



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Ridley

**Respondent:** On a Roll Sandwich Company

**Heard at Newcastle ET sitting at Teesside Justice Centre On:** 29 and 30 April 2024

**Before:** Employment Judge Martin

## Representation

**Claimant:** Mrs S Ridley (Wife)

**Respondent:** Ms Ismail (Counsel)

# RESERVED JUDGMENT

The Judgment is:

1. The claimant's complaint of unfair dismissal is not well founded and is hereby dismissed.
2. The claimant's claim for a redundancy payment is also not well founded and is hereby dismissed.

# REASONS

## Introduction

1. The claimant gave evidence on his own behalf. His wife Mrs Ridley also gave evidence on behalf of the claimant. Mr James Stoddart, managing director of the respondent company and Ms K Bridle, HR manager gave evidence on behalf of the respondents. The Tribunal were provided with a bundle of documents marked Appendix 1.

## The law

2. The law which the Tribunal considered was as follows:-

Section 95(1)(c) Employment Rights Act 1996

“For the purposes of this Part an employee is dismissed by his employer if:

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

Section 135 ERA 1996

“An employer shall pay a redundancy payment to any employee of his if the employee —

(a) is dismissed by the employer by reason of redundancy.”

3. The leading case of **Western Excavating (ECC) Limited v Sharpe** [1978] IRLR 27 where the Court of Appeal held that an employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct deny the case must be sufficiently serious to entitle him to leave at once. That case held that the three elements that have to be established in a case of constructive unfair dismissal, firstly that there was a fundamental breach of contract, secondly that that breach caused the employee to resign or was the last in a series of events which was the last straw leading the employee to resign, and finally that the employee did not delay before resigning, thus affirming the contract and losing the right to claim constructive dismissal.
4. The Tribunal also considered the well known case of **Woods v WM Car Services (Peterborough) Limited** [1981] IRLR 346 where the EAT held that a breach of the implied term of trust and confidence could amount to a fundamental breach .. to constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.
5. The Tribunal was also referred to and took into account the well known case of **Kaur v Leeds Teaching Hospitals NHS Trust** [2018], where guidance was given with regard to “last straw” cases. It held that the breach of the implied term of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term even though each individual incident may not do so. The question is does the cumulative series of acts taken together amount to a breach of the implied term. Although the final straw may be relatively insignificant it must not be utterly trivial and must contribute to the breach.
6. In the case of **Malik v Bank of Credit and Commerce International SA** [1997], the House of Lords held: 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 if, on an objective approach, there has been no breach such that then the employee’s claim will fail.

7. The case of **Braganza v BP Shipping Limited** [2015] UK SC17 where it was held that, it is not enough to simply say a discretion exercised under a decision was unreasonable, an employee must show that it was irrational under the Wednesbury Principles.
8. In the case of **Chandhok v Tirkey** [2015] IRLR 195, HHJ Langstaff made it clear that a case should not be based on “shifting sands” and that each party is entitled to know in essence what the other party is saying so that they can properly meet the case in front of them.
9. The Tribunal was also referred to and considered the ACAS Code of Practice on Disciplinary and Grievance procedures, and in particular paragraph 9 thereof which provides:

*“that there is a duty to inform the employee of a problem in employment and if it is decided that there is a disciplinary case to answer the employee should be notified of this in writing. The notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements with the notification”.*

### **The Issues**

10. The issues which the Tribunal had to consider were as follows:
11. In relation to the complaint of constructive unfair dismissal, the Tribunal had to consider whether there was a fundamental breach of contract on the part of the respondent and whether it was a breach of an express or implied term of that contract.
12. It was understood the claimant was relying on a breach of the implied term of trust and confidence. At the outset of the hearing the Tribunal sought to understand the specific breaches being relied upon.
13. The claimant’s representative indicated that the specific breaches were:- threatening the claimant with a written warning after having done 15 years’ service; bullying by managers regarding the same, being made mentally ill by it and being blamed for being mentally ill, being humiliated by his employer as a whole, insulted and degraded having given 15 years’ of professional service, and being given no offer of recompense or apology for the treatment.
14. The Tribunal also had to consider whether there was a series of breaches and whether there was any final straw that led the claimant to resign. Again, at the outset of the hearing the Tribunal sought to understand if there was a final straw being relied upon. The claimant’s representative indicated that the final straw was being off on the sick and awaiting a response and the response not making the claimant feel any better or that the situation would improve; and not providing the claimant with any reassurance that the same problem was not going to arise in the future; and losing wages whilst on sick pay..
15. The Tribunal then had to consider whether the claimant resigned in response to those breaches of contract.
16. Finally the Tribunal had to consider whether the claimant had affirmed the contract in the meantime and accepted any of those breaches of contract.

17. The Tribunal went on to consider what remedy may be awarded if the claimant was successful in showing that he had been constructively unfairly dismissed. In that regard the Tribunal noted that the claimant had no ongoing loss as had obtained employment immediately. He was not seeking reinstatement or reengagement. In discussing the matter with the claimant and his representative it appears that he is seeking his basic award and would also be seeking loss of statutory rights. The respondent acknowledged that there was no dispute with regard to the compensation sought if the claimant was successful in proving constructive unfair dismissal.
18. In relation to the claimant's claim for a redundancy payment, it did appear that the claimant accepted that this was really the remedy he was seeking in his constructive unfair dismissal claim namely the basic award which is equivalent to a redundancy payment. However, the claimant's representative did not formally withdraw the claim for a redundancy payment during the course of the proceedings. The Tribunal had to therefore consider whether the claimant had been dismissed by reason of redundancy and whether he might be entitled to any redundancy payment.

### **Findings of Fact**

19. The respondent's business is involved in the production of sandwiches and "food to go" to various outlets. The business is based in the North East and was set up by Mr Stoddart who is the managing director. The business was set up about 16 or 17 years ago and has now grown over the years to over 300 employees.
20. The claimant was employed by the respondent as a kitchen supervisor. He had worked for the respondent since 2008. He was one of the longest serving employees. Mr Stoddart said he had a good working and personal relationship with the claimant and knew how he operated.
21. The claimant's initial contract of employment is at pages 35-37 of the bundle. It indicates that he was employed as a high-risk supervisor. His hours of work are in the range of 40 hours per week. It goes on to indicate that the company operates 24 hours, 7 days of week and that the hours of work would include weekends and bank holidays. It refers to an hourly rate of pay.
22. The claimant was issued with a further contract of employment which notes his job title as supervisor. That contract is at pages 38-40 of the bundle. That again refers to his weekly hours being 40 hours and refers to the company operating 24 hour seven days a week with the claimant's hours including weekends and bank holidays as required. It states that the company reserves the right to require the claimant to work flexibly in accordance with business needs. The contract refers to the claimant being paid an annual salary (page 38 of the bundle).
23. The claimant was issued with a further contract of employment in 2015 which refers to him as assistant production manager, and again refers to his average weekly hours in accordance in effect with the operational business needs of the respondent. It again refers to an annual salary (page 42 of the bundle). It also refers to absence. It states that if an employee is unable to attend work for any reason they must contact their immediate manager. It goes on to say that the first three days of any sickness absence will not be paid. It says that Statutory Sick Pay does not commence until the fourth day of sickness absence. It refers to the company operating discretionary sick pay arrangements for salary staff who have completed one year of service. It says that following the first three days of absence the company will pay full salary for

the maximum of three weeks in any rolling 12 month period and says that those payments are inclusive of Statutory Sick Pay (page 43 of the bundle).

24. It is noted that the claimant received salary increases in 2019 (page 45), 2021 (page 46) and April 2023 to £25,000 (page 52).
25. The respondent's disciplinary process is set out at page 85 to 88 of the bundle. It refers to the usual processes around potential sanctions, including formal written warnings. At page 85 it refers to disciplinary hearings being held and says that the employee will be being invited to any meeting and provided with the evidence in advance.
26. The respondent also had a grievance procedure which is set out at pages 82 to 84 of the bundle. It refers to the usual process of trying to resolve a matter informally and then the formal process of a grievance being put in writing with a meeting thereafter being arranged to discuss the same.
27. The respondents also had a sickness absence procedure which is set out at pages 120-123 of the bundle. It states at page 120 stating that, unless the contract of employment sets out any enhanced entitlement, an employee will usually be entitled to Statutory Sick Pay for the first 28 weeks of absence.
28. In his evidence to the Tribunal the claimant said he worked very long hours for the respondent. He described working 60 to 70 hours a week. He said that this was principally at the first factory and that when there was a move to the second factory, which he thought was about eight years ago, he was still doing about 50 to 60 hours a week.
29. In his evidence the claimant said that he started working less hours over the last few years. This followed on from the move to new factory, but also principally he then had young children whom he had to look after. He said that by this stage he was probably working 40 to 50 hours a week. In his ET1 he had stated that he was working about 45 hours a week, whereas the respondent in their ET3 indicated that the claimant was working about 43 hours on average a week.
30. The claimant signed an opt out agreement from the working time directive (page 41 of the bundle).
31. The claimant said that he was working less hours from his point of view largely to ensure that he was working in accordance with the National Minimum Wage. It appears over the last few years he had been concerned about making sure he completed the job and he often felt like he had to work more hours. It seems that at the same time, the respondent was telling him he had to clock out to ensure that he came within the National Minimum Wage. The claimant said that he therefore did clock out to try and ensure that his wages were compliant with the National Minimum Wage.
32. The claimant said that he had an arrangement that he would clock out at 4.45pm i.e. approximately 15 minutes early as he had to get home because his wife was working shifts from 6pm until 6am. He said that he had this arrangement in place with his managers. As far as he was concerned this had been agreed by Mr Stoddart.
33. Mr Stoddart said in evidence that he was not aware of this arrangement. He did acknowledge that he would probably not be aware of any particular arrangements agreed by his managers. He said it was up to them to agree arrangements with employees and said he did not know exactly what hours the claimant was working or what days he was working. Mr Stoddart did however say that he would not have

expected any managers to have agreed this sort of arrangement on a long term basis as arrangements like this would normally be in place and may change according to the the needs of the business He said the business needs would fluctuate. At certain periods they would be very busy and at other times they would not be so busy, so he would have expected any such arrangements to be agreed on a day to day or more short term basis. The claimant however was adamant in his evidence that this was the arrangement which was in place.

34. The claimant said that there were two reasons he had to leave early: - firstly because he had to get home to ensure that his wife could leave for work and secondly because he had to ensure that he kept within the National Minimum Wage because his wages were at that level that if he was working excess hours, he suggested that may take him over the National Minimum Wage.
35. The claimant said that he often worked weekends and would often go in on Sunday mornings at 6am.
36. His usual working week pattern appeared to be Friday, Saturday and Sunday, Monday and Tuesday with him having Wednesday and Thursday off.
37. On 9 May the claimant worked because he had to undertake an audit. He came in at 6am that morning as noted at page 74 of the bundle. Accordingly he said that, as the audit had been completed and as he as he had got a thumbs up from two managers, so as far as he was aware he could then leave the premises. He therefore left the premises at 3.45pm i.e. an hour earlier than what he considered to be his normal arrangement of leaving at 4.45 because he had gone into work an hour earlier on that day.
38. A new manager had been appointed to the unit a few weeks earlier called Mr Martin Connelly.
39. The claimant said that Mr Connolly bullied and harassed him and said that he had asked him soon after he had joined "what are you looking at" and he then said the bullying thereafter by this manager was around what happened with regard to the invite to the disciplinary hearing.
40. It appears that Mr Connelly was not happy about the claimant leaving early and raised this with HR. He complained that the claimant had not told anyone he was going and that this was not the first time this had happened.
41. Following that complaint, HR then sent the claimant an invite to a disciplinary meeting. The invite was sent by email (page 71 of the bundle) and the invite itself dated 12 May 2023 is at pages 72 to 73 with the attachment showing the claimant's clocking in and out times for that day.
42. The invite states that it is a requirement to attend a disciplinary hearing. It refers to an investigation into events on 9 May indicating that there was some concern that the claimant appeared to have left the production site early without informing anyone and without approval and left the site with no management presence posing a health and safety concern. The evidence attached included the extracts for the fob times. It stated that the claimant had the right to be accompanied to the meeting and it also informed the claimant that, if the matters of concern were substantiated, he may be issued with a written warning (page 73).
43. The claimant opened this on the Friday evening. It was quite clear from the claimant's evidence that he was still shocked and taken aback by this invite. It is fair to say he was clearly shocked and distressed to receive this invite. He expressed

dismay that he had received an invite after all the hours of service he had put in for the respondent. He said he had never been late or absent from the respondent company during all years of service and that he had worked long hours for them.

44. In his evidence the claimant indicated that after he had received the letter he spoke to his manager. The claimant said in evidence that he asked if he would get a disciplinary every time he left early and that his manager said that he couldn't say whether he would or not but he might do. He was also told that he had to do more hours. He felt that the manager was bullying him in the way he responded to the claimant's questions about the disciplinary invite and its potential implications, namely that it could lead to more disciplinary action and that it could maybe result in his dismissal. This further concerned him due to the fact that he knew he had to leave work early to make sure he kept within the National Minimum Wage and also so that he could relieve his wife at home, so she could go work. He said in evidence that he felt sick when he thought about being invited to a disciplinary after all the hard work he had put in.
45. In his evidence, the claimant also said that he felt threatened by this letter. He said that he was effectively being warned or threatened with a written warning if he left early. He said that this was the arrangement in place and said there reasons why he had to leave early namely: - because his wife needed to get to work so he had to be home for his young children and further because he needed to keep himself within the National Minimum Wage. He said that his concern was that if he left under the arrangements he believed to be in place, he would just keep getting warnings which would ultimately effectively lead to his dismissal. He saw this invite as a threat to his ongoing employment.
46. The claimant was so distressed by this invite, he became so ill that he went off sick.
47. It seems that the claimant was due to work some time over the weekend because Mr Stoddart the managing director then telephoned the claimant when he realised that the claimant was not in work. Mr Stoddart appeared to have then been made aware that the claimant had been sent an invite to a disciplinary hearing. Mr Stoddart said in evidence that he told the claimant that he would sort it out. The claimant does not deny that Mr Stoddart did say that he would sort it out. He thought he just wanted him back to work. In fact he suggested that it may be Mr Stoddart who was behind all of this but Mr Stoddart denied that was the case.
48. The claimant then sent an email to the respondent on 15 May with two attachments: - one being a letter of 24 April and one being a letter of 14 May. He said that these letters were effectively drafted by his wife and in fact they appear to have been sent by his wife. That email is at page 75 with the first attachment being at page 76 to 77. In the letter dated 24 April the claimant makes a complaint about his treatment and pay. He refers to concerns that his pay is not in line with the National Minimum Wage because of the hours that he works, He says he has questioned this in the past around the number of unpaid hours he has worked. He says his pay does not correspond with the National Minimum Wage. He expresses his concern about the way salaries operate as opposed to hourly rates. He goes on to talk about being humiliated after years of outstanding service without having any investment in him or his position. He talks about being spoken to by the employer and manager in a derogatory manner which he indicates happened in past years and recently and that it was humiliating for him. He refers to management telling him that he had worked enough hours. He refers to the fact that he has never been late or absent and worked unsocial hours, including Sunday mornings. He also says his service to the company

is outstanding. He says that he cannot afford to leave his employment which he thoroughly enjoys and works hard for. He says he feels he has been taken advantage of. He also asks for a copy of his contract and the complaints procedure.

49. In the second letter dated 14 May 2023, the claimant indicates that he had withheld this until receiving the email of 12 May. He states that if a manager had told him he was required elsewhere, or his job was not completed on 9 May it wouldn't be necessary to undertake any disciplinary procedure. He also he says that he feels threatened by the reference to a warning. He says that he does not have a finishing time in his employment. He states that if he has to tell someone he is leaving for safety reasons then the disciplinary process is not a way to communicate this. He refers to his other email and refers having to clock out on time to ensure that he complies with the National Minimum Wage. He talks about not having an hourly rate preventing him from doing his job adequately and within the law, because if he stays too late then he has to leave early the next day or he would exceed his 45 weekly hours and that the job would not be completed. He talks about the fact his job is being made impossible because he needs to be on the premises to do his job. If he does so he is working below the National Minimum Wage. He refers to being treated with contempt when he has done nothing wrong. He refers to a manager recently asking him in an aggressive manner "who are you looking at" creating an unpleasant working environment. He indicates that he hopes the letter does not encourage any more unjustified or untrue allegations.
50. Ms Bridle, the HR manager, who sent the original invite to the disciplinary hearing responds to the claimant on 15 May. Her email is at page 81 of the bundle. She says that the respondent will treat his first letter as a complaint in accordance with the grievance procedure and sends him a copy of that procedure. She will discuss the content of the other matter which she says is connected to the disciplinary hearing at that hearing. She also sent him a copy of the disciplinary procedure and asked if he can confirm his attendance for the meeting scheduled for Friday.
51. The next day the claimant replies to the HR manager indicating that he is seeking medical advice because he has been so badly affected by being subjected to this situation. It is quite clear to the Tribunal from the evidence that the claimant gave that he was mentally affected by it. He makes it clear in that email that for the whole period of his employment he has clocked out when his work was finished, whether that is 7 hours, 10 hours or 14 hours. He also says he is not fit to attend the disciplinary hearing (page 89).
52. Miss Bridle writes back the next day to thank him for letting her know and indicating she hopes he is okay. She also asked if he needed any more support and to keep her updated on how he is feeling (page 90).
53. At this stage Mr Stoddart indicates that he wanted to try and get involved. He indicated in his evidence that he had some idea of how the claimant operated or how he may react. He did attempt it seems to contact the claimant again. It is noted at page 91 that Miss Bridle indicates to the claimant that she thinks that Mr Stoddart did try and call him but missed him and asked if he would be available for him to give a call back.
54. The claimant replies to that email on 19 May (page 92). He says "sorry about missing the call" and asks about his sick note. Miss Bridle then asked the claimant whether Mr Stoddart could give him a ring in the afternoon if he was around on 19 May (page 93).



55. The claimant replies in relation to the sick note but does not comment on whether he would accept a call from Mr Stoddart although it appears that he does not appear to do accept any such call (page 94).
56. At page 95 Miss Bridle replies to the claimant by email dealing with the sick note. There is further correspondence from the claimant at page 96 with regard to the sick note.
57. On 24 May Miss Bridle emails the claimant again indicating there was no problem with regards to the sick notes. She asks if he would come in at some point next week to have a chat and says it is nothing formal, but so that the company can understand more of what has happened and what they can do to help him back to work. She offers to get Mr Stoddart involved in that meeting if that would help. She says she knows he doesn't know her and that he has been there a long time and that they do want to help (page 97).
58. The claimant responds to that email on 25 May and thanks Miss Bridle for her invite and offer of help. He says that he is not well enough to come for a meeting. He asks that his complaints be dealt with on a formal basis so he can have a remedy and be able to return to work (page 98).
59. On the same day Miss Bridle then asks if he could come in for a formal grievance meeting or whether she could arrange it by telephone, so that they could discuss his complaint and provide him with an outcome (page 100).
60. The claimant then replies to that indicating he is too unwell to come in stating that he wants his complaints dealt with by email and wants those issues to be addressed by his employer and that they can deal with it at this stage by email (page 101).
61. In her evidence, Miss Bridle stated that she had undertaken a review of the claimant's working hours from his clock in cards over the previous year after the complaint was received from him. That review is at page 47 to 51 of the bundle. It shows that from April 2022 to May 2023 the claimant was working within the National Minimum Wage figures.
62. A discussion then takes place internally between Miss Bridle and Mr Stoddart. In his evidence he said that he made some suggestions to try and resolve the matter. As a result Miss Bridle then replies to the claimant by way of an email on 30 May (page 102 to 103 of the bundle). In that email she addresses the claimant's concerns about his hourly rates and suggests that they move him, if he wishes, on to an hourly rate rather than a salary. She also expresses concern about the way he has been spoken to. She goes on to state that Mr Connelly is no longer employed by the respondents. Finally, she goes on to state that the respondent will retract the invite to the disciplinary hearing and discuss the working hours on an informal basis (page 104). She goes on to say that she hopes the steps they have outlined will satisfy the claimant's concerns and that he will feel ready to consider working towards a return to work so that they can arrange a meeting to discuss those matters further. (page 104).
63. Having had no response to that email, Miss Bridle then chases the claimant up on 5 June to ask his initial thoughts on the respondent's response to his concerns. (page 105).
64. The claimant replies indicating that he is still confused about the whole situation (page 106).

65. Miss Bridle then contacts the claimant further to ask if she could give him a call and when he would like her to ring (page 107).
66. The claimant then replies to say he was given the written warning and his mental health has been affected. He says he has lost three weeks income and how will that be resolved. He also asks whether the £11.40 would be at the same rate after the next government review of the National Minimum Wage (page 108).
67. Miss Bridle then replies. She states that the invite to the disciplinary meeting only mentioned a written warning as a potential outcome and that the respondent is no longer proceeding with a disciplinary hearing and all record of it has been removed. She says she wants to meet with him to discuss his mental health. She goes on to indicate that it is normal practice to be paid SSP during sickness absence. She then states as a gesture of goodwill that he could use some holidays to cover it. She then says that hourly rates will be reviewed to ensure they remain competitive and to take account of increases, but that does not necessarily mean it will rise each year. She then indicates that his sick note is due to expire and that she will need a new sick note if he is not returning to work. She asks if there is anything else she can do to help him. (page 109).
68. The claimant then sends in a further sick note. Miss Bridle indicates that as it is over four weeks' absence she wants to try and arrange a meeting with him to review his absence and the next steps to take to try to support him back to work (page 110).
69. The claimant declines any meeting to discuss his health (page 111) and asks for a copy of his contract of employment.
70. Miss Bridle then replies, at page 112, suggesting the meeting be off site or by telephone rather than him coming in. She asks him to reconsider attending and suggests alternative dates if that would help or even delaying the meeting to help him to recover (page 112). The invite to the sickness absence review meeting is on page 113).
71. The claimant's further sick note indicates a return to work on 6 July.
72. Miss Bridle writes again to the claimant to ask if it is his intention to return on that date and, if so, she will make arrangements for him to attend earlier and try to meet up with him for a return to work interview (page 115).
73. On 30 June Miss Bridall then chases the claimant further with regard to her emails and asks for some availability from the claimant and whether they could fix a meeting by telephone or at a location of his choice (page 117).
74. On 2 July the claimant emails the respondent to submit his resignation. In his email he says he has no option other than to leave. He refers to his average working hours and his concerns about it being under the National Minimum Wage. He refers to being undermined, demoted and bullied. He then goes on to raise concerns about being threatened with a written warning for clocking out when his day was finished. He says there was no reason to threaten him with a written warning and he was told it would be retracted after he was threatened with it. He refers to then receiving no apology or being reimbursed for his lost wages. He suggests that the manager who invited him to the disciplinary meeting did it under his employer's instruction. He says it was his employer who caused his mental health problems.
75. The respondent replies to that email and indicate that they were disappointed to hear his comments. Ms Bridle asks if the respondent could meet him so that he could if he wished to retract his resignation (page 126). As the respondent received no reply,

they then chased him up but also noted that it appeared that he had declined any of those options. They therefore reluctantly said they accepted his resignation. His employment terminated on 6 July.

76. In his evidence the claimant said he obtained alternative employment which he started effectively immediately after his employment terminated. He said that this was a job that he had been told about by a family member. He said he knew about it prior to sending in his letter of resignation and he had effectively been offered the job but had started the job before he resigned. He said the job was on more money and was less stressful. He said that he could not afford to leave his employment until he was able to find alternative employment. That was a point reiterated by his wife in her evidence. He made it clear he would not have been looking for alternative work if there had not been the problems he was complaining about with the respondents. He produced his payslips from his new employment which show he is earning than he was earning with the respondents and therefore has no ongoing loss.
77. In their evidence both of the respondent's witnesses stated that, having received the claimant's complaints, they retracted the invite to the disciplinary meeting and looked at ways of trying to resolve the matter. Miss Bridle said in evidence that she would still need to meet with the claimant to discuss the matter but thought it could be dealt with on a more informal basis. It seems that Mr Stoddart took the view that having known the claimant a long time he thought there was a better way of dealing with the situation.
78. In her evidence Miss Bridle said in that given the circumstances and the health and safety that it was reasonable to invite the claimant to a disciplinary hearing. However, she acknowledged with hindsight that, given the relationship the claimant had with the respondents and what appeared to be his way of dealing with things, it may well have been better to have initially dealt with this matter informally. She said that which is why they retracted the invitation for a disciplinary invite and looked at trying to resolve the matter in a different way.
79. Mr Stoddart said that he did not know of the arrangements about the claimant being able to leave early. He did not think that was likely to be over an indefinite period. Mr Stoddart said that dealing with matters in a different way may be a better way of dealing with these matters bearing in mind the claimant's nature and personality. He stated it was his suggestion to retract the disciplinary invite to HR.
80. In his evidence to the Tribunal the claimant stated that the breach of contract for him was the invite to the disciplinary hearing and the threat of a written warning. He believed that he was allowed to leave early and had worked long hours for the employer for many years, so he considered it humiliating and degrading to be invited to a disciplinary meeting in those circumstances.
81. When he was asked in evidence why the resolutions offered by the respondent were not acceptable, he stated that from his point of view the damage had already been done. He accepted that the respondent had tried to help and suggested that there was nothing the respondent could have done at that stage because he felt so ill and the damage had already been done. He felt if he went back to nothing would change if he went back to work.
82. In answer to a question about what triggered his resignation on 2 July he said that he had been offered another job and it was better money and less stressful. However, he did make it clear he would not have been looking for work if the circumstances at his employment with the respondent had not occurred.

83. He stated in his evidence that the reason he left the respondent was because of the the invite to the disciplinary hearing, the way it was done and how it made him feel and the effect it had on him.
84. In his evidence Mr Stoddart said discretionary sick pay had only been paid on two occasions: - one to an employee who had a stroke and one who had cancer. Miss Bridle confirmed in her evidence that, as far as she was aware it was only paid on those two occasions for what were both potentially long term conditions.

### **Submissions**

85. The respondent's representative filed written submissions in which she referred to a number of cases. She said that there was no breach of contract and suggested that the claimant had confirmed the contract in the meantime. She also submitted that it was not clear that the claimant had resigned because of the breach or because he wanted to take up the new role.
86. The claimant's representative submitted that there was a clear breach of contract in the way that the claimant had been treated and that was the only reason he left his employment. She subsequently sent in further written submissions.

### **Conclusions**

87. The Tribunal reminded itself as it had reminded the claimant and his representative at the outset that the burden of proof in this case was on the claimant.
88. This Tribunal does not consider that there was a breach of contract on the part of the respondent. The claimant's representative referred to various breaches in the course of the discussion at the outset about the issues in this case. Those breaches were largely not relied upon by the claimant in his evidence. In his evidence the claimant made it clear that the reason why he left was because of the invite to the disciplinary meeting, the way it was done and threat of the written warning. He also referred to bullying by managers but his evidence on the allegations of bullying was principally the manager saying to him "who are you looking at" and then the discussion about the threat of the disciplinary process with that manager. No other specific allegations of bullying were raised with the respondent who were unable to meet with the claimant to discuss his complaints, nor were any other specific allegations of bullying given in evidence in this Tribunal
89. This Tribunal has to acknowledge and accept that the claimant felt that the invite to the disciplinary hearing did have an impact on him. It came through quite clearly in the claimant's evidence and was a very honest witness and clearly troubled by what happened even now. However, it is not enough to amount to a breach of contract. The respondents believed that there was a potential act of misconduct and quite rightly followed their own disciplinary procedure and the guidance of ACAS and invited the claimant to a disciplinary hearing to consider that allegation. They were entitled under the ACAS code to warn him of the potential consequences of that misconduct. It was not enough to amount to a breach of contract.
90. In normal circumstances an Employment Tribunal would consider that such an invite could not amount to a breach of contract. The Tribunal has to acknowledge that in the circumstances of this particular case that invite did have a deep impact on the claimant who had worked for the respondents for many years and was a very loyal and hardworking employee. That invite coming in the way it did clearly had an impact upon him. In retrospect, as was to a degree acknowledged by the respondents, it was an error to deal with this issue in this way with this claimant. The Tribunal concur

having heard the claimant's evidence and the very real impact on him, but the respondent was entitled to proceed in this way and was not a breach to do so.

91. Further, as soon as the respondents received the claimant's complaints, they clearly tried to look at ways of resolving the matter. Indeed, even before receiving those complaints, the managing director phoned the claimant to try to sort the matter out. The respondent sought on numerous occasions to try and meet with the claimant to try and resolve the matter. The claimant refused to do so. As requested by the claimant, the respondent then addressed the complaints in writing. They resolved the matter by retracting the invite to the disciplinary hearing, informing the claimant that the manager who was involved had his employment terminated and offering the claimant an hourly rate. It is difficult to see what else the respondent could have done. The way that they tried to resolve the matter is another reason why it could not be seen that the invite, which at best was an error on their part, could amount to a breach of contract on their part to justify the claimant in resigning.
92. The claimant did not appear to accept the respondent's response. He raised queries about his lost wages and whether his hourly rate would increase in each in line with the National Minimum Wage. The response from the respondents could not amount to a breach of contract. They correctly indicated the claimant was entitled to and was paid SSP. The respondents suggested they might allow him to take holiday instead. Their response with regard to his hourly rate of pay was to indicate that it may or may not rise with any increase under the National Minimum Wage, but they were not able to confirm that at that stage. They were perfectly entitled to respond in that manner, which could not be deemed to be a breach of contract nor part of a series of breaches and amount to a final straw. The respondent's reply was not even a minor breach of contract.
93. The Tribunal had to consider whether or not the respondent's decision not to pay, as suggested in the claimant's contract of employment, discretionary sick pay to the claimant bearing in mind his request for lost wages would amount to a breach of contract. The Tribunal accepts the respondent's evidence of the specific circumstance in which that discretion had been applied namely for long term conditions which may be a disability. However, it is quite clear from the evidence presented to the Tribunal that the claimant did not resign nor did he ever suggest he had resigned because the respondent did not exercise their discretion in his favour to pay him discretionary sick pay. In any event, this Tribunal does not consider that it was a breach of contract for the respondent not to exercise its discretion to pay the claimant long term sick pay, as the respondent clearly did not do so arbitrarily. Indeed, it seems they only would do so in cases where there are potential long term medical conditions.
94. The Tribunal does not therefore consider that any of the matters were sufficient to amount to a breach of contract on the part of the respondents to entitle the claimant to resign. None of the respondent's actions in this case could amount to a breach of either an express term or of the implied term of trust and confidence.
95. The claimant and his representative did not rely on any breach relating to a breach of the National Minimum Wage. It is noted by the Tribunal that there was no breach of the National Minimum Wage provisions, as noted from the documentary evidence produced by the respondents.
96. The Tribunal went on to consider whether the claimant had resigned in response to the breach of contract. The Tribunal notes that the claimant had, as he acknowledged arranged and been offered a new job before he resigned from his

employment, which he said was better paid and was less stressful. However, he did make it clear he would not have been looking for a new job if he had not found himself in those circumstances with the respondent. It was difficult for the Tribunal to conclude whether the claimant might have resigned in response to what he perceived as breaches of contract anyway. However, having been told about the other job, that is what appeared to ultimately trigger his resignation. Therefore, the Tribunal cannot be fully satisfied that it was not that job which was the reason for his resignation as opposed to what the claimant considered to be breaches of contract, particularly as the main breach he relies upon is the invite to the disciplinary hearing which occurred over 6 weeks earlier.

97. The Tribunal went on to consider whether the claimant had affirmed the contract in the meantime. It did not conclude that he had. Although the main breach upon which he relies is the invite to the disciplinary meeting and the threat as he perceived it contained within that invite, he had effectively raised a grievance about those matters. He resigned after that grievance had been concluded. Therefore, the Tribunal does not accept that he affirmed the contract in the meantime. If he did it was only a few days as he raised a further issue following on from the response to the grievance in which the respondent had sought to resolve all the issues he raised. The claimant resigned shortly after the subsequent email from the respondents in reply to his queries around lost wages and increase in his hourly rate. Therefore, on balance the Tribunal does not consider that he affirmed the contract in that short period.
98. Accordingly, this Tribunal does not consider that the claimant was constructively unfairly dismissed.
99. It therefore follows that the Tribunal does not find that the claimant was dismissed by reason of redundancy.
100. For those reasons, his claims of unfair dismissal and for a redundancy payment are not well founded and are hereby dismissed.

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**Employment Judge Martin**

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Date 23 May 2024

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