

giving him an opportunity to respond to the findings of the investigation before the warning was issued?

2.2. If so, did the respondent's conduct amount to a fundamental breach of contract? The claimant relied on the implied duty of mutual trust and confidence. Did the respondent, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties?

2.3. The respondent did not argue that the claimant had affirmed the contract.

2.4. The respondent was not arguing, if there was a constructive dismissal, that it was a fair dismissal.

Section 38 claim Employment Act 2002

2.5. Was the claimant issued with a written statement of employment particulars?

Remedy for unfair dismissal

2.6. What are the chances the claimant would have resigned if the respondent had acted in accordance with the disciplinary policy and not breached the contract? The respondent argued there was a possibility the claimant may have resigned because of the ongoing relationship with Kevin Richards.

2.7. Has the claimant mitigated his loss?

2.8. Should there be an uplift or reduction in compensation for failure to comply with ACAS Code?

3. It was agreed that we would deal with liability and the section 38 claim first and, if the claim was successful, then deal with all issues to do with remedy. There was insufficient time for me to make and deliver judgment on 22 June 2021 so I reserved judgment. This judgment deals only with liability and the section 38 claim.

Summary

4. The claimant was employed by the respondent as a joiner. He resigned after he was issued with a written warning without a disciplinary hearing having taken place. The incident leading to the warning was a verbal altercation with another employee, Kevin Richards, on 7 December 2020, which also resulted in the claimant and Mr Richards presenting grievances about each other.

Evidence

5. I heard evidence from the claimant and from David Hall, Contracts Manager and a Director and Craig Radcliffe, a Director, for the respondent. There were written witness statements for all witnesses. There was an electronic bundle of documents of 180 pages. I also viewed CCTV footage of interactions between the claimant and Kevin Richards. This had no audio recording.

Facts

6. The respondent is a contractor specialising in all aspects of interior fitting, refurbishment and bespoke joinery manufacturing. It had around 22 employees at the relevant time. David Hall and Craig Radcliffe were two of the four directors of the company. Mr Hall, through a holding company, bought the respondent company from the previous owners, in 2019.

7. The respondent did not have any dedicated HR person in the business or external HR adviser at the time. David Hall said he was aware of the ACAS Code of Practice on Discipline and Grievance at the time he issued the warning. He was also aware of the respondent's employee handbook.

8. The claimant worked for the respondent as a joiner. He was employed from 4 July 1994 until his resignation on 13 January 2021.

9. The claimant had a clean disciplinary record prior to the written warning given in January 2021.

10. The respondent has produced a document which it asserts was the statement of employment particulars given to the claimant. The claimant does not recall seeing this before these proceedings, although he recalls receiving an Employee Handbook in 2009. Both the handbook and the statement of particulars have the number "0907" at the bottom of the documents, which could suggest they were produced in July of 2009 or September of 2007. The copy of the statement of particulars produced by the respondent is not signed by the claimant or by anyone on behalf of the respondent company. The claimant accepted it was a possibility that he had received the statement and forgotten about it; he said that, with it being such a long time ago, it was hard to recollect.

11. The respondent has disciplinary rules in its employee handbook (p.124). These include the following provision:

"At all stages you will be advised in writing of the nature of the complaint against you, namely the alleged conduct or characteristics or circumstances that give rise to the disciplinary action. You will be given a reasonable opportunity to consider your response to the complaint before any disciplinary interview.

"You will be invited to attend a disciplinary interview and be given an opportunity at the interview to state your case and present information and facts in your defence before any decision is made."

12. The rules provide for a 3 stage process in relation to dismissal: being advised in writing of the proposed dismissal and the reasons, circumstances and characteristics which led to the proposal; a meeting to discuss the proposed dismissal and any points the employee wishes to raise, then being informed in writing of the outcome and right of appeal; and an appeal hearing.

13. The rules provide for a stage I, formal verbal warning when conduct or performance does not meet acceptable standards. They provide for a stage II

written warning where the offence is a serious one, or if a further offence occurs.

14. The dismissal procedure was stated to be non-contractual.

15. The employee handbook also sets out the grievance procedure which includes a meeting with Mr Hall to discuss the grievance after this has been put in writing (if not resolved by raising with the employee's manager), and Mr Hall informing the employee, after the meeting of his decision and any proposed action to be taken in respect of the grievance, and the right of appeal.

16. Kevin Richards is a polisher. The respondent has described him as the workshop supervisor. The claimant did not accept that he was the supervisor. I accept his evidence that he was told that, because there was not much work for Kevin Richards when they return to work, he had been given extra duties including looking after the stores and tidying up. Mr Radcliffe told him that only Mr Radcliffe or Mr Hall could tell the claimant what to do.

17. There were some difficulties between the claimant and Kevin Richards prior to the events immediately before the claimant's resignation.

18. In the period March to July 2020, the claimant was placed on furlough, due to the COVID-19 pandemic, along with other employees.

19. Shortly after the claimant's return to work (which the claimant says was in August and the respondent says was in July 2020), the claimant spoke to David Hall about concerns he had about Kevin Richards.

20. On 8 September 2020, the claimant raised a further concern with Craig Radcliffe about Kevin Richards. The claimant said that Kevin Richards was winding him up he was not taking orders from a semiskilled sprayer. Kevin Richards had locked the store's doors. The claimant asked Craig Radcliffe how much notice he had to give to terminate his employment. The claimant says this was said in jest, but it appears the respondent took this at face value.

21. For most of the claimant's employment, the claimant had free access to the stores which were not locked. The respondent changed to keeping the stores locked and Kevin Richards became the keyholder. The claimant had to get the key from Kevin Richards when he needed something e.g. screws, from the stores. I accept the claimant's evidence that he was frustrated by the loss of time when he had to look for Kevin Richards to find the key. I accept that the claimant was also upset by Kevin Richards waving the key in the air and saying "ask nicely" when the claimant asked for the key.

22. Craig Radcliffe and David Hall spoke to the claimant. An issue was discussed about the locked stores. The claimant also said that he did not think that Kevin Richards should be trained on the edge bander machine. The claimant was happy to train another joiner but Kevin Richards had a different skill set, being a polisher. Craig Radcliffe and David Hall then spoke to Kevin Richards. After doing so, they told the claimant that Kevin Richards would not be trained on the edge bander machine and another operative would be. The respondent did not agree to give the claimant a key to the stores, although the claimant had thought, before Mr Radcliffe and Mr Hall spoke to Mr Richards, that they were going to

agree to give him a key.

23. The claimant sent David Hall a text that evening. He wrote:

“Sorry, but feel I have to get this off my chest to move forward. Still a bit dumbfounded at today’s events, after our initial conversation I felt that we had created an amicable outcome to the issues, but the turnaround in the preceding conversation to me indicated Kevin wasn’t interested in any compromise and in turn you appear to have relented to his unfounded objections.

“Also it was clearly apparent Craig was fighting his corner and his “leaving for the sake of a key comment”, came across as disrespectful and wasn’t appreciated.

“I do genuinely hope this can return to being civil - only time will tell, but can’t help but think the refusal to get us together eye to eye may in time ultimately inflame what is already a awkward situation.”

24. There do not appear to have been any serious problems between the claimant and Kevin Richards after this, until early December 2020. The claimant did not report any other incidents although, in evidence, the claimant said there were ongoing issues about changing the station on the radio and Mr Richards saying hello to others but not to the claimant. I make no findings as to whether or not there were problems between the meetings in July or August 2020 and December 2020 since it is not necessary for my decision to do so. On 4 and 7 December 2020, there were verbal altercations between the claimant and Kevin Richards.

25. On 7 December 2020, the claimant left work and self-certified his initial absence because of stress. I accept that the claimant did not feel fit to work, following the altercation with Kevin Richards. The claimant works with machinery and felt that he could have had an accident if he had operated the machinery in his then state of mind.

26. On 9 December 2020, the claimant sent a WhatsApp message to David Hall. David Hall was off work at the time. The claimant requested a meeting about the incident on Monday 7 December, as soon as David Hall returned to work.

27. David Hall replied the next day, saying he would contact the claimant as soon as he returned to work and hopefully they could get together to chat through any issues. Alternatively, if he needed to discuss the matter that week, he was sure Craig would free up some time for him.

28. The claimant obtained a fit note from his GP, signing him off work from 10 to 18 December 2020 due to work-related stress.

29. Craig Radcliffe’s chronology records there being a meeting on 15 December 2020 with Kevin Richards, at the request of Kevin Richards, at which Kevin Richards said he wanted to raise a grievance against the claimant for his aggressive and intimidating behaviour and comments made in the lead up to and during the morning of 7 December 2020. There is no other note of this meeting

and no detail of the grievance until the record of the meeting on 11 January 2021. There are other references to the meeting being on 11 December 2020. I find that, whether it was on 11 or 15 December, Mr Richards said he wanted to raise a grievance, but did not set this grievance out until the meeting on 11 January 2021.

30. The workplace was closed for Christmas from 18 December 2022 3 January 2021.

31. On 18 December 2020, the respondent hand-delivered a letter to the claimant suggesting a meeting on 8 January 2021. This was delivered with a bottle of spirits, such a gift being given to all employees at Christmas. The claimant responded with a WhatsApp message agreeing to a meeting on 8 January but saying that, due to the fact that the issues that occurred a few weeks ago would only be addressed at this meeting, he was not comfortable returning to work until after the meeting. David Hall replied that that was fine, they would have a chat on Friday and take it from there.

32. On 6 January 2020, the claimant sent a further message saying that closure of schools had complicated things since the responsibility of care and online schooling for his daughter fell to him. He asked if the meeting could be rearranged for after school hours or that they have a phone conversation or video call.

33. The meeting was rearranged for 3:30 PM on 7 January.

34. The claimant attended the meeting on 7 January with Mr Hall and Mr Radcliffe. The claimant was accompanied by a colleague. The claimant read from a statement (which appears at page 59 of the bundle) and gave the respondent a copy of this.

35. In his statement, the claimant wrote that on Friday 4 December, Kevin Richards had requested "in a condescending manner" that the claimant brush around his bench before leaving at 3:30 p.m. The claimant said he replied "if I get the chance" as he was in the process of getting his job varnished ready for him to continue work on Monday, bearing in mind the varnish takes between 24 and 48 hours to dry in the workshop conditions. The claimant wrote that, on Monday 7 December, Kevin Richard's first words as soon as the claimant began work at 8 a.m. "in a condescending and noticeably agitated manner" were "clean round your bench now like I said on Friday". The claimant says he reminded Mr Richards of the valid reason for not doing so on the previous Friday, but he just walked off without reply. The claimant wrote that he had a quick brush around his bench that, at 8:40 a.m. Mr Richards returned and said "I told you to fucking brush up, why have you not done it?". When the claimant said he had, the claimant says Mr Richards replied "you have not done it properly". The claimant says he put to Mr Richards that he was deliberately targeting him and had been doing so since returning to work post-lockdown and said he had filed a grievance about Mr Richard's conduct towards him between his return and 8 September. The claimant wrote that he considered he was unable to work in a potentially dangerous environment feeling so stressed out so left work, having told Craig Radcliffe why he was doing so.

36. The claimant said he would like to make a formal grievance complaint against Kevin Richards.

37. David Hall's witness statement asserts that he informed the claimant, in the meeting on 7 January, that Kevin Richards had presented a grievance against him. The claimant disputes that he was told this in the meeting, saying he was only informed about this in the letter which followed the meeting. There is no note of the meeting on 7 January 2021 separate from the notes in Mr Radcliffe's chronology. It is not necessary for me to decide whether the claimant was told on 7 January or only in the letter dated 11 January 2021 that Mr Richards was bringing a grievance against him. If the claimant was told this on 7 January, he was not given details, since the grievance was not set out until the meeting with Mr Richards on 11 January. The claimant was not given a copy of the statement taken from Mr Richards prior to the warning.

38. The respondent's timeline, which Craig Richards informed the tribunal was compiled as events occurred, indicates that David Hall and Craig Radcliffe reviewed the CCTV footage on 8 January 2021 and concluded that this substantiated Kevin Richards's grievance and did not corroborate claimant's grievance. However, Mr Richards did not set out his grievance until the meeting on 11 January. The timeline suggests that witnesses were spoken to on 7 or 8 January. The chronology does not have the appearance of all having been written on the dates to which the notes relate. For example, the notes of events on 7 December have inserted Kevin Richards's account given at the meeting on 11 January.

39. Craig Radcliffe and David Hall had a meeting with Kevin Richards on 11 January 2021. Kevin Richards gave his account of events on 7 December (p.57). He alleged that the claimant lost his temper and raised his voice when Kevin Richards asked him to finish sweeping up. He denied using any abusive language that may have antagonised the claimant. He alleged that the claimant approached him in an aggressive manner and uncomfortably close and he had to tell him to back off as he was not comfortable and felt threatened. He alleged that the claimant made reference to a private matter, which he had not disclosed to the claimant. Mr Richards said he wanted to lodge a complaint against the claimant for aggressive and intimidating behaviour especially with the covid situation; Mr Richards alleged that the claimant had a total disregard for health and safety put in place and did not respect his personal space.

40. Mr Richards signed, on 11 January 2021, what was described as a "submission of events & formal grievance against Mr Darren Mawdsley".

41. By a letter dated 11 January 2021, following the meeting, the respondent confirmed that they would investigate the complaints made by Kevin Richards and the claimant against each other. The respondent informed Mr Richards that he was suspended on full pay whilst they investigated the matter further and took witness statements from colleagues and viewed the CCTV footage (although Mr Radcliffe's chronology suggested this had already been done). Mr Richards was asked to attend a further meeting at 4.30 p.m. on 13 January to discuss the findings of their investigation. They informed Mr Richards that disciplinary action could be brought against him if the findings did not go in his favour. Mr Richards was informed that he could request to be accompanied by a colleague at the

meeting. The letter stated that, in the event of disciplinary action being brought against him, he would have the right of appeal.

42. The respondent wrote to the claimant on 11 January 2021 in similar terms. The letter confirmed that Kevin Richards had lodged a grievance against the claimant for aggressive, bullying and abusive behaviour. The claimant was asked to attend a meeting at 3.30 p.m. on 13 January.

43. Mr Radcliffe, when asked by me whether the meeting on 13 January 2021 was to be a grievance hearing or a disciplinary hearing, or if he thought they were one and the same, gave evidence that he thought they were one and the same.

44. Statements were signed on 11 January 2021 by Craig Radcliffe, Paul Cox, and Derek Warnock. Mr Radcliffe had not witnessed the incidents between the claimant and Mr Richards. His statement included that the claimant informed him he was leaving because “he is stressing me out”, indicating Mr Richards. Derek Warnock had not witnessed the incident between the claimant and Mr Richards. Mr Cox described what he said he had witnessed. He said Mr Richards had spoken to the claimant in a civil way and the claimant reacted badly, ranting, using abusive language. He said Mr Richards did not react and walked away, but the claimant kept approaching him and trying to argue. Mr Cox said he was friends with both of them, but the claimant was out of order. Mr Hall put to Mr Cox a question: “Did you feel compelled to check on them in case the confrontation ending in a fight”, to which Mr Cox is recorded as saying “yes”. He said the claimant came to him and said Mr Richards was stressing him out and he was going home. The claimant asserts that Mr Cox is partially deaf and would not have heard the conversations in a noisy workshop from his bench, which was at least 15 metres away. Mr Hall said in evidence that he was unaware Mr Cox was partially deaf. I make no finding as to whether Mr Cox was partially deaf but note this is something that would have been raised by the claimant, had Mr Cox’s witness statement been provided to him and he was given an opportunity to address this in a disciplinary hearing.

45. On 12 January 2021, the claimant rang Mr Hall to say that his wife had been sent home with covid symptoms and had been told to take a test. He said he had to isolate until the result was received so he was not safe to attend the meeting the following day. Government advice at the time was that, if someone in the household displayed symptoms, all the members of the household had to self isolate until the results of the test. Mr Hall accepted the claimant’s explanation for postponing the meeting and told him to get in touch. Mr Hall accepted in evidence that he was aware the claimant’s wife would get a test result within 24 to 48 hours.

46. The respondent did not suggest that a meeting could be held by video; Mr Hall said this did not occur to him.

47. On 12 January 2021, David Hall wrote to the claimant, issuing him with a written warning. He wrote:

“Having reviewed all of the evidence at our disposal and cross-referenced both statements of events we are unable to find any physical evidence or witness statements that corroborate your statement of events. To the

contrary the CCTV and witness statements do support Kevin's statement of events.

"In view that you are unable to attend our scheduled meeting on Wednesday 13th January due to the possibility of having to self-isolate we consider it necessary to conclude the process in order that all parties can return to work at the earliest opportunity given our current commitments and the fact I am out of the office at the end of the week and all of next week.

"I therefore am writing to inform you of our decision regarding the disciplinary action being taken in the form of a written warning."

48. The nature of the unsatisfactory conduct or performance was described as follows:

"(1) Leaving the workplace without permission from a member of the management team or director which left short of staff for our programmed manufacturing works and client commitments.

"(2) Aggressive and intimidating behaviour towards a colleague.

"(3) The use of abusive language to a colleague when being asked to carry out a work task.

"(4) Invading someone's personal space and not observing social distancing rules in view of covid 19."

49. Mr Hall advised the claimant that he had the right of appeal against the decision in writing to David Hall within five days of receiving the disciplinary decision. The claimant's suspension from work on full pay was lifted as from that day Mr Hall wrote that the claimant could return to work as soon as possible pending his wife's test results and that he did not need to self isolate.

50. Mr Hall concluded:

"Given that we have not had the opportunity to meet face to face for this meeting which would have been preferable, I would like the opportunity to discuss further with you upon your return to work and address any questions or concerns you may have."

51. I accept Mr Hall's evidence, which is supported by the terms of the letter, that Mr Hall and Mr Radcliffe wanted to get the claimant and Mr Richards back to work as soon as possible because of client commitments.

52. Mr Hall wrote in his witness statement that he took the view that the matter had been "dragging on unnecessarily" and that there was no reason whatsoever why the claimant could not attend the office as previously arranged; his wife had not tested positive but "merely displayed symptoms". This view is contrary to Mr Hall's response in the telephone conversation on 12 January 2021 with the claimant.

53. The claimant was not provided with copies of any of the statements or given a chance to view the CCTV footage and comment on this prior to the issue of the written warning. The claimant was not advised of the specific allegations and given an opportunity to comment on them prior to the issue of the warning.

54. The claimant was not provided with copies of the evidence the respondent relied on, when the warning was sent to him or prior to his resignation.

55. Mr Hall and Mr Radcliffe both conducted the investigation and jointly decided to issue the written warning.

56. Kevin Richards returned to work on 13 January 2020. He was informed that no further action would be taken against him.

57. On 13 January 2021, the claimant resigned with immediate effect by text and email. He wrote that he would be writing shortly with further details.

58. Although Mr Radcliffe's timeline suggests that David Hall responded by text, a copy of the text has not been included in the bundle.

59. Mr Richards responded to the claimant's resignation on 14 January, expressing regret at the claimant's resignation. He did not seek to persuade the claimant to reconsider.

60. The claimant's wife was notified of a negative result on 14 January 2021. The claimant, therefore, no longer needed to self isolate.

61. On 22 January 2022, the claimant wrote again to the respondent providing reasons for his resignation, having taken legal advice. He wrote:

"I resigned because of a breakdown in my trust in my employer caused by you issuing me a written warning without first having a meeting with me (a disciplinary hearing) to discuss the findings of your investigation and to listen to my response before issuing the written warning.

"I intend making a claim of unfair constructive dismissal and have contacted a solicitor about this."

62. I accept that the claimant's reasons for resigning were as stated in this letter, which is consistent with his evidence at this hearing. He resigned because of how the written warning was issued which caused him to lose trust in the respondent. He felt betrayed, being put in that position after 27 years.

63. I viewed the CCTV footage several times. There was no audio recording. The CCTV footage did not appear to cover all the interactions between the claimant and Mr Richards on the morning of 7 December. It covered the time period 8.33 to 8.37. Mr Hall said he could not answer why we did not have earlier footage. I did not consider that the CCTV footage would have been of much assistance in determining whether the claimant or Mr Richards' accounts of the interactions between them on the morning of 7 December 2020 should be preferred.

Submissions

64. Both parties made oral submissions.

65. Mr Byrne, for the respondent, submitted, in summary, that, although the respondent did not handle matters as well as they should have and they breached their own processes, the respondent's conduct did not meet the high threshold of being a fundamental breach of contract. Mr Byrne submitted that it was clear in the minds of the respondent that the claimant had a right of appeal, which he did not exercise, and the matter could be discussed when the claimant returned to work.

66. This was a very small business with three people in the workshop. The implications of keeping two out of three on suspension with a full order book were critical. Mr Byrne submitted that the CCTV footage showed that, when Mr Richards tried to withdraw, he was actively pursued by the claimant. Mr Cox's witness statement supported what Mr Richards said occurred; that the aggressor was the claimant.

67. The claimant was invited to a meeting to hear the outcome of the investigation but could not attend; his wife had Covid symptoms, adding further delay. Hence the warning which was issued. The claimant overreacted.

68. In relation to the section 38 claim, Mr Byrne submitted that all employees had been issued with a handbook and contract in 2009. The claimant said he could not recall receiving this, but the respondent had fulfilled its obligations.

69. Mr Culshaw, on behalf of the claimant, submitted that the respondent's conduct in handling the disciplinary matter goes to the heart of trust and confidence. This was not just a verbal warning but a stage 2 written warning. The respondent was in very serious breach of both the ACAS code of practice and its own disciplinary policy. The claimant wanted an opportunity to comment on the CCTV and witness statements.

70. Mr Culshaw submitted that the CCTV footage did not support the account that the claimant was acting in an aggressive way. The claimant did not suggest that Mr Cox was a dishonest witness, but he was unreliable. Mr Hall accepted that he was not aware Mr Cox was deaf or how far away he was. There was no explanation as to why staff had to remain on suspension pending the outcome of the disciplinary process. Mr Hall gave no plausible explanation why he could not have met with the claimant by video hearing. The respondent had done nothing to convincingly argue that the respondent was justified in departing from basic matters of fairness. The claimant had been employed for 27 years with an unblemished record. He had first tried to resolve matters in September. He had done so again by raising a grievance when problems arose again in December.

71. In relation to the section 38 claim, the claimant could not say 100% either way whether or not he had received the document on page 73. There was no evidence the document was delivered to the claimant. Mr Culshaw submitted that the tribunal should draw the conclusion that it was more probable than not that the claimant did not receive the document.

Law

72. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) provides that an employee is to be regarded as dismissed 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.”

73. An employee will be entitled to terminate a contract of employment without notice if the respondent is in fundamental breach of that contract and the employee has not affirmed the contract by their conduct.

74. An implied term of an employment contract is the term of mutual trust and confidence. This is to the effect that an employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. Browne-Wilkinson J in **Woods v WM Car Services (Peterborough) Limited** 1981 ICR 666, said that the tribunal must “look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.”

Conclusions

Constructive unfair dismissal

75. I accepted that the claimant resigned for the reasons he gave in his letter dated 22 January 2022 and in evidence at this hearing; he resigned because the respondent had issued a written warning without holding a disciplinary hearing and without giving him an opportunity to respond to the findings of the investigation before the warning was issued. The respondent’s actions caused him to lose trust in them.

76. I conclude that the respondent’s actions in this respect were calculated or likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent. There were very serious breaches of procedure, both in relation to the ACAS code of practice on discipline and grievance and the respondent’s own disciplinary procedure. The claimant did not have advance notice of the specific allegations he was to face. The claimant had not been informed that he was facing disciplinary action, although the letter of 11 January 2021 warned him that disciplinary action might be taken, if their findings did not go in his favour. He was not provided with the evidence, the witness statements and CCTV footage, and given an opportunity to comment on this before the respondent decided to issue the warning. It is not even clear, from the letter of 11 January 2021, whether the intended meeting on 13 January 2021 would have been a grievance hearing or also a disciplinary hearing, had it taken place.

77. I conclude that the respondent did not have reasonable or proper cause for acting in this way. Whilst I accept that they were keen to get the claimant and Mr Richards back to work as soon as possible, because of the need to fulfil orders

for clients, I do not consider that this desire can constitute reasonable and proper cause for the very serious failings in the procedure before issuing the written warning.

78. The respondent could have waited for the outcome of the claimant's wife's Covid test to see how soon the claimant would be available for a meeting in person before deciding whether an in-person hearing could take place within a reasonable timeframe. It was wholly unreasonable of the respondent to take the view, as expressed by Mr Hall in his witness statement, that there was no reason whatsoever why the meeting could not have gone ahead on 13 January 2021. The claimant was acting in accordance with government advice in self isolating and Mr Hall had appeared to have accepted this explanation when the claimant explained the situation by telephone on 12 January 2021.

79. Alternatively, they could have made arrangements for a hearing by video. Although Mr Hall said he did not think of this, the claimant had previously suggested a meeting by telephone or video and, at a time when so many people were conducting business by video rather than in person due to pandemic, it is surprising that the respondent did not think to make such arrangements.

80. The business need to get the claimant and Mr Richards working again would not have precluded the respondent from informing the claimant of the disciplinary allegations he was facing and providing him with the evidence to enable him to comment prior to a decision being made. The respondent had all the evidence it was going to rely on by 11 January and could have sent it with their letter of that date.

81. I conclude that it was a fundamental breach of the implied contractual term of mutual trust and confidence to issue the written warning in these circumstances. The claimant resigned in response to this breach. I conclude, therefore, that the claimant was constructively dismissed.

82. The respondent does not argue that the constructive dismissal was fair.

83. The complaint of unfair dismissal is, therefore, well-founded.

Section 38 Employment Act 2002 complaint

84. The claimant has not satisfied me, on a balance of probabilities, that he was not issued with the written statement of employment particulars that appears in the bundle. The claimant accepted that he might have forgotten this. From the date on this and the Employment Handbook, which the claimant accepted he had received in 2009, it appears likely that both the handbook and the employment particulars were issued to the claimant at the same time.

85. I conclude, therefore, that this complaint is not well-founded.

Employment Judge Slater

Date: 17 August 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
25 August 2021

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