EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104548/2016

Held in Glasgow on 20th, 21st, February and 14th, 15th and 16th March 2017

Employment Judge: Ms L Doherty

Mr N Brett	**Claimant** **Represented by:** **Mr Booth – Consultant**
Sky In Home Services Limited	**Respondent** **Represented by:** **Ms McCreath – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was not unfairly dismissed, and the claim is dismissed.

REASONS

1. In a claim lodged on 1 September 2016 the claimant presents a complaint of unfair dismissal under **Section 95(1)(c)** of the Employment Rights Act 1996 (ERA), and a claim of unauthorised deduction of wages. The later claim was withdrawn, and the claim before the Tribunal is one of constructive unfair dismissal only.

2. The breaches of contract relied upon by the claimant, as specified in the Additional Information (A.I.) supplied in response to an Order from the Tribunal are as follows:-

(1) It is said that the respondents breached the implied term of mutual trust and confidence on account of the length of the claimant's suspension, and the fact that the claimant had not been supplied with sufficient information about his suspension and disciplinary process. In this connection reference is made to the respondent's Disciplinary Code (Page 77) which under the Heading *Investigation* which states "*We'll carry out the investigation as quickly as we can."*

(2) The second breach of trust and confidence alleged is that the claimant was subjected to a witch hunt by virtue of the application of the disciplinary process, and that the claimant had not breached any of the respondents's rules or acted outwith normal operational procedure which justified the respondent's concerns about his performance or conduct.

The claimant identified two other breaches (failure to deal with the grievance within a reasonable period and loss of ability to earn bonus as a result of suspension) in his A.I. however Mr Booth confirmed in submissions that these were not being relied upon.

3. It is the claimant's position that each of the breaches amounts to a material breach justifying the claimant's resignation, and that he resigned in response to those breaches.

4. The respondents deny that there was any breach of contract, or that the claimant resigned in response to any breach.

5. The claimant gave evidence on his own behalf, and for the respondent's evidence was given by Craig O'Leary, Team Manager; Christine Croke, Regional Manager Field Operations, who dealt with the claimant's grievance; and Steven Allen, who dealt with his grievance appeal.

6. Both parties lodged a joint bundle of documents.

Findings in Fact

7. From the information before it the Tribunal made the following findings in fact.

8. The respondents are a large organisation engaged in the supply of television services. They operate throughout the UK. Part of the respondent's operation involves installation work, including the installation of satellite dishes.

9. The claimant, whose date of birth is 10 July 1978 was employed by the respondents as an Engineer with Field Operations. His employment commenced on 2 February 2009.

10. It was agreed that the claimant's gross salary prior to his dismissal was £673.96 per week, and that his net weekly salary, to include bonus, was £474.15 per week. The claimant could earn bonus, in addition to his basic salary. Bonus was assessed broadly on the basis of performance. The respondents have a policy which deals with the payment of bonus in circumstances where an employee is suspended, (document 100A).

11. The claimant's statement of terms and conditions is produced at Page 89 of the bundle. It provides *inter alia:*

> At Clause 19 under the heading *Other Employment - if you wish to take up other employment or engage in other business, permission must first be obtained from your Line Manager.*
>
> *Health and Safety – you are responsible for the safety of yourself, other employees, contractors and visitors whilst at work. This includes compliance with all company safety procedures and any special regulations relating to your immediate workplace."*

12. The claimant's job comprised primarily of field work, which involved visiting the homes of customers in order to provide installation services or repairs. The claimant worked as part of a team of engineers, but was generally

unaccompanied when he visited a customer's premises. Work was allocated to the claimant via an i-pad supplied by the respondent.

13. The respondents have a number of policies and procedures in place, including a Conduct Policy. This policy provides under the heading *Investigation;* "*depending on the nature of the problem either your manager or another manager will investigate. The investigation helps us find out if we need to take the matter any further. We will carry out the investigation as quickly as we can.'*

14. Under the heading *Suspension* the policy provides "*Suspension isn't disciplinary action and is only necessary in some rare cases. Examples of when we might need to suspend you from work are:*

- *A crime might have been committed.*
- *There is a risk to the health and safety of Sky people or anyone else.*
- *The misconduct could potentially damage our interests.*
- *You being at work may impact on our ability to conduct the investigation…*

If you are suspended from work, we will write to you to confirm the situation so that you understand why and what you need to do."

15. Examples of offences are given in the policy which should include *inter alia; "not following established duties, routines, methods of procedure or a breach of our rules."*

16. The policy provides non-exhausted list of examples of gross misconduct, which includes: *Serious breaches of the terms and conditions of your employment and/or Sky rules and policies; Any action that puts you or anyone else's health and safety at risk; any action or behaviour likely to damage the reputation of sky or any associated Company or any of its directors or people.*

17. The respondents take Health and Safety seriously. Maintaining health and safety of its employees is a very important consideration for the respondents, and the claimant was aware of that. They invest in H& S training and materials for engineers. Braches of Health and Safety are treated seriously and can result in disciplinary action, up to dismissal.

18. The claimant's training record is produced at Document 99. He received residential training on Health and Safety in 2009 around the time his employment commenced. He undertook training on Health and Safety on 28 August 2011 (Keeping Yourself Safe,) and on Manual Handling Risk Assessment and Combination Ladders, on 15 May 2013.

19. The claimant was issued with numerous health and safety guides, including "*How he used ladders".* A number of these are produced in the bundle, including, at Document 14 "*A Guide to the Lyte Combination Ladder",* and at Document 15, "*Ladder Working Instruction",* and at Document 16, "*Escalation Process Brief, at Document* 17, "*Use of Existing Dish Bracketry to Secure Ladders".*

20. The materials which the claimant received on the *Safe Use of Combination Ladders,* at Page 49 stated that in order to use these ladders, an eyebolt and a strap must be used for any work other than cable clipping.

21. The Ladder Working Introduction (the Introduction) which the claimant received (Page 59) provides that "*when setting up ladders you **MUST** ensure that all elements of the Safety System of Work are in place before climbing."* The safe systems of work are identified as eyebolt and strap, plus Microlite, plus Laddermate, plus Y-Hang.

22. The introduction includes a page on Ladder Hierarchy, (Page 63), and at Page 70, provides for what is referred to as an Escalation Procedure.

23. The Escalation Procedure (escalation) is designed to deal with situations where there is a question about health and safety. It sets out what the employee should do if he has such a question. The escalation provides that the employee should first consult his training material. It provides that if

employee cannot determine a suitable answer, then his team manager is the next point of contact. It then provides that if the team manager is unavailable, the next point of contact is the Buddy Team Manager, and if the Buddy Team Manager is unavailable or cannot answer the question, then the claim should be escalated to the Regional Health & Safety Advisor, and details of those Health & Safety Advisors are provided.

24. The claimant was aware of the escalation process, and regularly escalated queries to his team manager or acting team manager. He was unaware of the identity of his Buddy Team Manager, and never escalated a query to a Regional Health & Safety Advisor.

25. The claimant's training materials also contained a 'Guide on the Use of Existing Dish Bracketing to Secure Ladders' (Page 74 to 76). The Guide provides that "*On each occasion that this procedure is to be used a full risk assessment must be carried out, specifically in the areas noted within the document and the intention to do so escalated to your Team Manager or Buddy Manager."*

26. The claimant was aware of these training materials, and was aware of the need to escalate in the circumstances identified in the training materials, including when attaching a ladder to existing bracketry.

27. The claimant was aware that engineers should carry out a risk assessment of the jobs they perform on their work i-pad.

28. The respondents attach a great deal of importance to customer service. In terms of the claimant's job as a Field Engineer, there were 'Expectations', referred to as 'Team Expectations', of his performance. These were e-mailed to the claimant by Mr O'Leary, the claimant's Team Manager on 20 November 2015 (page 415), and included an expectations on customer service to the effect that that every customer deserves "*the best experience we can offer, and to do this we have to provide great service and a consistency of care".*

29. Under the heading RFT (Right First Time), the Expectations provide; *that if a dish (a satellite dish) needs changed, change it, if cables need replaced, replace it.* ***Quality work****!*

30. The claimant was aware of this Expectation.

31. Quality of work issues can be treated as training or coaching issue depending o n the circumstances.

32. The claimant was a good performer, and consistently scored well against the respondent's targets. He was aware of the respondent's emphasis on customer service, and of the Team Expectations.

33. Prior to November 2015 the claimant was employed in a team of engineers, managed by a Team Manager, Mr Ally Chapman.

34. At some stage a member of this team raised a grievance against Mr Chapman, and the claimant was approached by a Ms Turnbull of HR and asked for a statement. The claimant declined to give a statement, as he was concerned about repercussions of him doing so.

35. The claimant was transferred from Mr Chapman's team, to Mr O'Leary's team on 21 November 2015. The decision to transfer engineers from one team to another was taken by Ms Croke for operational reasons in order to rebalance the ratio of engineers with Team Managers.

36. It had been anticipated that another member of Mr Chapman's team would transfer to Mr O'Leary's team, but the individual earmarked for transfer left the respondents employment and the claimant was transferred in his place. Mr O'Leary asked for the claimant as he believed him to be a good engineer. Mr O'Leary and Mr Chapman's teams worked together as a 'pod' and so Mr O'Leary had previous experience of the claimant and had met him at work.

37. The claimant was given very short notice of the transfer. He was telephoned by Mr Chapman during his day off and advised he was to transfer the

following day. This was different to the respondent's normal practice, where engineers are generally given some weeks' notice of an intended transfer.

38. The claimant did not meet with Mr O'Leary on his transfer, but was in e-mail correspondence with him. Two other engineers transferred at the same time as the claimant into Mr O'Leary's team. He believed them to be less experienced than the claimant, and so focussed his attention on them. As he knew the claimant, he did not consider meeting with him was a priority. The first time after the transfer that the claimant met Mr O'Leary, was at a Christmas night out.

39. It is part of the respondent's practice that managers will check on jobs carried out by field engineers.

40. The respondent's aspiration is that the field engineer will complete the job correctly on the first occasion (Right First Time- RFT), and they apply a penalty in respect of bonus in circumstances where a re-visit is required within a certain period. If a revisit is required then a Revisit report is produced which comments on the reason why the revisit was necessary.

41. A Revisit report came to Mr O'Leary attention which suggested to him that the claimant had failed to provide the appropriate level of customer service in that he had failed to replace a rusty satellite dish. He decided to carry out 4 other post checks on 22nd January in order to ascertain if this was a one off. He was not satisfied having done so that it was, and so he asked the claimant to attend an investigatory meeting.

42. Mr O'Leary was accompanied by Mr Chapman when carrying out these post checks. This was not an unusual practice for team managers to adopt when carrying out post checks, as they considered it added to the efficiency of the process (one person could drive and the other fill out the paper work)

43. On 23 January 2016 the claimant attended an investigatory meeting with Mr. O'Leary. Handwritten notes of this investigation are produced at Page 201 to 212 in the bundle.

44. The claimant was shown the Revisit / audit reports during the investigatory meeting. These reports were an audit of the jobs which the respondents believed the claimant had performed, and contained photographs of the premises at which the jobs had been carried out.

45. At the investigatory meeting Mr O'Leary firstly asked the claimant about a Job Number 126252892 he carried out on 7 January 2016. He was asked the claimant to explain why another engineer had to attend to replace a rusty satellite dish and a broken cable. The claimant stated that he had access to the dish, but he did not notice it was rusty because of the rain. Mr O'Leary did not accept this. The claimant said that was obviously his fault as he had not paid attention and hadn't noticed the cable had been broken. In the course of the discussion about this job, the claimant confirmed that he knew the full checks which should be carried out, which were dish, cable, LWB box, and full system check.

46. Mr O'Leary asked the claimant about a second job, Job No 126370334, carried out on 17 January 2016. The check showed that the cable entry was not sealed. The claimant was asked to explain what he did at this job. The claimant said that the system had recently been installed by another installer. He said he had spoken to the customer regarding the cabling. He accepted that he had not carried out a full system check and said that the job details were just that the customer wanted the system to be moved. He accepted that the customer had not received the service which she could have expected. The claimant confirmed that he was aware of the Expectations in the team that every dish would be assessed. He was asked by Mr O'Leary why he chose not to provide this, and why he failed to escalate it to him, and the claimant answered to the effect it was stupidity. Mr O'Leary claimant accepted the issue would have been picked up if he had carried out a full check.

47. The claimant was then asked about a third job performed on Job No 126254533, performed on 8 January 2016. The check showed the cables having been left in an untidy state. The claimant said he thought he had

replaced the dish "*but he genuinely could not remember*." The claimant was then asked by Mr O'Leary why the cables were not tidied up behind the dish. The claimant said he didn't know, and he accepted he should have done this "*a bit better'* and he agreed that the customer could have recieved better service.

48. Mr O'Leary then asked the claimant about a Job Number 126254347, carried out on 8 January 2016. The check on this job suggested that the claimant had not used an eyebolt. The claimant said he had replaced the dish. Mr O'Leary asked him how he accessed the dish. The claimant said he though he had stood on something but couldn't remember what it was. He said it was perhaps his toolbox. He then said he thought it was a chair. Mr O'Leary told him the customer said that he had his ladder out, and changed the dish.

49. Mr O'Leary asked him why he stood on a chair, and the claimant said it was handy. He accepted it was not best health and safety practice, or in line with Sky's Health and Safety Policy. Mr O'Leary asked the claimant if an eyebolt (for the ladder) was drilled; the claimant said it wasn't. He confirmed that he knew what the set up for the job should have been, and explained the reason he did not do this, was because he was rushing. When asked why he didn't escalate it he said he didn't know. The claimant accepted he knew he should not have done what he did, and that he was cutting a corner and not following procedure, and said it would not happen again. He accepted that he fully understood the respondent's Health and Safety Policy, and said he made an error of judgment.

50. Mr O'Leary adjourned the meeting around 15 minutes. During the recess the claimant reflected and concluded that he had accessed the dish using a combi ladder strapped to the bracketry of an existing satellite dish.

51. On resumption of the meeting he asked the claimant why he put himself at risk by using a chair to access a dish. The claimant said he wasn't sure if it was a chair, and that he thought he was used a combi ladder extended with a strap on to a bracket.

52. Mr O'Leary asked the claimant if he had phoned a colleague during the recess, as this was a position which had been advanced by another employee facing disciplinary charges in the claimant's team. This employee (a Mr Devlin) had not been dismissed because the respondents concluded there was a training issue. The claimant denied that he had, and showed Mr O'Leary his phone.

53. The claimant said that it was standard policy to use this method if you cannot set an eyebolt low level. He was asked by Mr O'Leary what he should have done this before doing this, the claimant answered that he should have escalated it. Mr O'Leary asked him why he had not done so. The claimant explained that he honestly did not think that it would be a massive problem, but he accepted he should have escalated it.

54. The claimant was asked if he usually used this procedure. He accepted in the course of the meeting that he knew an eyebolt should be used every time he accesses a dish.

55. Mr O'Leary adjourned the meeting again and when reconvened he advised the claimant he considered there was a case to answer under the disciplinary process in relation to poor workmanship and customer service on a number of jobs, and health and safety issues on the last job discussed.

56. The claimant was given time to look at the notes of the meeting, and he signed a statement to the effect that he had read and agreed the notes and that they were an accurate account of the meeting (Page 212). The claimant was not given a copy of the notes away with him after the meeting.

57. The claimant was suspended from work. A letter was sent to the claimant on 26 January 2016 (Page 218) stating *inter alia*:-

> *"Following our recent meeting on 23/01/2016 when I advised you the allegations had been made that a Health and Safety breach at job no 126254347 specifically failing to use an eyebolt.*

I am writing to confirm that you are suspended, without prejudice, from your duties with immediate effect until further notice in order for us to carry out a full investigation. We will endeavour to carry out this investigation within two weeks of your suspension.

Due to the serious nature of the allegation a full investigation will be carried out. If the investigation is ongoing it may be necessary to extend the suspension period past two weeks. Should this be the case, we will confirm this to you in writing. Should the suspension be lifted at any time we will contact you to discuss your return to work.

During the period of your suspension you will remain on full pay. This is calculated at your basic pay plus an average of any commission/bonus/incentives payments over the lat 12 weeks."

58. During the suspension the claimant was paid basic pay, and commission pay, assessed on the basis of the respondent's policy for payment of commission during suspension.

59. Mr O'Leary decided to carry out some more post checks of the claims work, and carried out three further post checks for jobs performed. He did this on the basis that the earlier post checks were triggered by quality of work issues, but he carried out these checks part of his disciplinary investigation which included H&S issues. The checks were carried out on 26th and 29th January. Mr O'Leary believed having done these checks, that that on one of the jobs no eyebolt had been used, and that on the other two there were quality of work issues.

60. The claimant was asked to attend a second meeting with Mr O'Leary on 3rd February 2016. The notes of this are produced at Page 213 to 217. The claimant was asked about a Job Number 1262352033, which Mr O'Leary said had been carried out by him on 7 January 2016. Mr O'Leary asked the claimant why no eyebolt had been used on that job. The claimant said he was not sure if he had carried out this job. He accepted that he knew an

eyebolt should be used, and if it cannot be used, it should be escalated. He accepted he had H&S training and an H&S manual.

61. At the end of the meeting Mr O'Leary told the claimant that he would have to carry on with his investigation but he would conclude it as soon as he could.

62. Mr O'Leary wrote to the claimant on 3 February (Page 247).

63. In that letter Mr O'Leary referred to his earlier correspondence of 26 January, when the claimant was advised that the respondents would endeavour to carry out the investigation within two weeks of his suspension. Mr O'Leary advised the investigation was still ongoing at present however it was hoped to conclude soon. The letter stated; "*I will review the suspension again on 17/02/2016 and will be in contact with you again on or around that date."*

64. At the point when Mr O'Leary interviewed the claimant on 3 February he had a TM Field Companion Report which suggested that work had been carried out on site in a way which was not complaint with the respondent's Health and Safety Policy, in particular, that there had been no eyebolt used to secure a ladder in order to access the satellite dish. The claimant's work record indicated that he was the person who was responsible for performing this job, albeit the claimant could not recall having carried out the job.

65. Mr O'Leary prepared an investigation pack, which he submitted to the respondents Employee Relations (ER) team on 5th February. The propose of this was to allow ER to review the information and give advise. The ER representative was a Mr Maddock. Mr O'Leary phoned him on a number of occasions but was unable to speak to him. Unknown to Mr O'Leary, Mr Maddock was working a reduced shift pattern because of family illness.

66. On 15th February Mr Maddock emailed Mr O'Leary with his comments (257A). This flagged that the first three allegations were workmanship issues and suggested that Mr O'Leary would have to consider of they were

conduct issues, or if they were issues which would normally be dealt with by training.

67. Mr O'Leary prepared the disciplinary pack in its final for and sent it to ER on 21st February. He took the view that in addition to the H&S issues the number of instances of poor customer service moved matters from a capability/ training coaching issue, to a conduct issue.

68. On or around 12h February, while still suspended the claimant became ill with stress. He attended his GP and obtained a fitness certificate. The claimant was signed off work with stress from 12 February.

69. The claimant e-mailed Mr O'Leary on 12 February confirming this, and advising he had a sickness certificate for two weeks. He also phoned Mr O'Leary. Mr O'Leary returning the claimant's telephone call, and spoke to him on 15 February. He told him that his suspension was still ongoing and that he was still continuing with his investigation. He also asked the claimant to phone in each week of his sickness.

70. Mr O'Leary e-mailed him on 15 February referring to their telephone call, and advising that he should update him on a Monday and Friday each week of his sickness (Page 257B).

71. The claimant telephoned Mr O'Leary on the 22nd of February, but was unable to speak to him.

72. Mr O'Leary telephoned the claimant on the 27th of February but was unable to speak to him. He left a message on his answering machine. When he could not get hold of the claimant, Mr O'Leary contacted ER, who advised him that the claimant had been in touch with them.

73. Mr O'Leary became ill and was absent from work from the 28th of February till 3rd March. In his absence Mr Chapman and the other pod team managers took on responsibility for his team. The claimant did not attempt to contact Mr Chapman or any of the other pod team managers, and they did not attempt to contact him.

74. On 15 February, the claimant sent a letter of grievance to his Regional Manger Field Operations, Christine Croke (Page 248 to 249). The claimant indicated he wished to raise a grievance against Mr O'Leary, and Mr. Chapman on the grounds that he felt they were bullying him at work and failure to follow the policies laid down by the respondent.

75. The claimant raised a number of points in his grievance, including that he had been transferred from Mr Chapman to Mr O'Leary's team at very short notice, and had never had an introductory meeting or face to face meeting with Mr O'Leary even though he was sent an e-mail by him on 20 November, saying *"I will speak to you next week".*

76. The claimant also complained about the fact that he was currently under suspension after being accused of breaking health and safety at Job No 126254647 even though he had explained that he used a procedure widely used in the field.

77. The claimant complained that Mr. O'Leary failed to correctly follow the investigation policy, and failed to give him adequate notice of meetings, and to advise him what the meetings were about. He also complained about the manner in which Mr O'Leary acted during the first investigatory meeting. He complained that when he gave the correct answers Mr O'Leary started to tut and shake his head as if he was angry, and that he accused the claimant of phoning someone when he was out of the room; the claimant had to show him his phone to establish that he had not made a call.

78. The claimant complained that Mr O'Leary gave him the impression that the he was going to be suspended no matter what he said, and that he failed to write down everything which was discussed, as it benefitted the claimant's position.

79. The claimant also complained that in the investigation policy it said that the suspension was a last resort for very serious breaches.

80. The claimant stated that he was told at the last team meeting it was announced that there was a zero tolerance policy on health and safety, and

complained that this was the first time that this been mentioned, and that he had not received any documentation or been sent any documentation to say he acknowledged this was the practice. The claimant also stated he understood the practice of attaching to a dish bracket was no longer to be followed, but this was again discussed after his suspension.

81. The claimant complained that he was being targeted by Mr O'Leary and Alistair Chapman for constructive dismissal due to a past grievance against Alistair Chapman. He stated, "*I also know the correct procedure had not been followed. I have currently been signed off work with work related stress due to the continued pressure put on me by this investigation and suspension.*"

82. Ms Croke was on holiday when the email on 15th February. On 19 February the claimant e-mailed her acknowledging this, but chasing her for a response to his grievance. Ms Croke replied on 19 February acknowledging the grievance and advising the claimant she would be in touch in due course. (Page 258/259). A meeting was arranged for 26th February. The claimant was invited to attend the meeting by letter in which he was advised he could be accompanied by a representative (page 550).

83. Mr Croke was not involved in the disciplinary proceedings. It was her view, having taken advice from ER that because of the nature of some of the complaints made by the claimant in the grievance about how the disciplinary investigation had been conducted, that the conduct proceedings should be put on hold until the grievance was dealt with.

84. Ms Croke spoke to the claimant on the telephone on a number of occasions between 19th and 26th February. She wanted to make sure that the claimant wanted to proceed with the grievance. She advised him that as part of the grievance concerned the manager who had carried out the disciplinary investigation, the conduct proceedings would be put on hold until such times as the grievance had been dealt with.

85. The claimant regularly expressed to Mr Croke in these telephone calls how stressful he found the situation and that he was keen to proceed, and she continued to advise him that the conduct proceedings would be put on hold pending the resolution of the grievance.

86. The points raised by the claimant in his grievance were discussed in the course of the meeting of 26th February. After the meeting notes were produced by the note taker which the claimant considered to be incomprehensible (341 /374). Mr Croke agreed the notes were not satisfactory, and therefore arranged for a further meeting on 4 March. The claimant was not sent a formal invitation to this meeting.

87. At this meeting Mr Croke went through each part of the grievance and the notes and sought to agree with the claimant what he has said. Ms Croke typed notes of the meeting (270/272) and emailed these to the claimant on the 4th of March. Her email asked the claimant '*Can you review the notes as discussed, advise of any further amendments or conform that they are accurate.*

88. The claimant replied by email on the 4th of March stating;' *Have looked over all the notes and everything looks ok, happy to proceed.*

89. In the course of the meetings of 26th February and 4th March Ms Croke advised the claimant that relation to his suspension, sometimes the process can take longer than everyone would like, but that his conduct case could not proceed until she concluded the grievance, so that would cause further delay. She assured him she would do all she could to bring it to a conclusion as quickly as she could. This is noted in the minutes of the 4th March meeting (page 344).

90. Ms Croke advised the claimant that she could not discuss the content of the conduct case against him but could only discuss the conduct of the managers, which the claimant had complained about.

91. Mr Croke considered she required to speak both with Mr O'Leary and Mr Chapman to investigate the claimant's grievance. Mr Chapman was on

holiday, and Mr O'Leary was off sick, which caused Ms Croke some delay in completing the grievance.

92. The claimant e-mailed Mr Croke on 14 March asking that about a time line agreement and how long a grievance would take to complete. He stated;

93. "*I feel that my length of absence is now potentially a fundamental breach of contractual agreement. I feel the company has a duty of care to provide this to me and if not then I may have to pursue a constructive dismissal claim against BSKYB.*"

94. Ms Croke responded to the claimant on 15 March advising that she could not provide a time line for fully responding to the grievance as she needed to speak with individuals who were currently on holiday and therefore not available. She advised him that until she spoke to these individuals she could not progress but she assured him that she would respond as quickly as she could.

95. Ms Croke carried out further investigations. She spoke with Mr O'Leary on 18 March, and notes from the meeting are produced at Page 373.

96. Ms Croke completed her grievance investigation, and sent her conclusion on the claimant's grievance to him in a letter dated 21 March (Page 409 to 414). This letter covered sixteen points raised by the claimant in his grievance. Ms Croke gave reasons for not upholding the sixteen points.

97. The claimant was advised that he had the right to appeal against the grievance outcome to Mr Allen within seven day.

98. The grievance having been completed, the respondents wrote to the claimant asking to attend a Conduct hearing in a letter dated 23 March 2016 (Page 443).

99. The Conduct letter outlined five charges, three of which related to a failure to provide an acceptable level of customer service, and two of which related to breach of health and safety procedures for safe ladder working, specifically by failing to use an eyebolt on accessing a dish.

100. The claimant was advised that if the allegations were upheld, it would constitute gross misconduct, which may lead to his dismissal.

101. The claimant was provided with the documentation which the respondents relied on for the purposes of the Conduct Hearing. He was advised of his right to be accompanied to this meeting and to call witnesses.

102. The claimant appealed against the grievance outcome to Mr Steve Allen, the Head of Field Services North in an email of 25th March (page 450). He stated that he had a conduct meeting to attend on the 29th March, but that he felt that the his grievance had a bearing on the case he had to answer. He said he wanted to sit down with someone in upper management to go through all the points, and that he felt it would be unfair to expect him to go to his conduct meeting until this had been resolved.

103. Mr Allen consulted with ER and a decision was made to postpone the conduct meeting, and the claimant was advised of this on 28th March.

104. Mr Allen wrote to the claimant on 29 March 2016 (Page 453) asking him to attend a Grievance Appeal meeting on 14/04/2016 summarising the grounds of the claimant's appeal against the grievance outcome as*; had not been handled professionally and the relevant points had not been investigated properly.*

105. On 5 April the claimant decided he was going to resign. He e-mailed Steve Allen (Page 459) stating "*After much careful thought I wish to hand in my resignation. I will still come and meet with you on the 14th but wish this to be my final day with BskyB. I will come to the meeting with a formally typed letter of resignation but if you could get the proceedings started to allow my departure I would be much appreciated."*

106. The claimant attended the Appeal hearing on 14 April, and gave Mr Allen a letter (Page 460) in the following terms:-

"I *am writing to inform you that I am resigning from BskyB with immediate effect. Please accept this as my formal letter of resignation and a termination of our contract.*

I feel that I am left with no choice but to resign in light of the following:

a. *fundamental breach of contract, I was transferred teams with one day's notice and then targeted constructive dismissal. I have raised these concerns to a regional manager to no avail.*

b. *breach of trust and confidence, I feel that two managers have purposely sought to discredit me and force my departure from the company.*

c. *I feel that the handling of my grievance by Christine Croke has been insufficient, I had to have two meetings to get the notes right. Having read the reply to my grievance, Christine has not conducted a full investigation and just relied on the answers given to her by the two managers I raised the grievance against.*

I consider this to be a fundamental/unreasonable breach of the contract on your part.

I appreciate the time and energy which you have invested in training me. I believe that the skills which I have learned will serve me well in the future. I will do my very best to ensure a smooth transition upon my departure. I look forward to hearing from you."

107. Mr Allen conducted the Appeal hearing with the claimant on 14 April, notes of which are produced at Page 463. Mr Allen carried out extensive investigations with the witnesses and Ms Croke thereafter. The outcome of the appeal was some of the concerns were upheld, but the grievance was not upheld in full and the majority of the complaints were not upheld, including the complaints about the conduct of the mangers in the investigatory meetings, or being targeted for unfair dismissal.

108. One of the matters which were upheld was that the notice period for the claimant moving teams did not follow best practice. Mr Allen also concluded that during the period between the claimant being suspended and his contact with Ms Croke, it seemed that there was a breakdown in communication between the claimant and Ally Chapman. Mr Allen agreed that Mr Chapman should have been in touch with the claimant regularly throughout his absence but he also highlighted that the claimant had a joint responsibility to make contact with his manager as stated in the absence policy.

109. The claimant took up other employment commencing on 4 April. He did so without obtaining permission from the respondents. The claimant's income from that employment is £325.79 per week.

Submissions

Claimant's Submissions

1. Mr Booth for the claimant made oral submissions. He clarified the basis on which the claim was advanced and which represented a departure to some extent from the basis of the claim as set out in the Additional Information (AI) supplied by the claimant in advance of the hearing, (Page 38/39).

2. Mr Booth referred to Paragraph 1 of that AI and submitted there was a breach of the implied term of mutual trust and confidence in that it is said that the respondent did not deal with the disciplinary allegations against the claimant within a reasonable period, and that the claimant having been suspended from 23 January 2016 and then "left in the dark" despite repeated attempts by him to progress matters.

3. Mr Booth confirmed the claimant also relies upon a breach of the implied term of mutual trust and confidence in that the disciplinary allegations against the claimant amounted to a witch-hunt.

4. Mr Booth confirmed he was no longer relying upon the length of time which the respondents took to conduct the grievance procedure, or the basis upon

which the claimant was paid bonus and commission payments and breaches of the implied term of mutual trust and confidence.

5. Mr Booth took the Tribunal to the tests which the claimant needed to meet in order to be successful in a complaint of constructive unfair dismissal.

6. Mr Booth submitted the claimant transferred to Mr O'Leary's team in November 2015. He carried out some work in January 2016 at a customer's property which eventually led to an investigation and recommendation of conduct proceedings, a grievance procedure, and a grievance appeal. The claimant was instructed to attend a conduct hearing on 29 March to face five charges, three of which were related to capability, and two of which related to health and safety breaches. While Mr Booth accepted that the disciplinary procedure was incorporated into the claimant's contractual terms, he submitted the claimant had a reasonable expectation as to how the disciplinary procedure would be applied and the respondents failed to apply it reasonably, which amounted to a breach of the implied term of mutual trust and confidence.

7. The claimant's expectations were based on what was stated in the procedures, and the claimant expected the matter to be dealt with in compliance with those procedures. The failure to adhere to the stated procedure is capable of amounting to a breach of the implied term of mutual trust and confidence and Mr Booth referred to the case of *Blackburn v Aldi Stores UKEAT/0185/12/JOJ* as authority for the proposition that a failure to adhere to a grievance procedure can amount to a breach of the implied term. This he submitted applied equally to a disciplinary procedure. In that case the EAT considered the implied term was compounded in that its conduct breached the provisions of the ACAS Code. In this case the claimant was suspended on 23 January, and was then suspended until further notice by letter dated 3 February. In that letter the claimant was told that the suspension would be reviewed on 17 February. There was however no further contact with the claimant.

8. The lack of contact in respect of Mr Chapman and Mr O'Leary was a continuing theme when Mr O'Leary was off Mr Chapman was covering for him, but neither bothered to contact the claimant and Mr Booth submitted this was unacceptable, taking into account the size of the respondent's undertaking. He submitted this was compounded by the fact the claimant was absent with stress and this must have been a very concerning time for him. Mr Booth pointed to the fact that Mr Allan at the appeal stage upheld the claimant's grievance about the lack of contact.

9. Mr Booth submitted that the claimant was left in the dark for a period of around 4 weeks and the respondent's position was contradictory. On the one hand they were saying they would keep in contact, and on the other hand they advanced justification for lack of contact in that Mr O'Leary was off, and Mr Chapman did not deal with HR issues when covering his team.

10. Mr Booth then dealt with Ms Croke's evidence and he submitted that her evidence to the effect that she advised the claimant that the conduct proceedings were to be delayed and he submitted her evidence to the effect that she told him on numerous occasions that this was the case was incredibility. There was no written confirmation of the position.

11. Mr Booth also submitted that the notes of the meetings of 29 February and 4 March did not support the position that she advised the claimant of this position. Firstly there was no record of it at all in the notes of 29 February.

12. There is a record in the minutes of the meeting of 4 March to the effect that Ms Croke told the claimant this however the claimant's response related to something entirely different, which Mr Booth submitted indicated that reference to the conduct proceedings had been inserted in the minutes, but had not actually been spoken about. In support of this, the claimant did not recall being told by about the delay and his evidence was that he found out about the fact that the conduct proceedings were delayed pending the grievance procedure, on 16 March. During the whole period the claimant was pressing ahead and he wanted to get things progressed.

13. Furthermore, the respondents were not under any obligation to deal with the grievance before the conduct proceedings. There is no statutory obligation, or obligation in terms of the ACAS code to do so, and had they decided to go down this route they should have got the claimant's agreement to do so. There was no reason why both procedures could not have run concurrently.

14. Mr Booth submitted that the real reason for the delay was the impact this would have on the claimant. Mr Booth submitted the claimant was a good worker, and was proud of his job. After 10 years he resigned. Mr Booth submitted that the manner of his resignation was a bit confused, but the fact that the claimant was stressed and confused had to be taken into account.

15. The claimant did not resign because he believed he was going to be dismissed and the Tribunal should accept his evidence on that point. The claimant had experience of other individuals who have not been dismissed who have been guilty of similar offences and therefore he did not expect to be dismissed. The claimant knew of another colleague, John Devlin had not been dismissed for similar health and safety breaches. There was a number of ways in which the respondents could have dealt with the issues such as coaching.

16. Mr Booth submitted that Mr O'Leary's evidence should not be regarded as credible or reliable. He submitted that Mr O'Leary was particularly aggressive under cross-examination and submitted that it was likely he would have been aggressive towards the claimant in the course of the investigatory meeting, it was credible, as the claimant suggested that Mr O'Leary had behaved as alleged by the claimant in the course of the investigatory meeting. In the circumstances Mr Booth submitted the claimant had been constructively dismissed and the claim should succeed.

Respondent's Submissions

17. Ms McCreath provided written submissions which she supplemented with oral submissions.

18. Ms McCreath took the Tribunal to the tests in a constructive dismissal claim, citing *Western Excavating (ECC) Ltd v Sharpe [1978] IRLR 27, and Malik v Bank of Credit* and *Commerce International SA [1997] IRLR 462.*

19. Ms McCreath dealt with each of the breaches relied upon by the claimant, and submitted the claim should not succeed. Firstly, in connection with the alleged delay in carrying out the disciplinary process she submitted that firstly the respondent's disciplinary procedure did not set a timescale for concluding the proceedings and simply stated that the investigations would be carried out as quickly as we can. In any event this procedure did not form part of the claimant's contract of employment. The respondents were made aware of an issue with the claimant's work on 13 January 2016. There was no disciplinary procedure at that stage but simply investigations. Mr O'Leary carried out further checks on 22 January, and the claimant attended a disciplinary investigation on 23 January. Further checks were carried out on 26 and 29 January and there was a second hearing on 3 February. Mr O'Leary then provided a draft investigation report and sent this to the respondent's HR team for review on 5 February. The report was finalised by 21 February, less than a month after the investigation commenced.

20. The claimant raised a grievance on 15 February and the allegations and the grievance overlapped significantly with the disciplinary procedure. The respondents took the decision to put the disciplinary procedure on hold, and Ms Croke first told the claimant about this during several phone calls she had with him between 17 and 29 February. There was a record of her telling the claimant this at the meeting of 4 March. The claimant admitted in evidence that Ms Croke understands was that at 4 March he was aware the disciplinary procedures were on hold.

21. The day after the grievance was concluded the claimant was invited to attend a conduct hearing however he appealed his grievance and requested the disciplinary proceedings be put on hold pending the outcome of the grievance appeal, and then resigned on 5 April.

22. It was reasonable for the respondents to put the conduct proceedings on hold pending the conclusion of the grievance procedure and there was no unreasonable delay in carrying out the investigation.

23. Furthermore Ms McCreath submitted the claimant was not "left in the dark". Mr O'Leary spoke with the claimant on 22 February and told him to call him weekly thereafter to update him on his absence, but the claimant did not do so. It was Mr O'Leary's evidence that he called and left a message for the claimant on 27 February but the claimant did not return his call. Mr O'Leary had contacted the respondents HR team who confirmed that the claimant had been in touch with them.

24. Ms Croke had spoken to the claimant on a number of occasions during this period.

25. Ms McCreath submitted that while the respondents and the claimant's evidence as to communications was in conflict she submitted that the respondent's position was to be preferred, and that the claimant's evidence was at best confused. The reason the claimant had been left in the dark this did not constitute a fundamental breach of contract on the basis that it did not meet the threefold test set out in *Malik*.

26. In relation to the allegation that the disciplinary allegations against the claimant amounted to a witch-hunt Ms McCreath submitted there was no evidence to support this. The evidence from Mr O'Leary was that all seven post checks he carried out revealed the claimant had made simple mistakes and had not provided the expected level of customer service. The claimant admitted this in the investigation meeting, and admitted that he had not followed health and safety regulations. Ms McCreath submitted that it was reasonable for the respondents to carry out a disciplinary investigation and that there is a clear basis for the allegations made against the claimant. The claimant accepted that he gave the answers which he did in the investigation meeting albeit he said he was under pressure, and these were the answers which Mr O'Leary took into account in determining whether a further investigation was necessary and whether the matter should proceed

to a disciplinary hearing. The claimant would have had the opportunity to put his version of events forward at the disciplinary hearing, but he resigned before this could take place.

27. The claimant accepted in evidence that given the nature of the allegations against him it was appropriate to suspend him. He accepted that other employees had been suspended for similar incidents. There was nothing to support the claimant's position that the disciplinary allegations would have blemished his reputation with the respondents and in evidence to support this, the respondent's witnesses spoke to the fact of there being no adverse consequences for the claimant.

28. Ms McCreath referred to the test of determining whether there has been a repudiatoray breach. That is looking at the circumstances objectively, from the perspective of a reasonable person in the position of the innocent party; the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract (*Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168).* She submitted that based on the evidence a reasonable person would not have reached the conclusion that the respondents had an intention to abandon performance of the claimant's contract of employment.

29. Ms McCreath submitted it was likely that the claimant resigned because he considered it was likely he would be dismissed in the event the disciplinary procedure went ahead, and he had obtained another job.

30. McCreath also submitted that the claimant had affirmed the contract, in that the claimant claims there was a delay in carrying out the disciplinary investigation and it was that delay, and not the outcome of those which led to his resignation. If that was genuinely the case, then the claimant should have resigned whilst the investigations were ongoing and by not doing so he affirmed the contract. In this regard Ms McCreath referred to the cases of *Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121* and *Fereday v South Staffordshire NHS Primary Trust UKEAT 0513/10.*

31. Ms McCreath argued in the alternative that if the Tribunal finds that the claimant was dismissed then dismissal would have been fair on the grounds of some other substantial reason (*Buckland v Bournemouth University) supra.* The respondents also submit the dismissal was fair on the grounds that the claimant committed a repudiatoray breach of contract by obtaining other employment whilst still employed by the respondent. Ms McCreath asked the Tribunal to prefer the evidence of the respondent's witnesses over that of the claimant.

32. In relation to compensation she submitted there should be a reduction on the basis of contributory fault, and submitted 100% would be appropriate. The repudiatoray conduct was a breach of the respondent's health and safety rules and failing to provide the expected level of customer service. The Tribunal should apply a reduction in the grounds of *Polkey.*

33. In the event the Tribunal concludes that there were a variety of reasons for the claimant's resignation but only one of them was in response to a repudiatoray breach of contract, then the respondents submitted that any compensation should be limited to the extent that the response is not the principal reason (*Wright v North Ayrshire Council [2014] ICR 77*).

34. In relation to compensation the Tribunal should take into account that the claimant was in employment from 4 to 14 April, and there should not be double counting for this period.

35. The claimant had failed to mitigate his loss and that he had not found a job which he earned the same income as he had with the respondents.

Note on Evidence

110. While a considerable amount was not in dispute in this case, there were some points of conflict, or matters where the credibility of the witnesses' evidence was an issue, which the Tribunal had to resolve. The Tribunal approached this by considering the credibility of the witnesses generally, and the particular points that were in issue.

The Claimant

111. The Tribunal formed the view that the claimant did not set out to mislead, however it formed the impression that his conviction that he had been wronged was so strong, that from time to time this coloured his evidence, and this on occasion impacted on his credibility.

Mr O'Leary

112. The Tribunal formed the impression that Mr O'Leary was in the main credible and reliable. It formed the view that he was likely to have been a robust manager, but it did not accept this gave rise to any adverse inferences in relation to the credibility or reliability of his evidence.

113. In relation to the notes which Mr O'Leary took in his meetings with the claimant, while the claimant complained about the attitude demonstrated by Mr O'Leary in the course of those meetings, and complained that everything said in the meetings which was not noted down, in particular matters which might have been helpful to him, he did not dispute the material elements of his response as noted by Mr O'Leary in the minutes.

114. In forming its view of Mr O'Leary's credibility, the Tribunal took into account that he made appropriate concessions, e.g. accepting without difficulty that he had challenged the claimant after a break of the first investigatory meeting on the basis that he believed he had telephoned a colleague because he changed his position the alleged health and safety breach.

Ms Croke

115. The Tribunal found Ms Croke to be a credible and reliable witness. It did not accept as submitted by Mr Booth that her evidence had lacked credibility, and was self-serving. The tribunal formed the impression that Ms Croke gave her evidence in a straightforward and consistent manner. She was able to clearly explain the steps that she had taken in conducting a grievance, and the conclusions which she had reached.

Mr Allen

116. The Tribunal found Mr Allen to be an entirely credible and reliable witness, in that his evidence was not challenged in cross-examination.

Issues of Fact

117. The first matter which the Tribunal considered was whether the health and safety, as said by the respondents, was a primary concern to them. The Tribunal did not understand the claimant to suggest that respondents did not take H&S seriously, however it was a plank of the respondent's case that H&S was of utmost importance to them.

118. The Tribunal was satisfied on the basis of the evidence of all the respondent's witnesses that health and safety of engineers working in the field, was of primary concern of the respondents.

119. Mr O'Leary and Ms Croke gave convincing evidence of this, which was supported by the extent of the training which the claimant had been provided with, and the documents before the Tribunal setting out health and safety guidelines.

120. The Tribunal also concluded the respondents took breaches of health and safety procedures seriously, and these were potentially disciplinary matters. This is the position set out in the respondent's Disciplinary Code.

121. There appeared to an issue in relation to how this was applied arising from how a health and safety breach by a field engineer in the claimant's team, a Mr Devlin, had been dealt with. Mr Devlin had been disciplined for attaching a ladder to the existing bracketry of a satellite dish, but had not used an eyebolt, but was not dismissed.

122. There was no dispute as far as the respondents are concerned this was the case. Mr O'Leary explained in evidence that Mr Devlin had transferred from a different company, and had not received the respondent's training briefing in relation to the case of eyebolts, and for that reason, it was not considered appropriate to impose a sanction of dismissal. The Tribunal understood the

claimant's position to be that this demonstrated that H& S breaches would not led to dismissal.

123. The Tribunal could not conclude that this was the case. Mr Devlin's circumstances demonstrate that the respondent treated each case on its own facts, but does not beyond that to support what was contended for by the claimant.

124. It was the claimant's position at his grievance that the procedure of attaching a ladder to the existing bracketry of a satellite dish was no longer to be followed was only discussed after his suspension.

125. The Tribunal was not persuaded that the respondents had ever adopted a practice of attaching a ladder to an existing bracketry of a satellite dish, but rather concluded that the respondents had in place comprehensive health and safety rules for the use of ladders, which indicated this practice was to be used only as a last resort, and only after it had been Escalated by the field engineer. Indeed the claimant accepted this to be the case in the course of the investigatory meetings.

126. The claimant suggested in cross-examination that he had said in the course of the investigatory meeting that he had tried to Escalate his failure to use an eyebolt. When it was put to him that this did not appear in the minutes of the investigatory meeting, he said that Mr O'Leary did not write everything down, and did not write everything down that was beneficial to the claimant.

127. The Tribunal however was not persuaded that the claimant had said that he tried to Escalate instead to use an eyebolt. In reaching this conclusion it took into account that the flavour of the claimant's evidence at the Tribunal Hearing, which was that attaching the ladder to the existing bracketry was an acceptable practice. This apparoach rendered it less likely that he would have tried to escalate it in the first place. Secondly, the claimant signed the minutes of the meeting, and the Tribunal considered it would not have been likely that he would have done so, had there been such an important omission from the notes.

128. The Tribunal did not find credible the claimant's evidence that he did not consider that it was at all likely that he would be dismissed. The Tribunal was satisfied that the respondents attached very significant weight to health and safety issues, and the claimant was aware of this, and therefore it was unlikely that he would not have considered dismissal a possibility as a result of health and safety breaches.

129. In any event the letter informing the claimant of the conduct meeting outlines that dismissal was a possibility, and therefore it could not be said that by that stage the claimant could not have been aware that dismissal was a potential consequence of a disciplinary procedure.

130. The Tribunal was also satisfied that the respondents took customer service seriously. The Claimant did not appear to dispute that this was the case, and such a conclusion is supported by the respondents operation of a scheme such as RFT, and the emphasis on post checking engineers work.

131. The next conflict was the reason why the claimant was moved, from Mr Chapman to Mr O'Leary's team. The claimant's position was that the move amounted to act of bullying, which linked to his involvement in an earlier grievance, which had been dealt with by Ms Turnbull.

132. There was undisputed evidence that the claimant had refused to become involved in giving evidence for that grievance, which rendered it unlikely in the Tribunal's view that he would have been bullied as a result of his involvement in the grievance in the first place.

133. Furthermore, there was very convincing evidence from Ms Croke and Mr O'Leary as to the reasons why the claimant was moved from Mr Chapman into Mr O'Leary's team. Ms Croke explained that it was for operational reasons, and that the quota of engineers had to be re-balanced from time to time with the team managers. She had directed that three engineers move from Mr Chapman to Mr O'Leary's team. Three engineers were identified for the move however one, a Mr Foster, left shortly before the move was to

take place; Mr O'Leary expressed a preference for the claimant to move into his team, as he considered the claimant to be a good engineer.

134. The Tribunal was satisfied that although the claimant was moved in short notice he expressed no objection to this, and the move from Mr Chapman to Mr O'Leary's team was for an entirely legitimate reason. It did not draw any adverse inference from the fact that Mr O'Leary did not meet with the claimant for some time face to face after the transfer, and was satisfied that the reason for this was that Mr O'Leary focused on the other transferees over the claimant, as he knew the claimant and was confident in his abilities.

135. The next area of conflict was in relation to the degree which Mr O'Leary contacted or spoke to the claimant after his suspension. There is no dispute that Mr O'Leary wrote to the claimant confirming he was suspended on 26 January (page 218) and that he wrote to him again on 3 February (page 247), advising that his suspension would be reviewed again on 17 February 2016.

136. There was also no dispute that the claimant e-mailed Mr O'Leary on 12 February confirming that he had been signed off work ill with stress, and Mr O'Leary responded to him on 15 February by e-mail asking the claimant to update him on Monday and Friday each week of his sickness (Page 257). Taking into account the terms of Mr O'Leary's e-mail to the claimant of 15 February, which refers to "*Following our conversation today"* the Tribunal was satisfied that Mr O'Leary had spoken to the claimant on or around 15 February.

137. There was a conflict between the claimant's evidence and Mr O'Leary's evidence as to the telephone contact between them thereafter.

138. Mr O'Leary said that the claimant called him on 21 or 22 February to update him on his condition, and he was expecting another call but did not receive this, and he phoned the claimant on 27 February. He left a message for the claimant but the claimant did not return his call. Mr O'Leary said he then got in touch with his ER Department, who had said the claimant had been in

touch with them, and Mr O'Leary did not pursue this further, as he himself was then off ill, from 3 to 23 March.

139. The claimant said he phoned Mr O'Leary on 22 February, but did not think that he spoke to him. He could not recall a voicemail left by Mr O'Leary on 27 February; he denied that Mr O'Leary had tried to call him on 27 February and left a message.

140. There was not a great deal between the evidence of Mr O'Leary, and the claimant. Mr O'Leary contacted the claimant on 15 February, and they both agreed the claimant got in contact on or around 22 February. The Tribunal did not consider a great deal turned on whether Mr O'Leary had phoned the claimant again on 27 February as he said, and left a message for the claimant, but on balance it was satisfied he had. In reaching this conclusion the Tribunal takes into account that Mr O'Leary was prepared to concede that he could not recall the exact date of telephone calls and that on one occasion he had not spoken to the claimant when he called. The fact that he was prepared to make these concessions enhanced his credibility with regard to the contact on the 27th.

141. Thereafter there was no dispute that neither Mr O'Leary, nor Mr Chapman, contacted the claimant.

142. The next conflict this Tribunal had to resolve, which was whether Mr Croke advised the claimant on telephone calls was between the 19 February and 29 February that the conduct proceedings would be put on hold pending the resolution of the grievance procedure.

143. The Tribunal found Ms Croke to be a credible and reliable witness, and was satisfied that she had advised the claimant that this was the case. Ms Croke gave convincing evidence as to the reasons why a decision was taken to do this, and that was because part of the claimant's grievance related to the way in which the manager had conducted the investigatory meeting. She also gave convincing evidence about the fact that she knew from her telephones calls with the claimant that he was very stressed about the

situation and wanted to push matters on. These circumstances rendered it likely that Ms Croke would have told the claimant that the conduct proceedings were on hold pending the resolution of the grievance, given that this was the decision which had been made, and it was going to delay the conduct case.

144. Furthermore, the Tribunal was satisfied that Ms Croke did advise the claimant of this when she met with him, and that on balance it was likely that she did so both on 29 February, and on 4 March.

145. Both Ms Croke and the claimant considered the minutes of the meeting on 29 February were inadequate and do not reflect all the conversation which had taken place between them, and therefore the Tribunal did not draw a great deal from the fact that this is not included in those minutes.

146. Ms Croke went over the minutes of the meeting of 29th February with the claimant again, and made sure that the revised minutes from the meeting of 4 March reflected what had been discussed between them in relation to the claimant's grievance. Thereafter, significantly, Ms Croke sent the claimant an e-mail with the revised notes, and that he responded, in an e-mail of 4 March (page 348) confirming that he had went over the notes, and everything "*looked okay".*

147. The claimant as said in cross-examination that he skimmed over the notes, and he mostly concentrated on what he was saying, however that the Tribunal did not find this position to be a plausible, in circumstances where the claimant had objected to the earlier notes on the basis that they did not represent what was discussed . The fact that he did so indicated he was not prepared to accept notes which were inaccurate. The fact that he confirmed that the notes from 4 March were accurate, supported the conclusion that Ms Croke had told him in the course of that meeting that the conduct of proceedings were on hold pending the resolution of the grievance procedure.

148. The Tribunal was not prepared to infer from the fact that Ms Croke had not confirmed this with the claimant in writing, that she had not told him that this was the case. It was the evidence of both Ms Croke and the claimant that there was constant e-mail and telephone communication between them, which supported the conclusion that there was ample opportunity for Ms Croke to tell the claimant what the position was in the course of her telephone conversation with him.

Consideration

149. **Section 94** of the ERA creates the right not to be unfairly dismissed. It is said that the claimant was dismissed in terms of **Section 95(1) (c)** of the ERA, which provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. The onus is on the claimant to prove that he was constructively dismissed. The test which must be satisfied by the claimant, is set out in the case of *Western Excavating (ECC) Limited v Sharp,* referred to by Ms McCreath is that:-

1). there must be a fundamental breach of contract by the respondent, which was either sufficiently important so as to justify the claimant's resignation or else the last in a series of incidents which would justify the claimant's resignation;

2). he must leave in response to the breach and not for some other unconnected reason; and

3). he must not delay too long in terminating the contract in response to the respondent's breach, otherwise he may be deemed to have waived the breach and have agreed to vary the contract and have agreed to vary the contract.

The claimant relies upon a breach of the implied term of mutual trust and confidence which is implied to all contracts of employment.

150. In considering whether it has been a breach of contract, implying the case of *Malik v Bank of Credit and Commerce International*, the Tribunal must consider whether the conduct relied on as constituting the breach such that it could be said to "*impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer."*

151. The test which the Tribunal has to apply is therefore an objective one.

152. The claimant relies on a number of acts, each of which is said to separately, to amount to a breach of the implied term. At the outset of the case Mr Booth identified a number of alleged breaches, but at the point of submission, confirmed the claimant was no longer relying the length of time which the respondents took to deal with his grievance procedure, or the allegations that there were matters outstanding in relation to the grievance at the date of his resignation, and that he was no longer relying upon an alleged breach of the implied term in that the claimant lost entitlement to earn bonus and commission during his suspension period.

153. It was also confirmed that the claimant was no longer relying upon any express breaches of contract. He does however continue to rely upon a breach of the implied term of mutual trust and confidence in that the respondents are said not to have dealt with the disciplinary allegations against the claimant within a reasonable time, and that the claimant was left in the dark after his initial suspension.

154. Mr Booth also continued to rely upon the breach of the implied term, in that it is said that the disciplinary allegations against the claimant amounted to a witch-hunt. What is said by the claimant is that he did not believe that he breached any of the respondent's rules or acted out with normal operational procedure which would justify the respondent's concern about his performance and the fact that he was subjected to a *witch-hunt* in this way amounted to a breach of the implied term of mutual trust and confidence.

155. The Tribunal considered firstly whether it could be said that the claimant's being subjected to disciplinary allegations amounted to a witch-hunt on the part of the respondents, in particular, at the instance of Mr O'Leary and Mr Chapman.

156. For the reasons given above, the Tribunal was not persuaded that there was anything sinister or untoward in the claimant transferring from Mr Chapman to Mr O'Leary's team. Indeed, it concluded that Mr O'Leary was genuinely pleased to have the claimant in his team on the basis that he was regarded as a good engineer.

157. Nor did the Tribunal draw any untoward inference from the fact that Mr O'Leary did not meet with the claimant face to face after the claimant transferred into his team. Mr O'Leary gave convincing evidence about the fact that he had three engineers transferred at the same time, one of whom was the claimant. He already knew the claimant, but the other two transferees had less experience, and therefore his focus was diverted towards to them. Mr O'Leary did not consider meeting with the claimant a priority, for the reason that he was confident in his ability. This appeared to the Tribunal to be an entirely plausible position, and it was not one from which it drew any adverse inference.

158. The Tribunal then considered how it was the allegations came about. Both the claimant and Mr O'Leary gave evidence to the effect that field engineers were subject to a scheme Right First Time (RFT) which was customer service focused, and that there were Expectations upon field engineers as to the level of customer service they provided. The claimant accepted he had seen the Team Expectations which Mr O'Leary sent dealing with this.

159. Mr O'Leary and the claimant both gave evidence about the fact that field engineers were regularly subjected to checks on their work by their team managers; and that a penalty in respect of bonus was meted out for a failure to meet the requirements of the RFT scheme.

160. The claimant was called to an investigatory meeting on 23 January by Mr O'Leary as a result of audit/ revisit reports of jobs which he had conducted on 7, 8 and 17 January.

161. The Tribunal considered if anything should be drawn from the fact that Mr O'Leary carried out three post checks after he received the revisit report flowing the claimant's RFT failure on a job.

162. Mr O'Leary explained that he did so in order to check if this was a one off, or if there were quality of work issues. In an environment where engineers are working unsupervised in the field and checks of their work is standard practice, and there is such emphasis on customer service, it could not be said that such an approach was out with the band of reasonable responses on the part of Mr O'Leary. Similarly, taking these factors into account, and the respondent's emphasis on H&S, it could not be said that it was unreasonable for Mr O'Leary to have carried out further checks after the H&S issue came to light, as part of his disciplinary investigation.

163. The Tribunal also considered whether anything was to be drawn from the fact that Mr O'Leary and Mr Chapman post checked the first tranche of jobs, but drew no adverse inference from the fact that they carried out this task together. Mr O'Leary gave convincing evidence as to why Mr Chapman accompanied him, which was that it was not unusual, and it was an effective way of carrying out post checks, as one person could drive, and one person could fill in the paperwork. This approach was confirmed by Ms Croke who spoke to the fact that it is not unusual for team managers to carry out post checks together.

164. The first three jobs which the claimant was asked about at the investigation meeting raised customer service issues. The claimant accepted responsibility for what had gone wrong. Albeit the claimant in his evidence before the Tribunal sought to put something of a different gloss of what had happened, he accepted that the answers which were recorded in the minutes of the meeting were the answers which he gave. In each instance,

the claimant accepted responsibility, and accepted effectively that he knew he could have done better.

165. In relation to the fourth job (Job No 126254347) carried out on 8 January, the claimant was asked about a health and safety issue (failure to use an eyebolt). Again, the claimant confirmed that he knew what he should have done; that he should not have done what he did do; and that he was cutting a corner by not following procedure; he said it would not happen again.

166. The Tribunal was satisfied that the respondents treated breaches of health and safety procedures seriously. Indeed this is reflected in their disciplinary policy. It was also satisfied that they took customer service seriously. The fact that the claimant accepted he had not provided the expected level of customer service and accepted that he had breached the respondent's health and safety policy, supported the conclusion that there were legitimate concerns as far as Mr O'Leary was concerned,

167. In relation to the decision to suspend the claimant the Tribunal did not conclude that Mr O'Leary in suspending the claimant was acting unreasonably, judged against the objective standards of a reasonable employer, in an industry where field engineers are working alone and unsupervised, and health and safety is a significant issue.

168. After the first investigation meeting Mr O'Leary carried out another four post checks, which he considered identified poor quality of work, and one post check, on 29 January which he considered identified a health and safety issue, in that no eyebolt had been used. He reconvened the investigatory hearing and asked the claimant about this job. It was the claimant's position at this investigatory hearing was that he could not remember the job; however it was not unreasonable for Mr O'Leary to conclude from the respondent's records, that it was the claimant who had done the job, as he was recorded as being the engineer responsible.

169. Mr Booth made the point that a number of the issues which the post checks threw up were customer service issues, which could have been dealt with by

coaching. This indeed was picked up by the HR team in correspondence to Mr O'Leary, however Mr O'Leary took the view that the number of customer service issues were such that they could reasonably be dealt with as a conduct issue. It could not be said that that was an unreasonable position for him to take. Further, Mr O'Leary was not simply relying on performance issues; he was also dealing with two alleged health and safety breaches. Judged by the objective standard of a reasonable employer, it was not unreasonable for him to recommend disciplinary action.

170. In the circumstances the Tribunal did not conclude that Mr O'Leary had subjected the claimant to a witch-hunt by the instigation of disciplinary allegations against him.

171. The Tribunal then considered the second limb of the claimant's argument which was that the disciplinary proceedings took too long, that he was left in the dark in relation to his suspension, and conduct proceedings.

172. The claimant was called to the first investigatory meeting on 23 January. Mr O'Leary then carried out four further checks between 26 and 29 January, and the claimant was asked to attend for a further investigatory meeting on 3 February. Mr O'Leary prepared a draft investigation report, which was sent to the respondent's HR team for review on 5 February, and the investigation pack was finalised by 21 February. Judged against the objective standard, these were not unreasonable timescales for the investigation.

173. The claimant was told when he was suspended on 23 January that the respondents would endeavor to carry out the investigation within two weeks. While this was their stated aspiration, it is not a contract term, and it was not an implied term of the claimant's contract of employment that the investigation would take no more than two weeks.

174. The respondent's extended the suspension and advised it would be reviewed on 17th February. A letter was sent to the claimant on 3 February

(page 247) confirming this. Thereafter there was no formal written contact from the respondents to the claimant in relation to his suspension.

175. The Tribunal was satisfied however as a matter of fact that the claimant was in regular contact with Ms Croke, and that she did advise him that in the course of telephone calls which took place between 19 and 29 February that the conduct hearing was put on hold pending the conclusion of the grievance procedure. The Tribunal was also satisfied that this was confirmed to the claimant on 29 February and again on 4 March. The Tribunal concluded that the claimant was aware that his conduct hearing was on hold pending the conclusion of his grievance.

176. The Tribunal considered firstly whether this approach, which caused a delay in the conduct proceedings coming to fruition, was unreasonable. The claimant's grievance complained about the conduct of Mr O'Leary and his conduct of the disciplinary investigation. In these circumstances applying an objective test, it could not be said that it was unreasonable for the respondents to take the view that the grievance required to be resolved prior to the conduct proceedings being dealt with, and to take that decision without consulting the claimant.

177. Indeed the claimant himself, at the point of the grievance appeal suggested that the conduct proceedings were put off until such times as the grievance appeal was dealt with, which lends support to the fact that the decision to approach matters in this way was not unreasonable.

178. The Tribunal also considered the fact that the claimant did not have the position confirmed to him in writing. While no doubt it would have been better if the respondents had written to the claimant confirming this, it did not conclude that much could be drawn from their failure to do so in circumstances where it was satisfied that the claimant had been told quite clearly what the position was.

179. The claimant does not advance the position that the grievance took too long to complete, and the Tribunal was in any event satisfied on the basis of Ms

Croke's evidence, and the steps which she took to investigate matters, that the grievance took not an unreasonable amount of time to complete. It was reasonable for Ms Croke to insist that she interviewed those employees whom the claimant complained about before concluding her grievance (Mr O'Leary and Mr Chapman), and because of circumstances beyond her control (Mr Chapman's annual leave, and Mr O'Leary's unexpected illness) she was prevented from doing so as quickly as she might have wished.

180. As soon as the grievance was completed, the claimant was invited to attend a conduct hearing. The Tribunal did not draw any adverse inference from the fact that Mr Allen in dealing with the grievance appeal upheld part of the grievance appeal in relation to the failure of the claimant's team managers to contact him during his sickness leave. The claimant was in regular touch with Ms Croke and was being advised of the position in relation to the grievance procedure, and he knew that the conduct proceedings were on holding pending conclusion of the grievance.

181. In these circumstances the Tribunal did not conclude the respondent's conduct of the disciplinary investigation was unreasonably long, or that the claimant was "*left in the dark*", in relation to the disciplinary or grievance procedure.

182. The Tribunal did not conclude that applying the *Malik* test that the conduct of the respondents in this case was such that judged objectively, it was likely to destroy or seriously damage the degree of trust and confidence that the employee is reasonably entitled to have as his employer, and it did not conclude that the respondents had acted in breach of the implied term of mutual trust and confidence.

183. The consequence of this conclusion is that the Tribunal was not satisfied the claimant was dismissed in terms of **Section 95(1) (c)** of the ERA and accordingly, the claim is dismissed.

184. In these circumstances, it is not necessary for the Tribunal to determine the reason why the claimant resigned, however, had it required to do so, it

would have had to take into account the fact that the claimant was clearly made aware from the terms of the letter calling him to the conduct meeting that dismissal was a potential outcome, and it was satisfied that he was aware of the fact that the respondents took health and safety breaches seriously, and it would also to have to take into account the fact the claimant had already obtained a new job, at the point where he decided to terminate his employment with the respondent.

Employment Judge: Laura Doherty
Date of Judgment: 24 March 2017
Entered in register: 27 March 2017
and copied to parties