proportionate response***" (my emphasis).

21. The key cases on the second limb, whether strike-out is a proportionate response, include the decisions of the Court of Appeal in *Arrow Nominees v Blackledge* [2000] 2 BCLC 167 and the decision of the EAT in *Weir Valves v Armitage* [2004] ICR 371. Both emphasise that, even where the jurisdiction to strike-out is engaged by one party's non-compliance with court orders, strike-out is not a punishment, but is rather a tool to be exercised with caution in furtherance of justice – to secure the fair trial of the action in accordance with the applicable rules.

22. In the case of *Armitage* (*Blackledge* was not an employment law case), Judge Richardson centred the question of what is a proportionate response on the overriding objective, set out in Rule 3 of the ET Rules:

"*The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It*

should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."

(c) Non-compliance with an order of the Tribunal

23. As for strike-out on ground (c) above, the key consideration here is the overriding objective, i.e., whether strike-out would further or hinder the Tribunal's objective to deal with cases fairly and justly, and whether strike-out is a proportionate response.

24. One of the key case authorities on the subject is *James v Blockbuster Entertainment Ltd* [2006] EWCA Civ 684, where it was noted that:

"*This power… is a Draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response.*"

(d) Not actively pursued

132. An employment tribunal can strike out a claim, response, or part of a claim or response, where:

a. there has been delay that is intentional or contumelious (disrespectful or abusive to the court); or

b. there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the other party

(*Evans v Commissioner of Police of the Metropolis* [1993] ICR 151).

(e) Whether it is possible to have a fair hearing

133. The reported decisions on this basis for strike-out generally concern cases which could not be progressed because of the claimant's ill health where there was no prognosis about when they would be well enough for the case to be pursued. The central applicable considerations are the balance of prejudice to the parties in the matter continuing or being struck-out.

<u>Employer contract claims as they relate to statutory sick pay</u>

134. The jurisdiction of the Employment Tribunal is governed by section 3 of the Employment Tribunals Act 1996. That Act, together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 (the **Order**) provides that, in certain circumstances, an Employment Tribunal may determine a claim brought by a former employer against its former

employee for claims arising on the termination of the employee's employment. One pre-condition to an employer bringing such a claim is that the employee has brought a breach of contract claim against it in the Employment Tribunal.

135. The Social Security Contributions (Transfer of Functions, etc) Act 1999 provides, in section 8(1)(f), that the Commissioners of Inland Revenue have the exclusive jurisdiction to determine entitlement to statutory sick pay. This excludes the jurisdiction of the Employment Tribunal to determine such disputes, even where they arise under the guise of the Tribunal's wide powers to adjudicate matters such as an unauthorised deductions from wages, or breach of contract. Those general powers of the Tribunal are to be read and understood in light of the specific (and exclusive) power of the Commissioners of Inland Revenue to determine disputes pertaining to statutory sick pay (*Taylor Gordon & Co Ltd (t/a Plan Personnel) v Timmons* EAT/0159/03/RN).

Health and Safety at Work etc Act 1974

136. Section 9 of the Health and Safety at Work etc Act 1974 provides:

"*No employer shall levy or permit to be levied on any employee of his any charge in respect of anything done or provided in pursuance of any specific requirement of the relevant statutory provisions.*"

Constructive unfair dismissal

137. The right not to be unfairly dismissed is set out in section 94 of the 1996 Act. For these purposes, an employee is dismissed by their employer if:

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

(section 95(1)(c) of the 1996 Act).

138. This treatment of the employee's resignation as "constructive dismissal" pre-dates the 1996 Act, and Lord Denning MR in the Court of Appeal decision in *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221 described the nature of the contractual breach which entitles the employee to accept that breach and treat the employer's conduct as dismissing them:

"*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 from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.*"

139. Therefore there are three elements that an employee needs to prove to demonstrate that they have been constructively dismissed:

a. A fundamental breach of the contract of employment between them on the part of the employer;

b. A causal link between the employee's resignation and that employer breach; and

c. Evidence of the employee accepting that breach before any affirmation of the contract.

Fundamental breach

140. An employer may, in the words of Lord Denning MR in *Western Excavating*, "[*show*] *that* [*they*] *no longer* [*intend*] *to be bound by one or more of the essential terms of the contract*" through a course of conduct, which may cumulatively amount to a fundamental breach of contract. This is so even if the 'last straw' incident does not, by itself, amount to a breach of contract (*Lewis v Motorworld Garages Ltd* [1986] ICR 157), although that 'last straw' must contribute to the course of conduct relied upon. A blameless act by the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer (*Omilaju v Waltham Forest London Borough Council* [2005] ICR 481).

141. The test of whether the term of the contract has been breached is an objective one. There will be no breach simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely this view is held (*Omilaju*).

142. The term breached may be an express term of the contract, or an implied one. In the case of the implied term of trust and confidence:

"*A finding that there has been conduct which amounts to a breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract, and entitling the employee to resign and claim constructive dismissal*" (*Morrow v Safeway Stores plc* [2002] IRLR 9).

143. Where there has been a 'course of conduct' and the employee has continued to work, the employee may still rely on that course of conduct where it is continuing, despite the fact that the employee has continued to work under the contract, seemingly affirming it in spite of the employer's breaches – the effect of the 'last straw' is to revive the employee's right to resign (*Kaur*).

<u>Failure to pay compensation for annual leave on termination of employment</u>

144. Regulation 30(5) of the WT Regulations provides that:

"*Where on a complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a worker in accordance with regulation 14(2) or 16(1), it shall order the employer to pay to the worker the amounts which it finds to be due to him.*"

Wrongful dismissal

145. An employee, by dint of their contract of employment with their employer, is entitled to be given a period of notice before that contract is terminated, being either the notice period prescribed by their contract of employment or statutory minimum notice (whichever is longer). Where an employer dismisses an employee without notice or payment in lieu of notice in breach of that contract, the employee has been wrongfully dismissed and is entitled to seek damages equal to the pay and value of benefits they would have received had their employer complied with the terms of the contract.

Unauthorised deductions from wages

146. Section 13 of the 1996 Act provides:

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

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

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

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

147. Section 27 of the 1996 Act defines wages as "*any sums payable to the worker in connection with his employment*", and that includes, in subsection (a), "*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise*".

148. The words "*properly payable*" in section 13(3) mean there must be some legal entitlement to the sum in question (*New Century Cleaning Co Ltd v Church* [2000] IRLR 27).

149. A claim of unauthorised deductions is not the same as a claim for breach of contract or for misrepresentation (where damages may be awarded if the claim is successful) - rather it is a statutory claim based on an entitlement to payment which has not been made (or not made in full). This will involve a factual determination of whether the claimant had a legal entitlement to the payment in question (*Steel v Haringey LBC* EAT 0394/11).

Application to the claims here

Complaint 1: That the Claimant was constructively unfairly dismissed by the Respondent

150. The Claimant avers that there were a number of ways in which the Respondent breached the contract of employment between them (set out in issues 1.1.1.1 to 1.1.1.5 of the List of Issues), and the Tribunal has found that none of those breaches occurred. That is an objective matter, and not one that depends on the Claimant's interpretation (*Omilaju*). The Tribunal does not need, therefore, to consider whether any of those breaches, either individually or collectively, were fundamental breaches of the Claimant's contract of employment. Complaint 1 fails.

Complaint 2: That the Respondent owes the Claimant compensation for accrued but untaken holiday on the termination of his employment

151. The parties agree that upon the termination of his employment, the Claimant had accrued but not taken all of the annual leave to which he was entitled pursuant to Regulations 13 and 13A of the 1998 Regulations. This means that the Claimant should have been paid compensation in lieu of that accrued but untaken leave, pursuant to Regulation 14, on the termination of his employment. The value of that compensation is, on the Respondent's calculation (a higher sum than as per the Claimant's), £3,452.71 gross.

152. While that would, ordinarily, mean that the Tribunal would make an Order for the Respondent to pay the Claimant the amount that is due to him (regulation 30(5)), the Respondent's Counterclaim succeeds, and the terms of the Claimant's contract of employment (incorporating as it does provisions from the SGNC Joint Agreement) entitles the Respondent to deduct from remuneration due to the Claimant any sums due to it, including any overpayments (pursuant to provision D.2.g of the SGNC Joint Agreement). The value of the Counterclaim exceeds the value of the compensation due to the Claimant by way of accrued but untaken holiday (as set out below).

153. Complaint 2 does not succeed.

Complaint 3: That the Claimant was wrongfully dismissed

154. The Claimant's complaint that he was wrongfully dismissed and is owed notice pay is misconceived. The Claimant acted in fundamental breach of the employment contract between him and the Respondent when he:

a. Commenced employment with Centrica which obliged him to work hours that were hours when he was contractually obliged to be available for work with the Respondent; and

b. Claimed sick pay, stating that he was unfit for work, while he was working for Centrica.

155. That fundamental breach of contract by the Claimant entitled the Respondent, when it learned of that breach, to accept it and treat the contract as terminated. No further sums were due under the contract from that point in time.

156. The Claimant's complaint that he was wrongfully dismissed (Complaint 3) fails.

Complaint 4: That the Respondent made unauthorised deductions from the wages owed to the Claimant, or breached his contract of employment in respect of the sums paid to him, in respect of the period 18 March to 29 August 2022 (from the date when the Claimant began to be paid half pay until the date his employment terminated)

157. As noted above, the Claimant was not entitled to any sick pay from the Respondent from at least 7 March 2022 (possibly earlier, if he was fit for work at an earlier point in time). These were not sums that were "*properly payable*" by the Respondent to the Claimant, and so the complaint of unauthorised deductions from his wages in respect of them cannot succeed (section 13(3) of the 1996 Act, and the case of *New Century Cleaning*).

158. Nor can this complaint succeed if framed as one of breach of contract – the Respondent was not in breach of contract by failing to pay the Claimant full sick pay. In fact, the Claimant was not entitled to any sick pay whatsoever from at least 7 March 2022 (and potentially from an earlier date). The Claimant committed fraud when he claimed sick pay from the Respondent while undertaking work for Centrica.

159. His complaint – Complaint 4 - of unauthorised deductions from his wages, or breach of contract, does not succeed and is dismissed.

Complaint 5: That the Claimant owes the Respondent £2,408.05 in respect of sick pay paid to him to which he was not entitled (after setting off sum the Respondent owed him in respect of accrued but untaken annual leave on the termination of his employment)

160. The Tribunal has already found that, from 7 March 2022, any sums paid to the Claimant by way of company sick pay were claimed fraudulently by the Claimant. This is because he was simultaneously telling the Respondent that he was unfit for any work whilst undertaking work (and paid work) for Centrica.

161. The Tribunal cannot determine that the statutory sick pay paid to the Claimant in this period was not due to him, because exclusive jurisdiction to determine entitlement to statutory sick pay resides with the Commissioners of the

Inland Revenue (pursuant to section 8(1)(f) of the Social Security Contributions (Transfer of Functions, etc) Act 1999, as interpreted in *Timmons*).

162. The unchallenged information provided by the Respondent is that it paid the Claimant £4,461.98 by way of company sick pay in the period 7 March to 29 August 2022. Setting off the sum the Respondent owed the Claimant by way of compensation for accrued but untaken holiday (£3,452.70), the Claimant owes the Respondent **£1,009.28** by way of damages for fraudulently claimed company sick pay.

Complaint 6: That the Claimant failed to return property belonging to the Respondent to it on the termination of his employment, valued at £5,625.42

163. As noted in the Facts section above, the Tribunal finds that the Claimant failed to return this property to the Respondent, and therefore that the Claimant owes the Respondent compensation in respect of that property.

164. While the Claimant has pointed to section 9 of the Health and Safety at Work etc Act 1974, which he says prevents an employer charging an employee for the provision of PPE, the Tribunal considers that that provision only prevents an employer from charging *an employee* of his for PPE. The Claimant ceased to be the Respondent's employee, the equipment was no longer needed by him for the performance of his employment duties, and the equipment should have been returned. As the Claimant said, all this equipment was provided to him to protect him from harm in the conduct of his duties, but the Claimant no longer requires the equipment for that reason.

165. As the equipment was not returned, the Claimant is Ordered to pay the Respondent the sum of **£5,625.42** in respect of that equipment.

Conclusions

166. Each of the Claimant's complaints fails and is dismissed.

167. The Counterclaim succeeds, and the Claimant is ordered to pay the following sums to the Respondent:

a. £1,009.28 in respect of company sick pay fraudulently claimed by and paid to him; and

b. £5,625.42 in respect of Respondent property which the Claimant did not return on the termination of his employment,

so **£6,634.70** in aggregate.

Employment Judge Ramsden
Date **22 April 2025**

JUDGMENT AND REASONS SENT TO THE PARTIES ON
29 April 2025

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Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

List of issues from the Orders of EJ Rice-Birchall on 13 June 2023

1. Unfair dismissal

1.1 Was the claimant dismissed?

1.1.1 Did the respondent do the following things:

1.1.1.1 Towards the end of November 2021 (on the day on which the claimant alleges he was the victim of an attempted hit and run), the respondent did not provide support after multiple requests (via the call centre and escalated to on call management (the on-call repair manager and EMS manager, one of whom was Tom Jackson) and was not truthful about the support which was available;

1.1.1.2 Withheld the claimant's pay in December 2021 (the claimant was paid monthly) and refused to sign off time sheets to allow for the pay to be processed;

1.1.1.3 During the communications with HR and the managers in question (Tom Jackson's boss) the claimant felt that he was ignored as regards his request for support as set out above and his requests for his pay issues to be resolved resulting in having to wait until January/February 2022 for the issues to be resolved;;

1.1.1.4 Delay in communicating with the claimant over his requests for full pay during sick leave and refusing to engage with the claimant as regards these issues. The communications were with the HR department;

1.1.1.5 Halve the c's pay and fail to engage with the claimant when requested ihis pay to be reconsidered. No response when requested sick policy forcing c to take a second job.

NB There are additional allegations on which the claimant seeks to rely which are referred to above and which may be the subject of an amendment application by the claimant at the preliminary hearing in September 2023.

1.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

1.1.2.1 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

1.1.2.2 whether it had reasonable and proper cause for doing so.

1.1.3 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.

1.1.4 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.

1.1.5 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.

1.2 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? The respondent says the reason was a substantial reason capable of justifying dismissal, namely a breakdown in its relationship with the claimant.

1.3 Was it a potentially fair reason?

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

2. Remedy for unfair dismissal

2.1 Does the claimant wish to be reinstated to their previous employment?

2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

2.5 What should the terms of the re-engagement order be?

2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.6.1 What financial losses has the dismissal caused the claimant?
2.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
2.6.3 If not, for what period of loss should the claimant be compensated?
2.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
2.6.5 If so, should the claimant's compensation be reduced? By how much?
2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.6.7 Did the respondent or the claimant unreasonably fail to comply with it ?
2.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
2.6.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

2.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
2.6.11 What statutory cap applies?

2.7 What basic award is payable to the claimant, if any?

2.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Wrongful dismissal / Notice pay

3.1 What was the claimant's notice period? The claimant says his notice period was four weeks.

3.2 Was the claimant paid for that notice period?

3.3 If not, was the claimant guilty of gross misconduct / did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Holiday Pay (Working Time Regulations 1998)

4.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended? The respondent says that it withed that payment because of an overpayment as a result of the claimant wrongly claiming sick pay.

Unauthorised deductions/breach of contract

5.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted? The claimant says that he was entitled to be paid full pay during the period he was being paid half pay under the sick pay which was for a period of 13 weeks..

6. Remedy

6.1 How much should the claimant be awarded?