



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mr B Forster

AND

BAB Accommodation Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields

On: 28 February 2018

Before: Employment Judge Martin

Appearances

For the Claimant: In person

For the Respondent: Mr Howson (Employment Consultant)

RESERVED JUDGMENT

- 1 The claimant's complaint of unlawful deduction from wages is well-founded and the claimant is awarded the agreed sum of £12,000.
- 2 The claimant's claim for a redundancy payment is withdrawn by the claimant and is hereby dismissed.
- 3 The claimant's complaint of breach of contract (notice pay) is well-founded. The claimant is awarded the sum of £3,420.
- 4 The claimant's complaint of unfair dismissal is well-founded and the claimant is awarded the sum of £16,239.92. The Recoupment Regulations apply to that award. The prescribed element is £6,869.95 and the prescribed period is 9 August 2017 to 28 February 2018.

REASONS

Introduction

- 1 The claimant gave evidence on his own behalf. Ms Cheryl Scott, former Deputy Manager of the respondent company, and Ms Paula McCullagh, a Support

Worker at the respondent company, both gave evidence on behalf of the claimant. Ms Mikaela McGowan, Acting Manager of the respondent company, and Ms Jennifer Bowman, Director of the respondent company, gave evidence on behalf of the respondent.

- 2 The Tribunal were provided with a bundle of documents together with the documents referred to in the claimant's witness statement. The bundle was marked Appendix 1.
- 3 At the outset of the hearing the claimant acknowledged that he had not been dismissed by reason of redundancy and was not entitled to a redundancy payment. Accordingly he withdrew his claim for a redundancy payment.
- 4 The respondent also agreed at the outset of the hearing that the claimant was entitled to some back pay for sleepovers. The respondent's representative stated that the issue of sleepovers was a national issue. The respondent agreed to pay the claimant the sum of £12,000 by way of back payment for sleepovers.

The law

- 5 The Tribunal considered the law as follows:-

Section 95(1) of the Employment Rights Act (ERA) 1996:-

- “(1) For the purposes of this Part an employee is dismissed by his employer if –
- (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.”

- 6 Section 98(1) ERA 1996:-

- “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
- (a) the reason (or if more than one the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”

- 7 Section 98(4) ...

- “(4) The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.”

- 8 Section 86(1) ERA 1996:-

“(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more –

(b) is not less than one week’s notice for each year of continuous employment if his period of continuous employment is two years or more but less than 12 years.”

9 Section 13(3) ERA 1996:-

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

10 Section 123(1) ERA 1996:-

“(1) The amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.”

Section 123(4):-

“(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of the person to mitigate his loss as applies to damages recoverable under the common law of England and Wales.”

Regulation 4(4) of the Employment Protection (Recoupment of Benefits) Regulations 1996 –

Where the employment tribunal at the hearing announces to the parties the effect of a decision which includes a monetary award it shall inform those parties at the same time of the amount of any prescribed element included in the monetary award.”

11 The case of **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27** where the Court of Appeal held:-

“An employer is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice but the conduct in either case must be sufficiently serious to entitle him to leave at once.”

12 The case of **Post Office v Strange [1981] IRLR 515** where the EAT held that:-

“Where an employer failed to observe their own disciplinary procedures and took action against the employee that could in itself amount to repudiation of the contract entitling the employee to treat it as at an end.”

- 13 The case of **Woods v WM Car Services (Peterborough) Limited [1981] IRLR 347** where the EAT held that:-

“It is clearly established that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. The employment tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that it’s cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.”

- 14 The case of **Lewis v Motor World Garages Limited [1986] ICR page 157** where the Court of Appeal held that:-

“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 might not amount to a breach of contract.”

- 15 The case of **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** where the Court of Appeal held:-

“The last straw does not have to be of the same character as earlier acts or amount to unreasonable or blameworthy conduct although in most cases it will do so but the last straw must contribute to the breach of the implied term of trust and confidence.”

- 16 The case of **Polkey v A E Dayton Services Limited [1987] IRLR 503** where the House of Lords held:-

“A tribunal can consider whether an employee would have still been dismissed even if a fair procedure had been followed and if the tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee may still have lost his employment.”

The issues

- 17 The issues which the Tribunal had to consider were as follows:-
- 17.1 Was there a fundamental breach of the claimant’s contract of employment? Was it an express or an implied breach?
 - 17.2 Was there a breach of the implied term of trust and confidence and/or were there a number of breaches resulting in “a final straw”? In that regard the Tribunal had to consider what were the alleged breaches of contract.
 - 17.3 Did the claimant resign in response to any breach of contract and/or did he affirm the contract in the meantime?
 - 17.4 The respondents have not argued that they had a fair reason for dismissing the claimant nor that they had acted reasonably in dismissing him.

17.5 The Tribunal had to consider whether there was any loss suffered by the claimant and over what period. The Tribunal had to then go onto consider whether the claimant had mitigated the loss and/or whether he might have been fairly dismissed in any event and if so what was the chance of that happening?

18 **Findings of fact**

18.1 The respondent is a provider of supported accommodation for young people in the North East. They have one house which can accommodate five young people. The young people are in care and the respondent would take on young people through a contract with a local authority.

18.2 Ms Bowman is a Director of the respondent company. She works full time in other employment. There is one other silent partner in the business.

18.3 The claimant was employed by the respondent as a Support Worker. He commenced employment with the respondent in January 2008. He was the longest serving member of the respondent's workforce. He had a clean disciplinary record.

18.4 The claimant's contract of employment is at pages 28-29 of the bundle. He worked at the home where the young people were provided with accommodation. The claimant's contract of employment refers to the respondent's disciplinary and grievance procedure. It also refers to the notice periods applicable by both the respondent and the claimant. That is noted at page 29 and is consistent with statutory notice periods.

18.5 The respondent's disciplinary procedure is at pages 30-48 of the bundle. At page 31 the respondent set out the general provisions under their disciplinary procedure. They state:-

- This disciplinary procedure is intended to ensure that employees are dealt with fairly in relation to any alleged misconduct;
- This disciplinary procedure is not necessarily sequential and may begin at any stage, or advance to any stage ...
- In most cases of minor misdemeanours, or shortcomings, the matter can, and will, be dealt with informally by the manager, without the need to utilise the more formal disciplinary procedure. There will be a two way discussion between the employee and manager where the emphasis is encouraging and instructive in order to find ways to remedy problems through supervision, training, coaching or counselling to enable the required standards to be achieved. The employee's line manager or supervisor will keep a record of the agreed course of action and the timescale in which it will be achieved for reference purposes.

Page 32 sets out the various formal stages for disciplinary action which includes warnings to dismissal.

18.6 Page 37 of the policy deals with suspension. At paragraph 3.7 it states:-

“Depending upon the circumstances of the case, there may be occasions when it is considered undesirable for an employee to remain on duty pending a disciplinary hearing. The sole purpose of

suspension from duty is to allow matters to be investigated and does not imply guilt on the part of the suspended employee, and is not considered as disciplinary action in itself.

Such action will only be taken after careful consideration and will be kept under review to ensure that it is not unnecessarily protracted.

The home's right to suspend under this section is a contractual right and is incorporated into all contracts of employment of the Home's employees".

18.7 At page 38 it goes on to indicate that:-

"Investigations will take place as soon as practicably possible and every effort will be made to identify, at the outset, the likely duration of the suspension which will be kept as short as reasonably possible. A suspended employee will be kept informed of any delay in the process and any reasons therefore."

18.8 It goes on to state that:-

"Suspension from duty will normally apply when:-

- Gross misconduct is suspected;
- Violence has occurred."

18.9 The policy goes on to set out typical dismissible offences which include physical violence or abuse to anyone in or connected with the Home; or bringing the Home/employer into serious disrepute. This is noted at page 40 of the bundle.

18.10 The grievance procedure is set out at pages 44-47 of the bundle.

18.11 As part of his role the claimant had received training on understanding and managing challenging behaviour and safeguarding. His other colleagues had received similar training. Ms McGowan had additional training. She had received KALMS training which she had received, because she had previously worked for many years in supported living accommodation for young people, which had been registered through OFSTED.

18.12 The claimant said that he and other staff were not paid their wages on occasions during 2016 or their wages were paid late. This was confirmed by Ms McCullagh in her evidence. The claimant said that he raised a grievance about this issue in August 2016 with Ms Scott who was his Line Manager. Ms Scott confirmed this in her evidence. Details of the grievance are at pages 57-58 of the bundle. Ms Scott indicated that there was a period during 2016, when wages were either not paid to employees or were paid late. Ms McGowan also confirmed that wages were paid late to employees or not paid at all for a period of time. All the outstanding wages were paid up to date by the end of 2016.

18.13 The claimant said that he and other staff at the Home had to, at various times, fund expenses for the young people during 2016 and 2017. He said that they had to provide them with money for bus passes or food or other expenses. He said that this was because there was no money in petty cash. This practice was confirmed by all the other witnesses in

evidence, including Ms Bowman and Ms McGowan who confirmed that that this did happen on occasions. The claimant acknowledged that he was always repaid the monies which he and other staff paid out of their own pocket.

- 18.14 The claimant said that the respondents had financial problems for some time which he said was the reason why wages were paid late and why staff had to pay expenses for young people out of their own wages. The claimant said that sometimes there were only a couple of young people at the Home. He said that the respondents needed to ensure that there were sufficient numbers otherwise there could be financial implications.
- 18.15 In her evidence, Ms Bowman acknowledged that the company did have financial problems for a period of time. She acknowledged that the respondents needed about two young people in the Home to make it financially viable. She said that the financial problems of the respondent company were improving. She said that the company had tried to make sure that staff wages were paid first, before they dealt with any other debts.
- 18.16 During 2017 there was a discussion about redundancies. The claimant was asked if he would consider redundancy. He had previously thought about retiring at around 60 and at that time was around that age. He was offered a package, but it was less than his redundancy entitlement so he decided to continue working at the Home.
- 18.17 An incident occurred between two young people at the home when Ms McCullagh was on duty. She could not recall when it took place. She does recall that both herself and her colleague locked themselves in the office and called the police. She said that she was following normal procedure which was confirmed by Ms Scott and the claimant. The incident concerned the same young person who was involved in the later incident on 16 June to which we refer further in due course. The other person involved in the incident was in the home on a temporary basis and was then removed after this incident.
- 18.18 Staff at the Home would often work alone depending on the number of young people in the home.
- 18.19 An incident occurred at the Home on 16 June 2017. There were two young people in the home at the time. The claimant was working alone.
- 18.20 The claimant said that the incident arose when the young person asked to go on the office computer to go on Facebook. He was told that he could go on for five minutes but abused that trust and went on Facebook for a long time. Whilst the young person was on the computer, a telephone call came in for him on the office telephone. The claimant handed the telephone to the young person and went into the office and closed it. After the young person had finished on the telephone, he went to go back into the office. The claimant told him that he could not do so. He said that the young person tried to push into the office and threatened him. The claimant said that he put his hands on the young person to push him away from the office and then locked himself in the office. He said that the

young person threatened to push him and he put his hands up to defend himself.

- 18.21 The claimant says that the young person then left the premises and the claimant called the police after the incident to report it. He says that he filled in an incident report sheet and called his manager Ms McGowan. She came to the premises a few hours later.
- 18.22 The claimant says that the police took a statement from him the next day. He says that the police told him that he was entitled to defend himself. The claimant says that the young person involved had been previously arrested for assault relating to another matter. He said that the police told him that the young person had absconded to Scotland.
- 18.23 The young person made a statement about the incident. That statement is at Appendix 3 to the claimant's witness statement. The young person said that the claimant pushed him back and that they were both shouting at each other. The young person said that he left the premises because he could not afford to get into any more trouble. He said that he left the office phone in the front room.
- 18.24 On 20 June 2017 the claimant received a telephone call from Ms McGowan. She informed him that he was suspended on full pay. He received a letter on the same day confirming his suspension and inviting him to an investigatory meeting. That letter is at page 59-60 of the bundle. In the letter Ms McGowan states that the claimant has been suspended to allow an investigation to take place following an allegation of assault. She says that the respondents have a duty to investigate the matter. She also indicated the possible outcomes from the meeting, which she stated may be that they decide, if necessary, to pursue a formal disciplinary procedure, or alternatively decide that there are no grounds for that. She also states that the discussions in the meeting may give her some idea of whether any further investigations need to be carried out before she gets back to the claimant.
- 18.25 The claimant said that although he understood the reason for his suspension and the investigation, he said that normally in such incidents the young people were removed immediately from the Home if they committed violence. The claimant said that he had been a victim of assault before. He said he was also aware it had happened to other colleagues. Both Ms McCullagh and Ms Scott agreed that what was what had happened in the past, namely that the young person was immediately removed from the premises when there was any allegations of violence. However, it was not suggested that any of those incidents referred to by the claimant or his colleagues related to an accusation, where there was an allegation of alleged assault on the part of the employee, as well as by the young person. All the witnesses referred to allegations of violence on the part of the young person only.
- 18.26 In evidence the claimant said that he believed that the reason the young person had not been removed from the Home was because of the financial position of the respondent company. He said that the respondents could not afford for there to be only one young person residing at the Home. However, it appears that the young person involved

had already absconded to Scotland and did not return to the Home anyway.

- 18.27 An investigatory meeting took place with the claimant on 27 June. Ms McGowan undertook the investigatory meeting. Notes of the meeting are at pages 63-65 of the bundle.
- 18.28 At the meeting the claimant went through the incident and explained that the young person tried to barge into the office and pushed the claimant threatening him. The claimant said that he pushed the young person away. He said that the young person was being abusive and threatening to him. The claimant said that he thought the young person left the Home and had taken the office telephone with him. The claimant said that he was just defending himself. He called the police who took a statement from him.
- 18.29 The following day the respondent wrote to the claimant. In the letter the respondent confirmed the claimant's suspension following allegations of physical force on a young person. They invited him to a disciplinary meeting. They warned him that the allegation was that the claimant used physical force on a young person on 16 June. They warned the claimant that it could amount to an act of gross misconduct. The claimant was sent copies of the investigatory meeting with him, the young person's statement and the CCTV footage. The respondent informed the claimant that the disciplinary hearing would be conducted by Ms Bowman. Ms McGowan would be in attendance as a note taker. That letter is at page 61-62 of the bundle.
- 18.30 The following day the claimant sent a letter of grievance. He raised concerns about the invite to the disciplinary hearing. He argued that he was defending himself from threatening behaviour. He referred to his contact with the police, and the young person's record for assault and allegation of assault against him. The claimant indicated that the CCTV footage did not show the incident. He raised concerns about lone working. He also raised concerns about the lack of training to deal with such incidents. He expressed concerns about a smear to his character. He stated that he believed that the invite to the disciplinary meeting was simply an attempt to oust him from the company because of its financial difficulties. The claimant's letter of grievance is at pages 66-67 of the bundle.
- 18.31 The respondent acknowledged the claimant's grievance. They arranged a grievance hearing and indicated that the disciplinary hearing would be put on hold until after the grievance hearing.
- 18.32 In the letter the respondent confirmed what they identified as the issues that needed to be considered at the grievance hearing as set out at page 68 of the bundle. These issues were identified as:- no training on aggressive and violent behaviour; fully within his right to defend himself from harm; concerned for his safety – lone working; financial state of the company having an effect on the ongoing investigation; young person not raised a complaint or had police involvement; CCTV evidence versus the claimant's version of events; no advice given around policies and procedures; and smear on the claimant's character and reputation.

- 18.33 A grievance hearing took place on 11 July 2017. Ms Bowman conducted the grievance hearing. She went through the list of issues identified in the letter by Ms McGowan, who attended the hearing as a note taker. The notes of the grievance hearing are at page 70-77 of the bundle.
- 18.34 Ms Bowman said that she addressed each of the claimant's issues in turn during the grievance hearing. She said that she asked the claimant a number of times about what effect the financial aspect of the company had on the investigation, but she said that the claimant did not really respond to that but talked about redundancy. The claimant said that Ms Bowman said at the grievance hearing that the financial difficulties of the company did not have any impact on his case. He thought the company was using this as a way to dismiss him without paying him a redundancy payment. During the grievance hearing the claimant did raise an issue about the staff not being paid before Christmas and indicated he could have raised a grievance about that as well. The respondents indicated that they would be in touch with the claimant following the grievance meeting.
- 18.35 On 21 July 2017 the claimant sent an e-mail asking for the minutes of the grievance meeting and the CCTV footage.
- 18.36 On 28 July 2017 the respondents wrote to the claimant. In that letter they confirmed the claimant's suspension on full pay and invited him to a disciplinary hearing on 2 August 2017. They stated that the disciplinary hearing was to consider the allegation of physical assault on a young person, which they said could amount to gross misconduct. They said that they would be providing a copy of the CCTV footage. In the letter it was indicated that Ms Bowman would conduct the disciplinary hearing. That letter is at pages 81-82 of the bundle. In evidence before the Tribunal, Ms Bowman indicated that she would have conducted the disciplinary hearing. She accepted that she had heard the grievance hearing which related to aspects of the disciplinary hearing.
- 18.37 On 2 August 2017 the respondents wrote to the claimant to inform him of the outcome of the grievance hearing. In the letter Ms Bowman addressed the various issues which had been summed up for the claimant in relation to that grievance as is noted at page 68 of the bundle. Ms Bowman concluded that the claimant had been given training in managing challenging behaviour. In relation to the claimant's right to defend himself she expressed concern about the claimant putting his hands on a young person which she said could amount to assault. She explained that care needed to be taken in working with vulnerable young people. She said that matter had to be considered at a disciplinary hearing. She went on to indicate that the respondent had been operating with lone working for some time and that other staff being present would not stop incidents of this nature occurring. She said that the financial state of the company had nothing to do with the claimant's case. She also stated that the young person had informed his social worker about the incident and had tried to contact the manager of the Home. She also said he had made a statement even if he had not been in touch with the police. She went on to say that the respondent was not trying to smear the claimant's name or reputation, but indicated that incidents of this nature could have an impact

on the reputation of the respondent company. That letter is at page 84-85 of the bundle.

- 18.38 In the letter Ms Bowman gave the claimant a right of appeal which she indicated would be to her. Ms Bowman concluded that none of the grievances were upheld and dismissed them. In evidence before the Tribunal Ms Bowman said that she would have contacted an HR department, who appear to be Peninsula, as to who should deal with any appeal.
- 18.39 The claimant said that he was not happy with the response to his grievance.
- 18.40 The claimant said that, on 3 August 2017, he received a telephone call from Ms McGowan telling him that he was no longer required to attend the disciplinary hearing and that he would get a letter requesting him to return to work. He said that he did not understand what was going on as the disciplinary hearing had been cancelled, yet the grievance had not been held. Further he had received the letter of 28 July telling him that he had a case to answer and to attend a disciplinary hearing.
- 18.41 On the morning of 4 August 2017 the claimant e-mailed Ms McGowan indicating that he would be considering appealing the grievance. That e-mail is at page 86 of the bundle.
- 18.42 On the same day, 4 August, the claimant received two letters from the respondent. Both were sent by Ms McGowan. They appear to have been sent together, although it is not clear whether one letter was sent first.
- 18.43 One letter stated that the investigation was completed and there was no case to answer. It referred to the investigatory meeting on 27 June 2017. The letter stated that, having listened to the explanation given by the claimant and further enquiries, the conclusion was that there was no case to answer and the matter was closed. It went on to explain that the suspension was lifted with immediate effect. The claimant was expected to return to work (page 88 of the bundle).
- 18.44 The other letter refers to an informal discussion on 27 June 2017, and states that the respondents are writing to underline their concerns regarding the claimant's conduct. Ms McGowan refers to the incident on 16 June and the explanations given by the claimant at the investigatory meeting on 27 June, when he said that he had defended himself from the young person who pushed him and was acting in an aggressive manner. She says that having listened to that explanation she feels that there are concerns about the claimant putting his hands on a young person. She goes on to say that, although the company are not proceeding with formal disciplinary action, she is issuing him with an informal warning and states that every effort should be made to address the shortcomings which have been identified. She refers to further training. She goes on to say that the informal warning will be retained on the claimant's personnel file and forms a reasonable management instruction. She goes on to say that if there is any repeat of the conduct or any misconduct in general, the claimant may be subject to formal disciplinary action. That letter is at page 87 of the bundle.

- 18.45 In evidence before the Tribunal Ms McGowan said that there was no further investigation after the investigatory meeting with the claimant other than the grievance hearing. She said that there was no further investigation with the young person. She said that the CCTV footage was viewed but it was not clear from her evidence when that was viewed.
- 18.46 In evidence before the Tribunal Ms McGowan also said that there was no informal meeting with the claimant on 27 June 2017. She said that the only meeting with the claimant was the investigatory meeting on 27 June 2017.
- 18.47 In her evidence to the Tribunal Ms McGowan was not able to explain clearly what happened from sending the letter on 28 July inviting the claimant to a disciplinary meeting and the letters then sent to him on 4 August 2017. She indicated that what actually happened in that timescale is that there was an incorrect reference in one of the letters which stated “was” referring to the claimant rather than “is” and that the concern was that that implied that the claimant had left his employment. There is no reference to this issue in Ms McGowan’s witness statement. Ms Bowen herself also confirmed that this error was on her part, but again she did not refer to it in her witness statement to the Tribunal either.
- 18.48 No meeting took place with the claimant to explain the change of position by the respondents or explain why the respondents decided not to proceed with disciplinary proceedings. No explanation was given about any errors in the correspondence as is now suggested by the respondent which they are now indicating was the reason why they changed their view about proceeding with a disciplinary hearing.
- 18.49 Further no meeting took place with the claimant to explain why he was given an informal warning or what that meant.
- 18.50 In their evidence to the Tribunal both Ms Bowman and Ms McGowan expressed concerns about the approach taken by the claimant in relation to the incident on 16 June. Ms Bowman indicated that it was potentially assault. Ms McGowan indicated in her evidence that she thought there were better ways of dealing with this incident. She talked about trying to talk to the young person and expressed concern about the fact that the claimant had effectively put his hands on the young person. She thought that the situation should have been deescalated in a different way without the claimant having to push the young person away. Ms McGowan expressed concerns about the actions taken by the claimant in that situation. She considered that his actions could potentially have led to disciplinary action which is why she said she wanted to give him some sort of warning about the incident.
- 18.51 On 7 August 2017 Ms McGowan e-mailed the claimant to detail his shifts and to confirm his return his return. That is at page 89 of the bundle.
- 18.52 In his evidence to the Tribunal the claimant said that while he was suspended he became aware that the respondent was not paying his tax or national insurance to HMRC. He said that he was told this by Cheryl Scott during his suspension. He thought he was told it just before receiving the letter on 4 August about his return to work. He said that for

him it was the last straw after having been told that he was going to be subject to disciplinary procedures and then told after a long period of suspension that there was no case to answer.

- 18.53 The claimant said that during his employment he received calls from HMRC but did not realise that they related to the non payment of his tax and national insurance and that of other employees. He said that those sums had been deducted from his salary and from the salary of other employees by the respondent.
- 18.54 Cheryl Scott said that she talked to the claimant regularly during his suspension. She was the office manager at the time. She was told not to pay the staffs' tax and national insurance to HMRC, because of the lack of funds available, due to the financial position of the company. She said that she did not tell staff at the time. She said that she told the claimant about this during his suspension. She could not recall when she told him. She does not refer to this in her witness statement and said that she was not asked to comment on it in her witness statement. She said that the issue came up with the claimant, when they were discussing matters about the financial position of the company and when the claimant was talking about receiving calls from HMRC after Ms Scott had left. Cheryl Scott said that the claimant was shocked when she told him his tax and national insurance had not been paid to HMRC and was concerned that staff had not been told about this.
- 18.55 Ms Bowman confirmed that tax and national insurance had been deducted from staffs' wages and had not been paid for a period of time to HMRC. She said that she did not think at the time it would have any impact on staff, because she thought it would only relate to the respondent company's position.
- 18.56 On 9 August 2017 the claimant sent an e-mail to the respondent resigning from his employment. He refers to his suspension and the investigation as to whether his behaviour amounted to gross misconduct. He comments that if the incident had been assault it would have amounted to gross misconduct and a final written warning would have been reasonable. He goes on however to say that, instead the company indicated that the allegations were investigated and that there was no case to answer and the matter was closed. However he says that, at the same time, the respondent said that they wished to give him an informal warning about the incident which was to remain on his personnel file. He indicates that he considers that to be unacceptable and to be a contradiction. He goes on to say that he feels that there has been a breach of the implied term of trust and confidence he would expect to have in his employers. He does not refer to becoming aware that his tax and national insurance were not being paid.
- 18.57 Ms McGowan said that she suspected that tax and national insurance were not being paid by the respondent. She thought that the claimant might have suspected that as well. She says that she thinks that the claimant became aware of this matter when he went to sign on for benefits. She says that she was not aware of the situation until she took over as acting manager and then became aware of the financial state of

the company in more detail. At that stage she said that she became aware that tax and national insurance were not being paid to HMRC and she was trying to put that in order going forwards.

- 18.58 Ms McGowan responded to the claimant's letter by e-mail on the same date and asked him to reconsider. Her e-mail is at page 91 of the bundle.
- 18.59 On 14 August 2017 the claimant responded by e-mail to say that he was not prepared to retract his resignation. He states that he was not happy about the way that the disciplinary issue had been dealt with. His e-mail is at page 92 of the bundle.
- 18.60 On 15 August 2017 the respondent wrote to the claimant to accept his resignation. That letter is at page 93 of the bundle.
- 18.61 The claimant's gross pay per week was £489. His net pay was £380. The parties have agreed that the claimant's pension loss is £3.33 per week, being the sum the respondent was paying into his pension.
- 18.62 Following the termination of his employment the claimant said that he looked for other employment. He said that he looked for various different types of employment from driving to security. He also said that he looked to go into similar type of support work as he was doing with the respondent company.
- 18.63 He said that when he told prospective employers of his Employment Tribunal proceedings, he was told to wait until after the outcome of those proceedings before seeking employment with them.
- 18.64 He said that G4S security wrote to him following an interview in January 2018. They indicated that he was not successful and would not be until the outcome of his Tribunal was settled, but that they would keep his details on file. That letter is at page 118 of the bundle.
- 18.65 The claimant says that he was told he could claim unpaid sleepovers after he left his employment. He does not suggest in evidence that this was an issue that led him to consider resigning from his employment.
- 18.66 The claimant said that he anticipated getting a job immediately after the Tribunal proceedings had been resolved. In evidence he acknowledged that he might be being optimistic. In their submissions the respondent's representative suggested that the claimant was probably being optimistic. He suggested that the period should be no more than eight weeks, with which the claimant agreed.
- 18.67 The claimant said that he signed on for Jobseekers Allowance immediately after his employment terminated.

19 **Submissions**

- 19.1 The claimant submitted that he resigned in response to a number of breaches, in particular the disciplinary process. He said that four things affected his decision to resign. He said that those were: - the late payment of wages back in 2016; having to fund expenses out of his own pocket for young people in his care; the disciplinary process in which he said he was first accused of assault and invited to a disciplinary hearing, then told that there was no case to answer yet was then issued with an

informal warning which went on his record. He said that the last straw for him was when he found out that the respondent had not been paying his tax or national insurance to HMRC although they had deducted it from his wages. He said that as a result he had lost all trust and confidence in his employer and that is why he resigned. He is claiming losses as per his schedule of loss at page 119 of the bundle.

- 19.2 The respondent's representative submitted that there was not a breach of contract and that the claimant did not resign in response to any breach. The respondent's representative submitted that there was no breach in relation to the wages and that the claimant had affirmed the contract in the meantime. He also submitted that all expenses had been repaid to the claimant. The respondent's representative submitted that in relation to the disciplinary process the respondents had to go through the disciplinary process because of the incident in question. Their representative argued that there was no last straw because the claimant had found out about the tax and national insurance issue after he had resigned. He relied on the fact that there was no reference to that in his resignation letter or in Ms Scott's witness statement to the Tribunal.
- 19.3 The respondent's representative conceded that if the Tribunal found that the claimant had been dismissed they were not asserting that they had acted reasonably in dismissing him.
- 19.4 In relation to remedy the respondent's representative did not contest the figures put forward by the claimant and suggested that there should be no more than eight weeks future loss.

20 **Conclusion**

- 20.1 This Tribunal finds that there was a fundamental breach of the implied term of trust and confidence which led the claimant to resign from his employment.
- 20.2 The background to this relates to a catalogue of what amount to various breaches of contract. Firstly, a failure to pay wages either on time or at all during 2016, which the Tribunal accepts was remedied. Secondly, the fact that employees, including the claimant, had to pay expenses for young people in their care out of their own wages which again it is accepted were reimbursed.
- 20.3 The real breach in this case was the way in which the respondent managed their disciplinary process in relation to an incident in which the claimant was involved on 16 June 2017. The respondent quite properly suspended the claimant and sought to undertake an investigation into the incident. They then invited the claimant to a disciplinary hearing which again they were entitled to do. They put their disciplinary hearing on hold pending a grievance raised by the claimant.
- 20.4 However it is the way that they then dealt with this matter which quite rightly led the claimant to lose trust and confidence in them.
- 20.5 Firstly, following the grievance hearing they invited the claimant to a disciplinary hearing to deal with an allegation that the claimant had

committed an act of assault which could as they indicated amount to an act of gross misconduct and lead to his dismissal.

- 20.6 Then it appears, due to some administrative error, they changed their mind, without any explanation being given to the claimant, and decided that there was no case to answer.
- 20.7 At the same time as saying that there was no case to answer they then told the claimant that they were nevertheless concerned about his behaviour in relation to the incident on 16 June. They informed him that they were issuing him with an informal warning. They told him that the informal warning would go on his record and would effectively be taken into account if there was any further misconduct.
- 20.8 No meeting took place with the claimant, in accordance with the respondent's own disciplinary procedures, to discuss or explain this informal warning.
- 20.9 This is against a background of the claimant having been suspended from his employment on the basis of an allegation of assault on his part for over six weeks, yet following the investigatory meeting a week after the suspension, no further investigation was undertaken into the incident.
- 20.10 This Tribunal considers that the way that the respondent treated the claimant in these circumstances did amount to a fundamental breach of contract of the implied term of trust and confidence. The claimant was left not knowing why the case had been dropped after they had suspended him for over six weeks, or why he was being issued with an informal warning for the incident. It is not surprising in those circumstances that he had lost all trust and confidence in his employer by then.
- 20.11 Further, this Tribunal also accepts that the claimant did find out about the fact that his employer had not paid his tax or national insurance to HMRC which they had deducted from his wages. The Tribunal accepts the claimant's oral evidence in that regard. It is corroborated by the evidence of the former manager of the business. Their evidence was clear, credible and consistent. Although the claimant does not refer to this issue in his letter of resignation, nor does Ms Scott refer to it in her witness statement the Tribunal notes that the claimant was acting in person and not legally qualified. Indeed the Tribunal notes that the respondent's witnesses do not refer in their witness statements to a significant matter namely why they decided not to proceed with the disciplinary hearing. They were represented throughout, but chose to omit crucial evidence from their own witness statements. Furthermore, the Tribunal notes that the claimant did not refer to a number of other issues in his letter of resignation which were also in his mind, namely the delay and non payment of his wages and concerns about having to pay out expenses for young people from his own wages, both of which he indicated were factors leading to him losing trust and confidence in his employer. Furthermore he did not suggest that the non-payment of his wages, relating to sleepovers, which was effectively an express breach of the terms of his contract of employment, was a factor leading to him resigning from his employment. Accordingly, the Tribunal accepts that the claimant found out about this matter, whilst he

was on suspension. It is his evidence that this was for him the “last straw”. The Tribunal accepts his evidence in that regard.

- 20.12 The Tribunal considers that breach would have amounted to a breach of contract on its own, which would have entitled him to resign. The Tribunal accepts that finding out about this during his suspension, was the final straw for the claimant.
- 20.13 This Tribunal accepts that the claimant did resign in response to a breach of contract on the part of the respondent and did not affirm the contract in the meantime.
- 20.14 Accordingly the claimant was unlawfully constructively dismissed. The respondent does not assert that they had a fair reason for dismissal or acted fairly in dismissing the claimant. Accordingly, the claimant’s claim of unfair dismissal is upheld.
- 20.15 However the Tribunal did note that both of the respondent’s witnesses indicated that they had concerns about the claimant’s behaviour in relation to the incident in question. Their evidence in that regard was consistent. This Tribunal considers that if the respondent had proceeded to a disciplinary hearing that there was a remote chance that the claimant might have been fairly dismissed by the respondent. It is difficult to put that chance very high bearing in mind the mitigating factors namely the claimant’s length and clean disciplinary record. The Tribunal has taken note of the clear evidence given by both of the respondent’s witnesses in that regard and noted the case of **Polkey**. The Tribunal considers that there should be a 10% reduction in the claimant’s compensatory award to take into account the chance that he might have been fairly dismissed in any event.
- 20.16 The claimant’s complaint of breach of contract (notice pay) is accordingly upheld. The claimant is awarded 9 (years) x £380 amounting to the sum of £3,420.
- 20.17 In relation to the claimant’s complaint of unfair dismissal the claimant is awarded the sum of £16,239.92 calculated as follows:-

Basic Award	9 years x 1.5 x £489	£ 6,610.00
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Compensatory Award

Immediate loss

From the date his notice period would expire - 11 October 2017- until the date of hearing 28 February

19 weeks x £380	£7,220.00
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Pension loss 11 October 2017 to 28 February 2018

19 weeks x £3.33	£ 63.27
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Loss of statutory rights	£ 350.00
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Future loss

8 weeks @ £380	£3,040.00
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Pension loss

8 x £3.33	£ 26.64	
Sub Total	£10,699.91	
Less Polkey @ 10%	£ 1,069.99	
Total Compensatory Award		£ <u>9,629.92</u>
Total award of compensation for unfair dismissal		<u>£16,239.92</u>

20.18 The Employment Protection (Recoupment of Awards) Regulations apply to this award. The prescribed element is £6,869.95. The prescribed period is 9 August 2017 to 28 February 2018.

20.19 The claimant's complaint of unlawful deduction from wages is upheld. The claimant is awarded the agreed sum of £12,000.

Employment Judge Martin

21 March 2018