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EMPLOYMENT TRIBUNALS

Claimant:	**Mr I Hill**		
Respondent:	**Mobility Nationwide Limited**		
Heard at:	**Cardiff via CVP**	**On:**	**28 and 29 October 2021**
Before:	**Employment Judge R Havard**		

Representation:
Claimant: In person
Respondent: Mr David Jones, Counsel

RESERVED JUDGMENT

1. The judgment of the Tribunal is that the Claimant's claim of unfair constructive dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. By a claim form dated 12 April 2021, the Claimant indicated that he wished to pursue a claim that he had been unfairly constructively dismissed.

2. On 16 May 2021, the Tribunal wrote to the parties. The Tribunal confirmed to the Respondent that, if it wished to defend the claim, it must complete a response form and submit it to the Tribunal by 14 June 2021. Standard directions were given by the Tribunal with a view to the substantive hearing taking place on 28 and 29 October 2021.

3. On 28 June 2021, the Respondent lodged its response confirming that it intended to defend the claim.

4. It was considered by the Tribunal to be appropriate and proportionate for the final hearing to take place remotely via CVP.

5. Counsel for the Respondent and the director and main witness for the Respondent share the same name. To avoid confusion, Mr David Jones of Counsel will be referred to as Counsel throughout this judgment.

Issues

6. A draft list of issues had been prepared by the Respondent. Following discussion between the Claimant and Mr Jones, the following list of issues to be determined by the Tribunal were agreed:

CONSTRUCTIVE UNFAIR DISMISSAL

1. Did the Respondent, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee as to breach the implied term of mutual trust and confidence in respect of the Claimant's contract of employment by:

   "1) It had become clear the Dave and Gemma Jones had not and were not going to treat me fairly in relation to the formal grievance, investigation and disciplinary processes.

   2) They were not going to allow me to call witnesses to the disciplinary hearing.

   3) They were going to continue to break the law by breaching the coronavirus social distancing regulations by not re-installing the safety barrier despite me being responsible for the health and safety of the site and subsequently liable for any breaches of the law.

   *4) I had discovered they had committed fraud - They claimed furlough payments for myself and other employees in April and May 2020 despite me being in work preparing sold vehicles and cleaning and painting the workshop." (**p.16**).*

2. If so, was the Respondent's breach repudiatory?

3. If so:

   3.1 Did the Claimant resign on 10 February 2021 because of the breach (**p.72-74**)?

   3.2 Did the Claimant waive or affirm the breach?

4. If not, and the Claimant was dismissed by the Respondent, was the Claimant's dismissal an unfair dismissal having regard to **section 98 Employment Rights Act 1996**?

COMPENSATION

5. If the Respondent did unfairly dismiss the Claimant, what, if any, compensation should be awarded to the Claimant having regard to those factors set out in **section 123 Employment Rights Act 1996**?

Evidence

7. The Claimant gave evidence on his own behalf.

8. The Respondent called:

i Mr Dave Jones, Director and Shareholder of the Respondent;

ii. Ms Gemma Jones, who described herself as Company Secretary but also stated that she was a shareholder in the business.

9. Those who gave oral evidence had provided written witness statements. Dave Jones had provided a supplementary witness statement. It had been disclosed to the Claimant very shortly before the hearing and the Claimant objected to it being admitted into evidence. After some discussion, it was accepted by Counsel that the content of the supplementary witness statement dealt with issues relating to remedy. Therefore, it was concluded that the Tribunal would take no account of its content when determining issues relating to liability.

10. An agreed bundle had been prepared and submitted by the Respondent, together with an index. The bundle ran to 276 pages. Two A4 sheets of wage slips had been added. Furthermore, within the bundle, there were emails from the Claimant which were marked without prejudice. Counsel did not object to the inclusion of those emails as it was anticipated that, taking account of the content of those emails, the Claimant did not mean them to be privileged.

11. It was agreed that the matter would be kept under review and, if reference was made to an email to which either party took exception, the matter could be resolved at that stage.

12. A meeting between the Claimant and Mr Jones took place on 20 January 2021. That meeting had been recorded by both parties. A transcript was in the bundle (pages 50-55). Counsel considered there was only a requirement for the Tribunal to listen to the transcript if there was a dispute regarding how Mr Jones had behaved in the course of that meeting. If the list of issues remained in accordance with the draft, then Counsel did not anticipate there would be any difficulty nor would there be a need to listen to the recording.

13. As stated, it transpired that the list of issues was agreed following further discussions between Counsel and the Claimant and therefore there was no requirement for the Tribunal to listen to the recording.

14. Unless otherwise stated, any page references in this judgment refer to pages in the bundle.

Submissions

15. At the conclusion of the evidence, Counsel provided a document entitled, "Counsel Note" setting out the legal framework within which this claim was to be determined. In fairness to the Claimant, he stated that he agreed with the content of that document. Counsel supplemented the note with oral submissions. The Claimant also made oral submissions.

Findings of Fact

16. The Respondent had operated as a business for 17 years based in Ruthin, North Wales. It employs ten people and operates a franchise for a car manufacturer. Mr Dave Jones is a director and shareholder. His partner, Ms Gemma Jones, is Company Secretary and also a shareholder. They manage the business and the employees report to them.

17. On 3 January 2017, the Claimant commenced his employment with the Respondent as Workshop Manager. Indeed, he was involved in setting up the "after sales" department shortly after commencing his employment.

18. On 18 January 2017, the Claimant signed a Written Statement of Employment (pages 41-47). This formed the Claimant's contract of employment. The contract refers to the disciplinary procedure at paragraph 12 which includes a three-stage process, commencing with the Respondent providing an employee with a written statement setting out the alleged conduct giving rise to the disciplinary process, and arranging a hearing to take place.

19. At paragraph 13 of the contract, the procedure with regard to an employee pursuing a grievance is set out.

20. It was not in dispute that, prior to January 2021, the Claimant had not been the subject of any previous disciplinary proceedings relating to his conduct. Indeed, in 2020, the Claimant had received a bonus for his performance.

21. There were two members of staff who worked closely with the Claimant and reported to him, namely David Seymour and James Spilstead-Love.

22. When the first lockdown was announced in March 2020, there was insufficient work to ensure that all staff were fully employed; therefore, two employees, David Seymour and James Spilstead-Love were furloughed. The Claimant continued, albeit on slightly reduced hours. It was alleged by the Claimant that, despite him working at reduced hours, the Respondent had, in his view, fraudulently claimed furlough payments. However, Dave Jones confirmed that furlough payments had been claimed at a time when there was considerable confusion with regard to the implementation and operation of the scheme but that, prior to the Claimant's subsequent resignation, he repaid the full amount of furlough payments received by the Respondent. The Claimant accepted that, at the time that he resigned, he was unaware that the Respondent had repaid the furlough monies.

23. It was not disputed, and the Tribunal found, that the Claimant was instrumental in the development of the workshop and the after sales side of the business. The Claimant was also given responsibility for health and safety on the site. He would report to Mr Jones.

24. The workshop and the after sales function were always extremely busy. The booking process of vehicles into the workshop and after sales, together with the requisite number of hours and shifts to be worked by members of staff, were managed and controlled by a Dealer Management System ("DMS") to which the Claimant had access.

25. Each employee was also issued with a handbook.

26. The Claimant accepted that the relationship between him and Dave Jones was a reasonable working relationship up to December 2020. His concerns with regard to the conduct of Dave Jones all arose from about that time. Indeed, the Claimant confirmed that, prior to 3 December 2020 when he returned to work following a period of annual leave, his working relationship with the Respondent was not a cause for concern.

27. Prior to that date, and in his role as the person responsible for health and safety, the Claimant had requested that a barrier should be erected in the Reception area to ensure that, in his view, the requirements of Welsh Government with regard to the measures to

be taken in the course of the COVID-19 pandemic were met (page 181). Such guidelines included the use of physical barriers and, of course, the need for social distancing.

28. Dave Jones had taken the contrary view with regard to the need for the sort of barrier the Claimant maintained was necessary. The reception area and the barrier are illustrated in the photographs (pages 154-157). Mr Jones remained of the view that the guidelines were being met without the need for the barrier located to the right of the reception desk which was shown most clearly in the photograph at page 156. Dave Jones stated that the guidelines were being met as there was a barrier between members of the public and the person sitting at Reception in the form of a Perspex screen which can be observed in the photographs. Furthermore, no more than one or two people would ever be in Reception and social distancing could be maintained. Dave Jones considered the barrier to the right of the desk to be unsightly, unnecessary, and particularly inconvenient as members of staff were always putting it to one side to enable them to gain access to and from the workshop.

29. In any event, when the Claimant returned to work on 3 December 2020, he noticed that the barrier which had been purchased by Dave Jones, had been removed and he put it back.

30. In the week prior to Christmas, the Claimant stated that the attitude of Dave Jones changed towards him. The Claimant believed that the reason for that change was because Mr Jones had booked his Mercedes in for work to be done but it had not been possible. Whilst the Claimant stated that Dave Jones was angry, the Claimant accepted that this did not impact on later events and certainly was not one of the reasons for the Claimant's resignation.

31. Following the Christmas holiday, the Claimant was absent from work between 4 and 19 January 2021 through ill health.

32. Whilst the Claimant was away, he was informed by one of the staff that the barrier in the reception area had been removed again. Furthermore, the Respondent had circulated a new handbook and also an updated COVID protocol (page 48). The Claimant stated that neither document was presented to him either by being delivered to him when he was on sick leave or immediately on his return.

33. Further, on his return to work on 19 January 2021, the Claimant found that his access to the Dealer Management System ("DMS") had been revised although, whilst accepted by the Respondent, it was maintained that the Claimant was still able to access those parts of the DMS which would enable him to fulfil his role.

34. On the following day, 20 January 2021, a meeting took place between Dave Jones and the Claimant. The Claimant stated that he had requested Dave Jones's PA, Ms Beth Spratt, to arrange a time for him to see Dave Jones to discuss with him the revisions to the handbook, the new COVID protocol, and ongoing issues with regard to the barrier to the right of the reception desk which, during his absence, Dave Jones had removed.

35. Mr Jones says that he requested Ms Spratt to arrange a meeting with the Claimant on his return to work at 2 p.m. that day. It transpired that the reason why Dave Jones wanted to see the Claimant was to question him about issues which had come to his knowledge whilst the Claimant had been away. The Tribunal found that, in effect, the Claimant and Dave Jones wished to see each other, albeit for different reasons and the purpose of the meeting to take place at 2 p.m. was, consequently, different for each of them.

36. Whilst it was maintained by the Claimant that he considered that the meeting was effectively a disciplinary hearing, and described the interview between him and Dave Jones as, "a kangaroo court", Dave Jones insisted that it amounted to an investigatory meeting.

37. Whilst it was not in dispute that Dave Jones had given the Claimant no advanced warning of the purpose of the meeting, the Tribunal was satisfied that it did amount to an investigation into matters which Dave Jones had discovered whilst the Claimant had been away. When asked why he had not given the Claimant advanced notice of the purpose of the meeting, Dave Jones indicated that it was in order to, *"preserve evidence"*. Whilst there was no evidence presented by the Respondent to suggest that the Claimant would have attempted to interfere with such evidence, Dave Jones proceeded to ask the Claimant a series of questions in relation to certain specific areas:

    i. Misleading a customer with regard to work undertaken on his vehicle;

    ii. Failing to follow management instructions, relating to work being delayed in respect of certain vehicles;

    iii. Carrying out work at discounted rates without management authority;

    iv. Undertaking private work outside working hours on work premises and company equipment without permission, and

    v. Failing to follow safe working practices, which related to the Claimant sitting in the tea room with other members of staff despite an instruction not to do so due to the pandemic in the document entitled, "Covid 19 Staff Precautions" (page 48).

38. The meeting was recorded by both the Claimant and the Respondent and a transcript had been produced. It was suggested by the Claimant that Dave Jones's attitude towards him had been hostile and "*nearing aggressive*" but, at the grievance hearing, the Claimant had described Dave Jones's attitude as poor and that, on one occasion, he smirked or smiled inappropriately. (page 82)

39. Whilst the Claimant may have been dissatisfied with the approach adopted by Dave Jones, the Tribunal did not find that Dave Jones's attitude had been either hostile or aggressive.

40. Furthermore, whilst it would have been appropriate for Mr Jones to have given the Claimant some advanced warning of the purpose of the meeting, the Tribunal was satisfied that this amounted to an investigatory meeting. Indeed, Dave Jones described it to the Claimant as such in the course of the meeting and no sanction was imposed at its conclusion.

41. In the course of the discussion, whilst the Claimant disputed a number of the allegations put to him, and also called for the evidence on which Dave Jones relied, the Claimant did accept that he had misled customers with regard to their vehicle, suggesting that he had told them, "white lies".

42. At the conclusion of the meeting, Dave Jones informed the Claimant that he would be suspended.

43. On the following day, 21 January 2021, Dave Jones wrote to confirm that the Claimant had been suspended pending a disciplinary investigation, setting out the basis on which

such a decision was reached and the allegations (page 78). It was made clear in that letter that the Claimant's suspension did not constitute disciplinary action and that he would continue to be paid during his period of suspension. Furthermore, in that letter, it stated as follows:

> *"If you know of any documents, witnesses or information that you think will be relevant to the matters under investigation please let me know as soon as possible. If you require access to the premises or computer network for this purpose, please let me know as we may agree to arrange this under supervision.*
>
> *I am in receipt of your email sent in the early hours of 21 January 2021. With reference to not following our own disciplinary procedures I would like to emphasize that we are at the investigation stage only which involves an informal fact-finding meeting. The appropriate procedures will be followed if the disciplinary procedure is invoked.*
>
> *In your email you also refer to the removal of a safety barrier from Reception. As you know the Company has taken all reasonable steps to ensure the workplace is Covid-19 Secure, as per the Covid Precautions document issued to all staff on 20.06.20. The Reception desk is behind a large Perspex screen and customers are encouraged to sit down whilst they are dealt with. The customers' seating is 2 metres away from the Reception desk and there is signage to remind customers of the need to maintain social distancing. The barrier was removed because it was not deemed necessary [was more of an obstacle] but the situation will be kept under regular review to ensure that we operate safely at all times which is of paramount importance."*

44. On 22 January 2021, the Claimant sent an email to the Respondent (page 57) in which he pursued a grievance, specifying four central issues, namely:

    i. the Respondent's approach to the safety barrier in the public reception area;

    ii the way in which, "the disciplinary meeting", was orchestrated and held;

    iii. the Claimant's suspicion that Dave Jones had an agenda, and the fact that, during the Claimant's illness, Dave Jones had employed another mechanic and that Dave Jones appeared to want the Claimant to leave the Company;

    iv. the fact that the Respondent was in breach of the Claimant's employment contract as he had to attend a "disciplinary meeting" without any notice and that he had been suspended without any written reason or explanation.

45. On 26 January 2021, the Claimant sent a further email (pages 59-60) which provided further detail with regard to his grievance.

46. On 27 January 2021, Ms Gemma Jones wrote to the Claimant inviting him to a grievance hearing on 29 January 2021 (page 80). The Claimant was informed that he was entitled to bring with him a fellow employee or a trade union representative and that, following the meeting, a full investigation into his grievance would be undertaken.

47. The grievance hearing took place on 29 January 2021. It dealt with the concerns raised in the Claimant's emails of 22 and 26 January 2021. No issue was taken with regard to the accuracy of the notes produced following that hearing and David Seymour accompanied the Claimant. The Claimant expressed concern that Ms Gemma Jones was the person conducting and determining the outcome of his grievance. However, the

Claimant very fairly accepted that Ms Jones was the only other person in a managerial position who could conduct the grievance and that he was not suggesting that anyone from outside the Respondent should do so. He also accepted that Ms Jones had listened carefully to the Claimant in the course of the grievance hearing and given him every opportunity to state his concerns.

48. However, in a grievance outcome letter dated 4 February 2021 (pages 144-146), the Claimant's grievance, and the individual issues raised in the course of that grievance, were not upheld. Ms Jones had provided a full explanation for her findings in respect of each of the matters raised by the Claimant.

49. On 3 February 2021, the Respondent wrote to the Claimant inviting him to a disciplinary hearing (page 86). In that letter, the allegations which would be considered were set out. The disciplinary hearing was arranged to take place on 5 February 2021. The Respondent enclosed with that letter the interview notes of the investigation meeting, short statements from Mr Seymour and Mr Love relating to the Claimant sharing breaks in the tea room despite instructions not to do so, and additional documents to support the allegations that were being made. Those additional documents included: a schedule of instances when it was alleged that the Claimant had undertaken work at a discounted rate without authority with accompanying documents (page 94); reference to emails in support of the allegation of being dishonest to customers (page 140), and an outline of the basis on which it was alleged that the Claimant had not followed management instructions (page 142).

50. The Claimant responded on 4 February 2021 (page 66), stating that he would wish to interrogate the Respondent's computer system to gather evidence and he set out the reasons why he considered the investigation process to have been unfair.

51. In an email of the same day (page 67), Dave Jones wrote to the Claimant stating that the disciplinary hearing would be postponed from 5 February 2021 to 8 February 2021 to enable the Claimant to attend the Respondent's premises to interrogate the computer and extract any documents he required.

52. Subsequent emails took place regarding the Claimant being able to attend the Respondent's premises to have access to the computer and thereby any documents on which he wished to rely.

53. Despite being offered three dates on which to do so, namely 5, 6 and 8 February 2021, the Claimant stated that he had been unable to attend. The Tribunal did not find the reasons given by the Claimant for him being unable to attend to be persuasive. Had the Claimant genuinely believed there were documents he could obtain from the Respondent that would assist him in the disciplinary hearing, he had been given ample opportunity to do so particularly as, at the time, he was suspended from work.

54. Indeed, on 8 February 2021, Dave Jones of the Respondent sent an email to the Claimant confirming that the Claimant had been given three opportunities to attend the premises and access the computer system and that he had failed to attend. Furthermore, Mr Jones went on to say:

> *"As you have declined the opportunity to attend under supervision, please let me know if there are any specific documents you would like me to access and I will provide you with a copy."*

55. The Claimant was informed in that email that the disciplinary hearing had been rescheduled for a second time and would now take place on Wednesday 10 February 2021. The Claimant was told that the allegations that would be considered were those set out in the letter of 3 February 2021.

56. On 9 February 2021, the Claimant wrote to Dave Jones endeavouring to explain why he had not been able to attend the office to access the computer and stated that he would not attend a disciplinary hearing until he had such access. He also set out the names of four people he wished to call as witnesses at the disciplinary hearing on the following day.

57. Dave Jones responded on 9 February to confirm the number of opportunities that the Claimant had been given to access the computer and also confirmed that it would be the Respondent who would carry out any questioning of individuals if that became necessary but that he was entitled to challenge the evidence produced by the Respondent.

58. On 10 February 2021, shortly before the disciplinary hearing was to take place, the Claimant sent an email entitled "Notice of resignation" setting out the basis of his decision to resign.

59. In his resignation email, in summary, the Claimant stated that he based his decision on:

    (i) the way in which the investigatory meeting was conducted;

    (ii) the removal of the safety barrier in the reception area;

    (iii) the company handbook and the change in the COVID protocol having been issued to everyone except for him;

    (iv) the Respondent claiming furlough payments for the Claimant in April and May 2020 which he alleged to have been fraudulent, and

    (v) the Claimant's inability to call witnesses at his disciplinary hearing, which, in his oral evidence, he described as the last straw.

The Law

60. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

61. In the leading case in this area, **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA,** the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract.

62. As Lord Denning MR put it: '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.'

63. In order to claim constructive dismissal, the employee must establish that:

a. there was a fundamental breach of contract on the part of the employer;

b. the employer's breach caused the employee to resign, and

c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

64. In order to identify a fundamental breach of contract on the part of the employer, it is first necessary to establish what the terms of the contract are.

65. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining the trust and confidence inherent in every contract of employment. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract — **Lewis v Motorworld Garages Ltd 1986 ICR 157, CA**

66. In such cases, the decision of the Court of Appeal **in London Borough of Waltham Forest v Omilaju [2005] ICR 481** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial.

67. In **Western Excavating (ECC) Ltd v Sharp** (above) the Court of Appeal expressly rejected the argument that s.95(1)(c) introduces a concept of reasonable behaviour by employers into contracts of employment. This means that an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably.

68. This was confirmed in **Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA**, where the Court upheld the decision of the EAT that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

69. The implied term of mutual trust and confidence is defined in **Malik v Bank of Credit and Commerce International [1997] IRLR 462:**

"*The employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee*".

70. A breach of that term may give rise to constructive dismissal, but both elements of the 'test' must be met for a claim to succeed:

i. the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; and

ii. that there be no reasonable or proper cause for the conduct.

71. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. The objective test also means that the intention or motive of the employer

is not determinative. An employer with good intentions can still commit a repudiatory breach of contract. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in Malik recognises that the conduct must be likely to destroy or seriously damage the relationship of trust and confidence.

Analysis and Conclusions

72. Addressing each of the agreed issues in turn, the Tribunal has carried out an analysis of the facts and, applying the legal framework, has reached the following conclusions.

73. The Tribunal did not consider that the Respondent had breached an express term in the Claimant's contract of employment. Indeed, it was accepted by the Respondent that the Claimant was entitled to rely on the implied term of trust and confidence in the contract between it and the Claimant.

74. The Tribunal was not satisfied that the Claimant had established, on the balance of probabilities, that the Respondent, without reasonable and proper cause, had conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent.

75. By reference to the agreed issues, the Claimant alleges that it had become clear that Dave and Gemma Jones had not and were not going to treat him fairly in relation to the formal grievance, investigation and disciplinary processes, and they were not going to allow him to call witnesses at the disciplinary hearing.

76. Dealing with each stage of the process in turn, the Tribunal was satisfied that, within the Respondent's structure, Ms Gemma Jones was the appropriate person to conduct the grievance hearing. Indeed, the Claimant accepted that Ms Jones was the appropriate person and was not putting his case on the basis that someone outside of the Respondent should be involved in the process.

77. The Tribunal was satisfied that Ms Jones had carefully considered the grievances set out in the Claimant's emails of 21 and 26 January 2021.

78. The grievance meeting to listen to the Claimant's grievances was held on 29 January 2021 and the Claimant was accompanied by David Seymour. A note was taken of that meeting by Beth Spratt and there was no suggestion that the Claimant disagreed with the content of those notes (pages 82-85). It was accepted by the Claimant that Ms Jones conducted the meeting properly and gave him a fair hearing. Ms Jones then investigated the grievance and subsequently wrote to the Claimant on 4 February 2021 setting out her decision not to uphold the Claimant's grievance together with her reasons for doing so.

79. Whilst the Claimant clearly would disagree with Ms Jones's decision and the reasons on which that decision was based, the Tribunal was satisfied that the Claimant had been treated fairly in this process and that Ms Jones had given the Claimant every opportunity to put his case.

80. With regard to the investigation, the Tribunal has concluded that it would have been more appropriate for Dave Jones to have provided the Claimant with advance notice of the intention to carry out an investigatory interview on 20 January 2021. The Tribunal had not found that Dave Jones had been aggressive in the manner in which he questioned the Claimant during that investigatory meeting. Further, the Tribunal was

satisfied that the purpose of the meeting had been made clear to the Claimant and there are various references in the notes of that meeting, which was recorded by both Claimant and the Respondent, to the fact that it was an investigatory meeting. Indeed, in the grievance meeting, the Claimant described Mr Jones's approach in the following way, *"Dave Jones' behaviour was poor, he was laughing and smiling. I had to tell him not to laugh and smile at me, …"* and that this only occurred on one occasion.

81. The Tribunal was satisfied that Dave Jones had reasonable grounds on which to commence the investigation and, whilst not able to produce what the Claimant described as an investigation plan, he did outline, and question the Claimant upon, the areas of concern with regard to the Claimant's conduct, asking him for an explanation.

82. The Tribunal also rejected the Claimant's suggestion that he believed Dave Jones wished to remove him from the Company.

83. First, there had been no concerns with regard to the Claimant's performance up until Dave Jones had carried out his investigation. Indeed, the Claimant indicated that he had been paid a bonus in the course of 2020. Secondly, the Tribunal was not satisfied that the Claimant had established that Dave Jones wished to replace him with someone who had been employed whilst the Claimant was on sick leave. It was not in dispute that the workshop and after sales function were always extremely busy.

84. The Tribunal noted the Claimant's concern that aspects of his alleged conduct were historic but, first, Dave Jones accepted that he was at fault in failing to detect these issues at an earlier date. Secondly, one of the allegations being investigated, namely misleading customers by providing false information to them, was accepted by the Claimant. The Claimant described the provision of false information to a customer as *"white lies"*. The Respondent described his conduct as dishonest. The Respondent had provided to the Claimant a summary of the way in which the Claimant had misled the customer (page 140), first by suggesting that certain parts, namely bearings, were on order but there had been delays, which was not true, and secondly by saying the work had not been done because the Claimant had been away ill when this was not the case. The Tribunal found that, on the Claimant's own case, there was sufficient evidence for the Respondent to pursue its investigation.

85. As for the remaining allegations centring around such issues as misuse of the family and friends discount arrangement, misuse of company property, and using the tea room contrary to instructions, again, whilst the Claimant was perfectly entitled to maintain that such allegations were unfounded, they were allegations which the Respondent was entitled to investigate.

86. At the conclusion of the investigation, the Claimant was suspended on full pay. The Tribunal considers that the letter dated 21 January 2021 (page 78) notifying the Claimant of his suspension was appropriately drafted and it was stipulated that the suspension did not constitute disciplinary action.

87. Consequently, the Tribunal did not find that the Claimant had established that the Respondent had conducted itself in a way calculated and likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent in the course of the investigation.

88. As for the disciplinary process, by letter of 3 February 2021 (page 94), the Claimant was invited to a disciplinary hearing on Friday 5 February 2021. The letter sets out the allegations which would be considered at the hearing and the Respondent had also

enclosed with that letter the evidence on which it intended to rely. The letter warned the Claimant of the possible outcome, namely his summary dismissal. The Tribunal finds that the content of the letter was appropriate.

89. The Claimant stated that he did not consider that he would receive a fair hearing as the evidence which had been disclosed by the Respondent was inadequate to substantiate the allegations being made. For example, the Claimant referred to the schedule which had been prepared relating to the allegation that he had undertaken work at discounted rates without management authority (page 94). He maintained that the Respondent had failed to provide any of the documentation in relation to each of the jobs to which reference was made.

90. The Claimant indicated to Dave Jones by email of 4 February 2021 that he considered the investigation to be flawed but, more particularly, that he would need to access the Respondent's computer and workplace to assist with the investigation. The Tribunal noted that Dave Jones of the Respondent had already indicated in an email of 21 January 2021 (page 78) that the Claimant would be entitled to have access to the computer. In the Claimant's email of 4 February 2021 (page 66), he states *"Now I finally have the list of the allegations in detail, I will need to access the computer system and the email account of a workshop computer to give a detailed and fair account of events to aid the investigation."*

91. In his response, Dave Jones states that, *"It is fair and reasonable that you have access to the information that you need."* He therefore postponed the disciplinary meeting arrange for 5 February 2021 to 8 February 2021, stating that the computer would be available for the Claimant to access on 5 February 2021 and then 6 February 2021 and again on 8 February 2021. Indeed, the arrangement for the Claimant to interrogate the Respondent's computer on 8 February 2021 was to coincide with the time at which the disciplinary hearing had been re-arranged. However, the Claimant had maintained that it had not been possible for him to attend on any one of the three occasions offered by the Respondent. The Tribunal did not consider that the Respondent's proposals to allow the Claimant access to the computer in order that he could gather whatever evidence he needed was unreasonable. In addition, the Tribunal did not consider that the Claimant's reasons for his inability to attend on those dates were reasonable, namely, that it was not during the working week and that the dates proposed offered unrealistic deadlines.

92. In any event, on 8 February 2021, the Claimant having failed to attend, Dave Jones offered to print off any documents the Claimant required and provide them to him, the disciplinary hearing having been rescheduled for a second occasion to Wednesday 10 February 2021. Again, the Claimant did not take advantage of that proposal.

93. The Tribunal concluded that the Respondent had acted fairly in the lead up to the disciplinary hearing, not only in relation to allowing the Claimant access to the Respondent's computer in order for him to prepare his defence to the allegations that would be considered at the disciplinary hearing, but also the postponement of the disciplinary hearing on two occasions to afford the Claimant a number of opportunities for him to do so.

94. As for the claim that the Respondent was being unfair by failing to allow him to call witnesses to the disciplinary hearing, there is no specific provision that entitles the Claimant to call such witnesses. Secondly, within the guidance provided by ACAS (page 174) it states that an employee should be given the chance to call relevant witnesses but with good notice. Whilst there is reference by the Claimant in earlier emails to his

wish to call witnesses, it was only in an email of 9 February 2021 i.e. the day before the re-arranged disciplinary hearing, that he stipulates those witnesses he wishes to attend. When declining his ability to call witnesses, it was made clear by Dave Jones that, if he considered further enquiries were necessary, such enquiries would be undertaken.

95. It was on the following day that, shortly before the disciplinary hearing taking place, the Claimant delivered his email with his resignation.

96. With regard to Issues 1(1) and (2), taking account of all the circumstances, the Tribunal was not satisfied that the Claimant had established that the Respondent had acted in a manner calculated and/or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant such that it had breached the implied term of mutual trust and confidence in respect of the Claimant's contract.

97. The Tribunal reached the same conclusion with regard to the issue relating to the installation of a safety barrier. There was clearly a difference of opinion with regard to the need for the safety barrier being positioned to the right of the reception desk as shown in the photographs (page 153-157). It was alleged by the Claimant that the Respondent was going to *"continue to break the law by breaching the Coronavirus social distancing regulations"* by failing to ensure that the safety barrier was in place.

98. The Tribunal accepted the evidence of Dave Jones and found that he had initially installed the safety barrier to placate the Claimant even though he did not consider the barrier was necessary. Indeed, the barrier had then been reinstalled and the Claimant was aggrieved that he only found out about its reinstallation informally and had not been formally notified by Dave Jones. The Tribunal did not consider this was material. Further, the Tribunal did not agree with the Claimant that it was of significance that the barrier had ben reinstalled on the day he submitted his grievance.

99. In any event, whilst the Claimant relied on a document issued by Welsh Government entitled "COVID-19 Five Key Steps to Keep Wales Safe at Work" (pages 180-181) and in particular the reference to the use of physical barriers, the Tribunal found that it was reasonable for the Respondent to conclude that the Perspex sheet that had been fixed to the front of the reception desk was sufficient to comply with the guidance. The Claimant's suggestion that, without the other barrier being in place, members of the public could walk around behind the reception desk to look through the window into the workshop was not accepted. The Tribunal accepted the Respondent's evidence that members of the public would not do so if there was someone sitting at reception. Other measures were in place to include social distancing between the reception desk and the customer and the wearing of facemasks.

100. The Tribunal had taken account of what it considered to be the reasonable explanation put forward by the Respondent, and acknowledged the responsibility held by the Claimant regarding health and safety. The Tribunal did not find that the issue with regard to the safety barrier, which the Tribunal did not doubt was a cause of genuine concern on the part of the Claimant, was such that the Respondent's actions were calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant.

101. Finally, with regard to the Claimant's allegation that he had discovered the Respondent had committed fraud by claiming furlough payments for him and other employees in April and May 2020 despite him being in work, again the Tribunal accepted the Respondent's explanation that the payments claimed in April and May 2020 were at the very inception of the furlough scheme. This was also an issue between the Respondent and HMRC.

Furthermore, whilst the Claimant purported to resign as a result of the alleged fraud, Dave Jones confirmed, and it was not challenged, that, well before the Claimant's resignation, the Respondent had repaid not only the furlough payments received in respect of the Claimant but also the other employees who had been furloughed. The Claimant accepted that he was not aware of this repayment having been made at the time that he resigned.

102. The Tribunal did not doubt that the relationship between the Claimant and Dave Jones of the Respondent had deteriorated. The text messages between the Claimant and a member of staff presented evidence of that. The Tribunal also did not accept the Respondent's submission that the Claimant had resigned because he knew that his conduct was such that he was likely to be dismissed i.e. as Counsel put it, he "jumped before he was pushed". Nevertheless, the Tribunal held the view that the Claimant had ample opportunity to prepare his response to the allegations being made against him and that he would have been able to put his case at the disciplinary hearing. If he considered that process to be unfair, further remedies would have been available to him.

103. However, the Tribunal had concluded on an objective basis that, both individually and cumulatively (the Claimant having described the refusal of the Respondent to allow him to call witnesses to the disciplinary hearing as the last straw when this was put to him by Counsel), the Claimant had failed to establish that the Respondent had conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent. There had been reasonable and proper cause for its conduct.

104. In the Tribunal's judgement, therefore, the Respondent had not acted in breach of the implied term of trust and confidence, such that it would entitle the Claimant to repudiate the contract.

105. In the circumstances, there was no requirement for the Tribunal to consider issues 3, 4 and 5 of the agreed list of issues.

106. For all these reasons, the Claimant's claim for unfair constructive dismissal is dismissed.

Employment Judge R Havard
Dated: 24 November 2021

JUDGMENT SENT TO THE PARTIES ON 29 November 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche