EMPLOYMENT TRIBUNALS

Claimant Derek Alan Andrews

Respondents The Kitchen Shoppe Limited

HEARD AT: WATFORD **ON**: 21 February 2018, 6 March 2018

BEFORE: Employment Judge Lewis (sitting alone)

REPRESENTATION

For the Claimant: In Person

For the Respondent: Mr P Powlesland (Counsel)

JUDGMENT

1. The Respondent's application to amend the Grounds of Resistance to assert that if the Claimant was dismissed, the dismissal was fair is refused.

2. The claim of unfair dismissal fails and is dismissed.

REASONS

1. The Claimant claims that he was constructively unfairly dismissed. He represented himself. The Respondent was represented by Ms Powlesland of Counsel. I head evidence from the Claimant and, for the Respondent, from Mr Pulford (who at the relevant time was a director and co-owner). References in square brackets in these Reasons are to pages in the hearing bundle.

THE ISSUES

2. The Claimant's claim is for unfair dismissal only. His ET1 also refers to a failure to issue terms and conditions of employment, but the Claimant confirmed at the outset of this hearing that he is not bringing a stand-alone

claim for a statement of terms and conditions. Instead he seeks a payment under s.38 Employment Act 2002 (two or four weeks' pay), dependent on succeeding in his unfair dismissal claim. The issues in relation to the unfair dismissal claim were agreed as being:

2.1 Whether the Respondent acted in breach of contract and if so whether the breach was sufficiently serious to be repudiatory. The Claimant relies upon the matters set out in his resignation letter, which raised the following matters:

(a) The terms of an email from Fiona Mendel (solicitor) sending a draft employment contract, which stated that amendments requested by the Claimant to previous drafts had been agreed whereas they had not. The Claimant contends this was the final straw.
(b) That he had still not been provided with a contract which reflected the terms verbally agreed (or, as it was put in the letter, his existing position).
(c) His belief that the Respondent had no intention of doing so.

The Claimant relies upon delay in providing him with terms and conditions of employment and then not providing them accurately. The history back to 2009 is said to be relevant context. In particular, issues as to the verbally agreed terms arose in 2009, 2012 and 2016 as well as in the period immediately leading up to resignation.

2.2 Whether, if so, the contract was affirmed.

2.3 Whether the Claimant resigned in whole or in part in response to the breach.

2.4 If the Claimant succeeds on liability, issues as to remedy including:
(a) whether there should be a reduction for failure to follow the ACAS code of practice
(b) contributory fault
(c) whether if the Claimant had not been unfairly dismissed, there is a chance (and if so what chance) his employment would have terminated in any event.

3. There was a discussion at the outset of the second day of the hearing as to whether it was accepted that if there was a constructive dismissal, it was said to be a fair dismissal. After taking instructions, Mr Powlesland stated that the Respondent did wish to pursue a case that dismissal was for some other substantial reason (ie good business reasons for the terms put forward) and the dismissal was fair. He accepted that this was not pleaded and that permission would be required to amend, and an application was made. After hearing submissions I rejected that application, applying the balance of hardship and injustice test in *Selkent Bus Co Ltd v Moore* [1996] ICR 836 (EAT). Reasons were given orally at the hearing and are therefore not set out here.

4. In the adjournment between the two hearing dates, the Claimant produced a revised schedule of loss, setting out the quantification of the claim if his case

succeeded. It was confirmed by the parties at the outset of the second day that the figures for the basic award (£11,736) and for the compensatory award (£4,314) were agreed subject to adjustment for contributory fault and failure to follow the ACAS code. Mr Powlesland also clarified that the Respondent did not contend that the award should be reduced for the chance that the Claimant's employment would have ended in any event. In discussion at the start of closing submissions I raised the issue of how I should proceed if I were to find that some of the terms to which the Claimant objected were permissible and others not. At that point Mr Powlesland did take a point that there should be a reduction for the chance the Claimant's employment would have terminated in any event. The Claimant did not object, and since it had been explored in cross-examination of the Claimant I permitted that submission to be advanced.

MATERIAL FACTS

5. The Claimant's period of continuous employment with the Respondent commenced in April 2001. He had worked for the Respondent previously but left after 5 years to work for a local competitor. He returned shortly after the competitor went into liquidation. He reported to Allan Pulford. Mr Pulford and his wife were the Respondent's owners and directors until 22 December 2017 when the business was sold.

6. It was initially agreed that the Claimant would be paid £20,000pa working initially from 9 to 5.30, being the shop hours. The recruitment was informal. There was no job advert and it was envisaged by Mr Pulford that the Claimant would be his right-hand man, doing a similar role to him as his assistant and with a mixture of selling and fitting work. No written terms and conditions were issued. Initially there was just the Claimant and Mr Pulford working there although at other times during the Claimant's employment there was another employee. Being a small business with only two or three employees flexibility was necessary to meeting the requirements of the business.

2006 agreement

7. In April 2006 agreement was reached orally in relation to various terms of the Claimant's employment. These were not recorded in writing at the time. However there was an exchange of correspondence in relation to this in 2009. In particular by a letter of 15 June 2009 the Claimant recorded that terms had been agreed as follows:

> "* May main role would be designing and selling kitchens.
> * I would be paid a salary of £27,000 per annum.
> * There would be a bonus system based on sales.
> * I would be required to be available for fitting kitchens 8 weeks of the year when and if required (including in the salary figure).
> * If any overtime or additional fitting days were carried out this would be at a higher rate of pay equal to a fully qualified kitchen fitter.
> * My hours would be 8am to 4.30pm.
> * 4 weeks holidays.

* I would be required to work every other Saturday and have Wednesday PM off.
* Tools would be paid for by The Kitchen Shoppe.
* There would be a petrol allowance."

8. There was no upper limit on the number of hours fitting that could be required, which was a point made in Mr Pulford's reply of 28 June 2009. Mr Pulford argued that part of the Claimant's job description was to work where and as Mr Pulford directed. That was not something that had been agreed. Indeed I accept that it was agreed in 2006 that the Claimant's main role was designing and kitchens. The context was of Mr Pulford accommodating the Claimant's request to cut down the amount of fitting work he was doing. It does not follow that Mr Pulford had given up the ability to direct the Claimant to carry out a higher proportion of other work from time to time if this was required by the needs of the business. The context remained one of a small business where it was necessary to pull together to meet the needs of the business.

9. In his reply on 28 June 2009, Mr Pulford also noted (and I accept) that the agreement to pay for petrol did not include coming to work or going home. Save for those noted at paragraph 8 above, no other issue was taken with the above terms. Other than as set out at paragraph 8 above, and save in relation to bonus (which I address further below), I accept that they accurately reflected the terms agreed in 2006.

10. The salary of £27,000 which was agreed in 2006 was an increase from the previous salary, which was £24,000. The increase took into account the 8 weeks of fitting work which were included. The working hours were a change from the previously agreed hours of 9 to 5.30. The Claimant had explained the reason for requesting these hours on the basis that for two weekdays he had evening commitments and it would be a rush to leave much later than 4.30pm.

11. A bonus arrangement was also discussed. A discretionary bonus had in fact been paid in each year of the Claimant's employment apart from possibly 2002, for which the paperwork was missing. The payments varied between around £1,500 (which was paid in 2005) and £3,000 (paid in 2004). Up until 2006, the bonus was paid in the exercise of Mr Pulford's discretion when he considered that the performance of the business merited this. There was nothing said to indicate a contractual right to a bonus in future.

12. As part of the discussions as to remuneration in 2006 Mr Pulford proposed a sales based bonus with a target for the Claimant of £200,000 worth of kitchen sales which would give rise to a £1,000 bonus, and then a further £1,000 for each increment of £50,000 sales by the Claimant beyond this. If implemented this would have been a significant change to the previous practice, by introducing an entitlement if targets were met and also making this dependent on the Claimant's own sales performance rather a broader discretion. The Claimant was also concerned at the targets that were set. He objected on the basis that they did not take into account his commitment to 8 weeks' worth of fitting. No specific revised targets were agreed. Instead they agreed to see how sales went. Matters continued as before in 2007 and

2008, when Mr Pulford awarded a bonus in the exercise of his discretion. Thereafter no bonus was awarded and no revised sales targets were proposed. I address below, in the "Discussion" section, my conclusions as to whether there was a contractual term as to bonus.

2009

13. An issue arose in 2009 because the Claimant was unhappy with the amount of fitting work he was doing. This was initially raised in April 2009. There was then a discussion on 11 June 2009 which, by agreement was recorded. Mr Pulford accepted that the transcript (which was made by the Claimant) was accurate, although not necessarily a complete transcript of the discussion.

14. During the discussion, the Claimant rehearsed the background to the agreement in 2006, which was that he wanted to do less fitting and that he believed that they had agreed that his role would be primarily designing and selling kitchens. Mr Pulford made the point that there was not a limit of 8 weeks fitting, but that if more was required the Claimant would receive an additional payment for it. The Claimant agreed but reiterated that it was not to be continual fitting, and that his role was to be primarily designing and selling kitchens. Mr Pulford accepted that they had spoken about cutting down the amount of fitting, but argued that this (ie the number of fitting hours) was not set in stone. He emphasised the difficult circumstances of the company in the context of the recession. The Claimant noted that all he was asking was to go back to what they had agreed. Mr Pulford replied that he was sure that they could do that in the future but, whilst he was not asking the Claimant to do continual fitting, he was asking him to help the company through what was a very bad period when it was under substantial financial pressure. I regard the discussion as consistent with the conclusions I have set out above.

15. In the course of the discussion on 11 June 2009 the Claimant requested that he be provided with his statement of employment [**75**] – which was a reference to the statutory duty to provide a written statement of certain particular of employment. Mr Pulford responded that he would do it the following week. This was the first of several requests made over several years. Three such requests were made in 2009: (a) In a letter of 17 June 2009 following up on his letter of 15 June 2009 setting out the terms of the 2006 agreement [**83**]; (b) in a chasing email on 16 July 2009 [**85A**] and (c) in a letter of 3 September 2009 [**85B-C**]. No particulars were provided at that time. Mr Pulford's contention was that this was because there was a dispute over the terms. However that was not a satisfactory reason for failure to comply with the statutory obligation to provide a statement of particulars. If necessary this could have been provided setting out the Respondent's view of the relevant terms.

2012

16. The issue as to the extent of fitting work that the Claimant could be required to do, in particular other than on his own sales, arose again in the Summer of 2012. The Claimant was concerned that his colleague, Alex Davies, who

had initially been taken on as receptionist/ administrative assistant, was now working as a salesperson. The Claimant believed that he was being routed down a path towards being a Kitchen fitter and contracts manager (or projects manager to use terminology adopted in negotiations in 2017 to which I refer below). He raised this with Mr Pulford on 14 July 2012. He subsequently sent an email of 7 August 2012 recording their discussion [**85E-F**]. He reiterated that they had agreed in 2006 that his main role would be selling kitchens, and that he would also arrange and assist in fitting on his own projects, but said that from 28 August 2016 his help on other's projects would be limited. He again requested his "Statement of Employment" and expressed his belief that if this could be provided the difficulties could be sorted out once and for all.

17. The Claimant also noted that when the contract package was agreed in 2006 they had spoken about providing him with a vehicle and agreed petrol money for travelling on company business and contributions towards tax and national insurance to cover running costs. He stated that whilst he had been using his own van for deliveries he would be getting a replacement car that he was not willing to use (for fitting) and so a vehicle would need to be supplied by the Respondent.

18. Mr Pulford replied on 7 August 2012. He noted that the Respondent was £20,000 in debt and he was doing all he could to keep the company going and pay a wage. He did not take issue with the Claimant's contention that they had agreed in 2006 that his main role would be to sell kitchens. But he emphasised that things had changed in the business and in the country, which was in recession. He again asked for a flexible approach from the Claimant.

19. The Claimant replied on 8 August 2012, reiterating his request for a statement of employment. Mr Pulford replied on the same day saying that he would sort out the paperwork during the summer shop closure and have it ready for 28 August 2012 [**85D**].

20. On around 28 August 2012, Mr Pulford provided the Claimant with a draft contract. It was put forward as a "discussion document" and not as the written terms and conditions that the Claimant had been requesting. It was a draft contract which he had received from a friend who worked in a bank and which Mr Pulford had started to amend up. There were gaps left including as to pay, and the hours of work were incorrectly stated. In addition the Claimant's role was stated as being "administrator/ kitchen fitter". That was incorrect. Whilst the agreement in 2006 had not covered the Claimant's job title, his role was not as administrator, and whilst part of the role included fitting his primary role was selling and designing kitchens.

21. A focus of the draft contract was to emphasise the element of flexibility which Mr Pulford contended was expected. It noted that in addition to the normal job duties, he could from time to time be required to undertake additional or other duties as necessary to meet the demands of the business and that he was required to work as part of a team and contribute to the smooth running of the team.

22. On 7 September 2012, the Claimant emailed Mr Pulford stating that he was not happy with the draft contract. He asked to sit down and talk about it at the earliest opportunity. In an email on 5 September 2012 Mr Pulford had asked the Claimant to let him know what he wanted to see in the draft contract. The Claimant addressed this by providing a draft contract which he said set out all the points agreed in 2006. The draft contract identified the Claimant's role as being that of "Kitchen Designer/salesman" and stated that his normal daily duties would be to design and sell kitchens. It also corrected the agreed hours. However in relation to bonus it set out Mr Pulford's proposal based on target figures for sales, whereas as noted above the Claimant had objected to this and they had agreed to see how sales went. The draft contract also included a stipulation that the 8 weeks fitting would only include assisting with general fitting work in extreme cases. This was not something which had been agreed.

23. Mr Pulford took exception to the Claimant having provided the contract, on the basis that it was not for the employer to do so. Although Mr Pulford said on 7 September 2012 that he would look over this and they would get together, matters did not progress and the Claimant was not provided with written particulars of his employment. From Mr Pulford's perspective that was because they could not agree the content, though as noted above that was not a satisfactory basis for not providing particulars at least setting out what he believed to be the applicable terms.

Negotiations in advance of proposed sale

24. In early 2016 the Claimant discovered that Mr Pulford had put the business up for sale. This prompted him to email Mr Pulford on 21 January 2016 again asking for his Statement of Employment. Mr Pulford replied asking what the Claimant would like to be included in it. The Claimant replied noting that he had not yet managed to get Mr Pulford to write down what was agreed in 2006 and so there was an ongoing dispute. He therefore asked Mr Pulford to write down what had been agreed, and said they would take it from there [**97**].

25. The matter was not substantively progressed until early February 2017 when Mr Pulford informed the Claimant that he had retained an HR company to draw up the contract. From February 2017, there were a series of draft contracts in an attempt to seek to reach agreement. In all there were the following drafts of the contract:

    25.1 An initial draft produced by Mr Pulford (rather than by the HR company) on 7 February 2017 ("**Draft 1**") [**99-111**];
    25.2 A second draft dated 29 March 2017 and received by the Claimant on or around that date ("**Draft 2**") [**122A-122N**].
    25.3 A draft produced by the Claimant in around the first week of April 2017 [**122O-S**].
    25.4 A third draft form the Respondent received by the Claimant on around 11 April 2017 ("**Draft 3**") [**126-141**]
    25.5 A fourth draft from the Respondent received on 13 April 2017 ("**Draft 4**") [**144-157**].
    25.6 A draft provided by the Claimant on 19 May 2017 [**158,164**]

25.7 A fifth draft from the Respondent given to the Claimant on 22 May 2017 ("**Draft 5**") [**169-181**]

25.8 A sixth draft from the Respondent emailed to the Claimant on 29 June 2017 ("**Draft 6**") [**218-231**].

26. After being provided with Draft 1, the Claimant met with Mr Pulford on 14 February 2017. Three points were covered: the Claimant's working hours (which had not been set out in Draft 1), the bonus clause and a restrictive covenant.

27. In relation to bonus, Mr Pulford had included a bonus provision. In contrast to the specific targets that had been put forward and rejected in 2006, although this referred to a "sales based commission", the clause provided for payment to be discretionary based on profitability of the Respondent, the Claimant's personal performance and potential future contribution to the company. Prompted by the inclusion of a reference to bonus, the Claimant raised the fact that no bonus had been paid, which had been the situation since 2008. Mr Pulford pointed out that profits had not recovered from the recession and that in the last year the Respondent had made a loss. He also argued that in any event the Claimant was not entitled to a bonus because he had rejected the structure offered in 2006. A bonus provision was not included in any subsequent drafts of the contract.

28. In relation to working hours, Draft 1 had provided that as part of the Claimant's job he would be expected to exercise a degree of personal flexibility which could involve unsocial hours, including working at evenings and weekends. The only change made to this in Draft 2 was to refer, instead of evenings and weekends, to working "evenings and Saturdays, in line with the needs of the business." This was not a provision which had been specifically discussed when terms were agreed in 2006. The Claimant did routinely start work between 7.15 and 7.30am and when fitting would collect materials at 6.30am, then go to the shop before going to the job for 8am. He also did sometimes carry out evening appointments outside working hours but this was not a common occurrence. Mr Pulford was able to produce extracts from showroom diaries since 2004, albeit that not every diary had been kept; diary entries from 10 out of the last 14 years were produced. These included a total of around 18 evening calls during that period, the last being in June 2014, though for a period there were personal diaries also kept which may have shown others. Most of the evening calls shown were in the period up to and including 2008, with only 5 or 6 afterwards. Generally the Claimant made his own appointments. It was left to him as a matter of trust to arrange the appointments as appropriate.

29. In the first week of April 2017, the Claimant sent Mr Pulford a contract which he had drawn up setting out what he contended should be included [**122O-122S**]. This was a much shorter document than had been supplied by Mr Pulford. As in 2012, Mr Pulford took exception to the Claimant having drawn up the contract. He replied on 9 April 2017 stating that he had employed a local HR company to write the contact and stating that it would come from them rather than from the Claimant.

30. In his reply Mr Pulford also noted that the new owners had "some admirable ideas for growing the company and raising it to the next level". The Claimant took this as indicating some reason for concern as to the changes which might be made by the new owners and how that might affect the Claimant's position. However Mr Pulford also expressly reassured the Claimant, in response to the Claimant having stated that the contract situation was causing him stress and sleepless nights, that his job was secure and that the new owners wanted him to carry on in the same role. Mr Pulford added that he wanted to retain the Claimant's services and also to know that if he left he would not go to work for a local competitor. That was a reference to the restrictive covenant which he had sought to include in the contract, but which had not been agreed.

31. Mr Pulford also added that the discussions were private and confidential and should not be discussed with the other employee, Alex Davies. Consistently with this, the heading "Private and Confidential" had been added to the previous draft of the letter. The Claimant's view was that he and Mr Davies were both in dispute over the terms of the contract and there were similarities in their position and they should be able to discuss the matter. I accept that the Claimant was entitled to take the position that he should be able to discuss the approach to the contract with Mr Davies, subject to this not causing disruption in carrying out of their duties.

32. In his email of 9 April 2017 Mr Pulford had also asked the Claimant to let him know exactly what he was not happy with in the contract that he had provided [**123**]. Therefore on 10 April 2017, the Claimant sent Mr Pulford a list of the amendments that he required [**124-125**]. The issues specifically identified included:

    32.1 The job description – which the Claimant identified should be "Kitchen Designer/ Salesperson" rather than "Designer and Project Manager".
    32.2 Duties, which should (amongst other matters) include that the primary duties were to design and sell kitchens.
    32.3 The reinstatement of the bonus provision.
    32.4 Deletion of the heading "Private and Confidential".
    32.5 In relation to working hours: inserting his working hours and deletion of the reference to personal flexibility involving working unsocial hours in the "working hours" section.
    32.6 Removal of the restrictive covenant.

33. On 11 April 2017, the Claimant was provided with Draft 3 [**126-141**]. Broadly this built into the contract the points that had been raised by the Claimant on 10 April 2017 by cutting and pasting from that letter, identifying some point of disagreement, and points to be discussed and amended and making some amendments such as changing the job title to that requested by the Claimant. The letter therefore did seek to engage with the Claimant's concerns. It was accepted that the provision in relation to use of the Claimant's vehicle should be replaced with the Claimant's wording and the deletion requested by the Claimant in relation to work location was agreed. However in relation to the request to reinstate the bonus provision, it was said that bonus was to be agreed by the new owners. The personal flexibility clause was said to be needed to cover evening survey calls.

34. The Claimant met with Mr Pulford to discuss the contract on 13 April 2017 but they were not able to reach agreement. The meeting concluded with the Claimant stating that Mr Pulford should include what he wanted and the Claimant would then respond.

35. Draft 4 was then supplied to the Claimant by an email of 13 April 2017. Mr Pulford stated that so far as he was concerned this was the final contract after taking advice. He suggested that the Claimant do the same and then respond [**143**]. The draft incorporated several of the changes requested by the Claimant. Notably:

    35.1 The job title was changed to "Kitchen Designer and Sales Person".
    35.2 In the duties section it was provided that the primary duties were to design and sell kitchens. Although there was a reference to having the role of "project manager" this was specifically in relation to arranging and overseeing the installations of the kitchens he had sold up to completion.
    35.3 A clause was included relating to use of a personal vehicle for normal sales duties but which provided that the company would provide a van for use throughout any period when the Claimant was required to carry out fitting work.
    35.4 The heading "Strictly Private and Confidential" had been removed.

36. However in other respects the draft did not meet the Claimant's concerns:
    36.1 Although working hours were inserted, they were incorrectly stated as being from 9am to 5.30pm except on Wednesdays to Saturdays, contrary to the agreement in 2006.
    36.2 The personal flexibility provision, referring to working unsocial hours including weekends and Saturdays, remained. Further there was an additional provision, after setting out the working hours, that the Claimant "may be required to visit clients in their homes to survey their kitchen out of these hours". There was no limit stated as to how often this may be required.
    36.3 The restrictive covenant remained.
    36.4 There was no provision for bonus.

37. On 28 April 2017, Mr Pulford emailed the Claimant and Alex Davies asking them to say by the following Tuesday whether they were going to sign the contract, and if not to give their reasons so that he could pass this on to the prospective new owners. [**161**]. The Claimant replied by email on 29 April 2017 saying he would not be signing the latest version as clauses that he requested be removed were still there [**162**]. He highlighted the main points he was unhappy with - the covenant, agreed hours, bonus, arrangements in relation to the care and some of the wording in a number of sections. He acknowledged that they had not been able to reach agreement on a fixed bonus structure but said that Mr Pulford had said that he would pay a bonus depending on sales and performance as he had done for a number of years. I do not accept that there was agreement to that effect. Indeed it differed from the Claimant's own evidence at this hearing, which was to the effect that matters were left that they would see how sales went.

38. The Claimant concluded that that he was happy to continue working under the original agreement made in 2001 as amended in 2006 and that he did not accept the terms in the latest proposed contract. He noted that should the new owners be content to abide by the original verbal agreement, he would still require a statement of terms within two months of the transfer. He added that the situation was causing him sleepless nights and stress which could have been avoided had he been provided with a contract 16 years earlier.

39. On 10 May 2017 the Claimant and Mr Davies had a two and a half hour meeting with the prospective new owners. The Claimant was not reassured by the meeting. He made clear that he would not sign the contract unless it was in line with what he regarded as his original agreement and present working conditions. In his evidence the Claimant stated that he had agreed to the suggestion made by one of the prospective owners that there be a meeting between the Claimant, the prospective owners, Mr Pulford and the representative of the HR company. This was unchallenged and I accept that it was said. However Mr Pulford was not present at the meeting, and nor did the Claimant raise this suggestion with him and nor was the issue explored in evidence as to whether the suggestion had otherwise been drawn to his attention.

40. The Claimant also became aware of two advertisements placed for the Kitchen Shoppe, one of which was for the position of Designer/Sales manager and Kitchen fitter with a lower salary. The Claimant took this as indicating that it had been placed by the prospective new owners in preparation for future changes. [**32,34**] However, the Claimant did not raise this with Mr Pulford. I accept that Mr Pulford was not aware of the adverts and that the prospective new owners were not at that time authorised by the Respondent to place the adverts on behalf of the business that they had not yet required. As such, the placing of the adverts was not a matter capable of contributing to any breach of contract by the Respondent.

41. On 17 May 2017 Mr Pulford replied to the Claimant's email of 29 April 2017, noting that Mr Pulford was in the process of re-writing and amending the contract to the extent he felt the points raised by the Claimant were acceptable or he was prepared to make concessions. He recorded that he understood from one of the prospective owners that the Claimant had a "long list of demands" rather than just the five points listed in the 29 April 2017 email and asked if there was anything else the Claimant felt should be included for him to consider.

42. The Claimant replied on 17 May 2017 stating that he would get back to Mr Pulford once he had had a chance to check what he needed in detail [**163**]. The Claimant then emailed Mr Pulford on 19 May 2017 stating that he would only be prepared to agree terms as per the agreement made in 2006 and attaching a draft contract that he would be prepared to sign [**164, 158**] He again emphasised the context of Mr Pulford's failure to provide written particulars of employment. He pointed out that he should not be made to feel that he was the guilty party as he should have been provided with the statement of terms promptly.

43. On 22 May 2017 Mr Pulford replied noting that whether the Claimant signed the contract or not, this would not stop the sale of the company and that it was in Claimant's interests to have a valid contract prior to handover to safeguard his present working conditions. [**164**] From the Claimant's perspective he was concerned not to be pressured into changes from the terms that he understood had been agreed, and was aggrieved to be in this position when it could have been avoided by providing the statement of employment earlier. It appeared to the Claimant that Mr Pulford's response was designed to seek to convince him to sign or else be in a vulnerable position if the sale went ahead. However the context of the email was that the Claimant had highlighted that when he spoke to the prospective owners he had made clear to them that if they accepted the Claimant's version of the contract he came "with baggage" [**165**] (and he had also forwarded the email to the prospective new owners [**166**]). It appeared to Mr Pulford that the Claimant was holding a gun to his head over the contract, believing it could hold up a sale and saying that he would come with a lot of baggage. As such, whilst noting it was in the Claimant's interest to have the terms recorded in writing, it was necessary to make clear that if the Claimant chose not to sign the contract this would not stop the sale of the company.

44. Mr Pulford's position in relation to bonus was set out in document at page 159 to 160 of the bundle. In Mr Pulford's evidence he suggested that this was sent following the version of the contract provided on 11 April. I consider it is more likely that it was sent in response to the single page draft contract sent by the Claimant on 19 May 2017 [**164**], possibly as the attachment to Mr Pulford's email of 22 May 2017 [**164**]. However nothing turns on this. Mr Pulford argued that the Claimant had turned down the offer for a target based system and therefore no bonus system was in place and had not been for many years. He also argued that the only way that having a bonus provision would work would be to have a simple system based on reaching a set number of sales. He was therefore not willing to include it in the contract, and said any bonus would be for the new owners to negotiate.

45. The Claimant had a further discussion about the contract with Mr Pulford on 22 May 2017 but again they could not reach agreement. Later that day he received Draft 5 of the contract [**169-181**]. On 25 May 2017 Mr Pulford left two further copies of Draft 5 on the Claimant's desk with a note asking him to sign and put one draft on his desk by Thursday morning. [**182**] The updated draft noted that the restrictive covenant had been deleted and it corrected the working hours, but other aspects to which the Claimant had objected were not changed.

46. By a letter emailed to Mr Pulford on 26 May 2017, the Claimant detailed what he said were changes or additions from what had been agreed and which he said therefore needed to be altered to agree the contract [**196-200**]. The letter detailed each of the terms which the Claimant said had been added or not been agreed. In some ways that was unhelpful in that it did not distinguish between changes/ additions that were or were not objectionable, but simply identified provisions which had not been the subject of previous agreement. The Claimant concluded the letter by stating that if the Respondent chose not to make all the amendments he would consider himself to have been dismissed. He followed up with an email of 27 May

2017 adding that the provision for bonus, consistent with that in Draft 1, also needed to be added [**201**].

47. By an email of 30 May 2017, Mr Pulford notified the Claimant that Donna (Obstfeld) from the HR company who had been advising the Respondent (DOHR) would be writing to the Claimant with a view to helping to resolve any concerns as to the future after Mr Pulford's retirement. The Claimant replied on 31 May 2017, stating that he did not have concerns about his future at the Respondent, and that his only concern was that he had a contract which stated the terms and conditions that were agreed and that he was not happy at Mr Pulford asking other people to persuade him to sign. He asked that Ms Obstfeld did not contact him as there was nothing he wanted to discuss with her. He said that should Mr Pulford decide not to make the amendments he would assume that he wanted him to sign a "new contract" which he was not prepared to do and would have no choice but to consider himself dismissed. He set a deadline of 9.30am on 6 June 2017 [**201A**].

48. On 3 June 2017 the Claimant emailed one of the prospective purchasers, Vix Iqbal, stating that he would be prepared to resolve the dispute through Mr Iqbal acting as mediator subject to the meeting being recorded to avoid any misunderstandings. Mr Iqbal replied stating that he was willing to offer he services as a neutral person but was not a professional mediator. [**202**]

49. On 5 June 2017 Mr Pulford wrote to the Claimant noting that he was under a legal obligation to provide a contract of employment and stating that this was brought to his attention during the recent discussions over the sale of the business, and that as it was a small business this had never been an issue for the Respondent before. In fact, as noted above, the Claimant had been pressing for a Statement of Employment for several years. [**204**]

50. Mr Pulford proceeded to explain that he regarded the purpose of the contract as being to clarify the terms that exist. He argued that many of the clauses that the Claimant was asking to remove would leave him legally exposed, and noted the concessions made, including in relation to removal of the restrictive covenant. He emphasized that he was keen to resolve the dispute. To that end he suggested that the Claimant attend a meeting with his solicitor, Mr Pulford, and the Respondent's HR advisor to discuss the issues reasonably, and argued (referring to the Claimant's letter of 26 May 2017) that issuing a 5 page letter was not a helpful or constructive way of resolving the concerns. He asked the Claimant to arrange for his solicitor to contact Donna Obstfeld of DOHR.

51. The Claimant replied on 8 June 2017 stating that having discussed with his solicitor they had decided that there was no benefit in having a meeting as it would cost about £1,000 and would not resolve the matter and he was not looking to agree any unilateral changes and that none of the changes were to his benefit [**205**]. It was however open to the Claimant to have attended without his solicitor to work through the points raised in his long letter, to hear the explanation for the clauses which he regarded as new, and to seek to finalise the contract. The Claimant's perspective, as he set out his letter was that he was not prepared to accept what he referred to as "the new offer" and

wanted to keep the same terms as had previously been agreed orally. He concluded that he would consider himself dismissed if the Respondent insisted on "the new contract".

52. Mr Pulford replied on 12 June 2017. He indicated a willingness to consider amendments, but noted that there were some points which he was not prepared to alter. In particular he stated that the occasional visit to a customer out of normal working hours would be "absolutely normal in any kitchen salesman's job description" and that the Claimant had done this previously so it was nothing new. He also commented that the fact that the Claimant was not prepared to cover the shop for just an hour when Alex Davies was not available was not in the interests of the business. This referred to an issue that had arisen in around the previous October where Mr Pulford had asked the Claimant to come in and leave an hour later which would have allowed Mr Pulford to arrange a cheaper flight for his holiday. The Claimant had declined, having only been given a matter of days' notice, but had not given an explanation at the time to Mr Pulford.

53. In the Claimant's reply of 13 June 2017, he took issue with the suggestion that mediation had been offered and argued that he was not the one wanting to change the agreement and so should not have to pay for all the costs (which in context must have been a reference to his own costs). In relation to evening visits to customers he argued that he could only remember having made 5 such visits over the last 16 years but that in any event the decision to make these visits had been his own, and that as he had not had any pay increase for 10 years and no bonus for 8 years it was not reasonable to expect him to work additional hours with no additional payment. He reiterated his belief that nearly all the new terms and conditions were for the benefit of the prospective new owners and that if they wanted to change the terms in future he would be happy to discuss it with them then. But he saw no reason to add new terms now. He concluded by reiterating his deadline of 21 June 2017. [**207**]

54. A reply to the Claimant's email was sent on behalf of the Respondent by Fiona Mendel, a Senior HR Adviser/ Employment Solicitors with DOHR, on 19 June 2017 [**209-211**]. In relation to pay, an offer was made to increase the Claimant's salary by 3% in July on the basis that all terms were resolved. She noted that it was understood that the offer to split costs was an issue and that therefore they would seek to find alternative ways to resolve matters and that one possibility was to utilise ACAS. The letter concluded by asking the Claimant to provide his solicitor's details so that they could liaise directly.

55. The Claimant replied by an email of 25 June 2017 [**212-213**]. He suggested that Mr Pulford provide a final contract based on what he was prepared to accept. He noted that there were a few clauses included in the contract that he was prepared to accept but which were included because they were added. He said that if these were the only points not removed then he would have no objection to signing. However he did not identify to which provisions he was referring.

56. Ms Mendel replied by a letter of 27 June 2017. The Claimant had asked why Mr Pulford was now insisting on a comprehensive, rigid contract when he

was on the point of selling the business, whereas at his choice he had employed the Claimant for 16 years without any written terms. In response Ms Mendel explained that this was to ensure it was compliant with current legislation "and reflective of your implied terms of employment since you commenced work with the company" and that the contract should not detriment him in any way. It also noted that there had already been agreement to remove the restrictive covenant.

57. The Claimant had also sought clarification as to when the offer of mediation and to split costs had been made. Ms Mendel sought to argue that the letter of 5 June 2017 had contained an offer of mediation, which was not the case. But in any event the Claimant was invited to attend a mediation on the basis of splitting costs evenly. It was believed that this would bring focus on reaching an agreement rather than just going through the motions. Further, mediation was not the only route offered to seek to reach a resolution. The letter also concluded by suggesting a meeting between Mr Pulford, Ms Mendel and the Claimant, and if he wished, his solicitor, so that the contract could be included to each parties' satisfaction.

58. The Claimant replied on 28 June 2017 [**217**]. He did not respond to the offer of mediation or of a meeting. Instead he referred back to his letter of 25 May 2017 specifying the amendments he required to conform to his existing terms and conditions, and stating that if he did not receive a contract which reflected his existing terms by 4.30pm on 3 July 2017 he would take whatever action he deemed necessary. There was however, I am satisfied, a genuine disagreement as to what had been agreed and its effect.

59. In response, Ms Mendel sent the Claimant an amended draft contract (Draft 6) on 29 June 2017. In her covering email Ms Mendel said:

> "You will note that your requested amendments have been agreed to and removed from the contract. Your suggested wording has also been inserted. We have provided the contract with track changes so that you can see the extent to which your requests have been accommodated.
>
> A few minor sentences remain but these are standard in all contracts and ensure compliance with the law. For example the Bribery Act stipulates that companies need to monitor the receipt of gifts and entertainment.
>
> I hope this now settles matters and if you could confirm your agreement, I will send you a clean copy of the contract (without the track changes) for your signature."

60. Contrary to this covering message, it was not the case that all the amendments requested had been made. Nor were all the revisions from the last draft shown as tracked, which appears to have been the result of amending an earlier version from around the time of Draft 2. In several respects the terms were less satisfactory to the Claimant than the previous Draft. Notably:

60.1 Having previously agreed to the title of "Kitchen Designer and Sales Person" this was now replaced by the title "Designer and Project Manager" without any explanation given for that change. The Claimant had objected to the reference to "project manager" in the previous draft (in the duties section), but in that context it had been clear that it referred specifically to the Claimant's own sales, which he accepted was part of his role. However that summary of duties, clarifying the meaning of project manager, was not included in this draft.

60.2 The summary of "Duties" which had been removed had also included a statement that primary duties were to design and sell kitchens. That had been removed. Instead there was a new provision that:

> "Your duties will reflect all those standard in the trade and those that you have been undertaking since the commencement of your employment."

This was the first draft that had included such a provision and it raised the concern as to what duties could be imposed under this heading.

60.3 The provision covering working out of hours remained, although the additional reference to surveying kitchens out of working hours was removed.

60.4 The Claimant's working hours were not stated.

60.5 Although the large restrictive covenant was removed, under the hearing of "Termination" there remained a six months post-termination restriction on approaching or carrying out work for customers of the Respondent without its prior approval.

60.6 The bonus provision was not included.

60.7 The "strictly private and confidential" heading, which had been removed, was re-inserted.

61. However the content of the contract is also in my judgment to be seen against the context that, as was apparent from the correspondence, the Respondent had not been seeking simply to provide the Claimant with a take it or leave it document. It had been seeking to work through the points raised by the Claimant in a meeting to seek to agree a resolution. Further, there was some reason to suspect that some of the omissions or changes had not been intended, since they appeared to contradict what had previously been accepted, including the omission of the working hours and the fact that there was still a covenant. Nor had any detriment been threatened if that version of the document was not signed.

62. The Claimant considered that matters had gone backwards with Draft 6. In response, by a letter dated 3 July 2017 the Claimant submitted his resignation with immediate effect, claiming that there had been a fundamental breach of contract [**232**]. He placed emphasis on the incorrect statement in the covering email from Ms Mendel that the requested amendments had been made, and his contention that the Respondent was

still not providing him with a contract reflecting the existing position and had no intention of doing so.

63. By a letter from the Respondent of 4 July 2017, the Claimant was invited to reconsider his decision and to attend a grievance meeting. The Claimant did not take this up [**233**].

APPLICABLE LEGAL PRINCIPLES

64. The first issue is whether the Claimant acted in breach of the implied term of trust and confidence. This has two elements: (a) whether, judged objectively, the Respondent's conduct was such as to destroy or seriously damage the relationship of trust and confidence and (b) whether there was reasonable cause or excuse for such conduct. A breach which is sufficiently serious as to amount to a breach of the implied term trust and confidence is necessarily repudiatory.

65. The test is objective. The relevant issue is not whether the Claimant had subjectively lost trust and confidence, but whether objectively the employer had acted in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence and whether there was reasonable cause or excuse for such conduct.

66. It is relevant for me to consider what was objectively conveyed to the Claimant, or that which would have been conveyed to a reasonable person in his position, as to his intention to comply with the agreed terms. There is sometimes reference to a test of whether the contract breaker had "clearly shown an intention to abandon and altogether refuse to perform the contract". However it is not a matter of whether subjectively he believed that the employer had no intention of providing him with a contract in the terms agreed, but whether objectively the employer acted in a manner such as to evince that intention. This is not in substance different from the test of whether without reasonable cause or excuse the conduct of the alleged contract-breaker, considered objectively, was likely to destroy or seriously damage the relationship of trust and confidence between employee and employer: see *Leeds Dental Team Ltd v Rose* [2014] ICR 94 at paras 26, 28.

67. Pursuant to s.1 of the Employment Rights Act 1996, the Respondent was under a statutory duty to provide the Claimant with a written statement of terms within two months of the start of his employment. That was a statutory duty rather than a contractual obligation but in my judgment was an important aspect of the relevant context against which to view the Claimant's request for particulars, the failure to provide them by the time of the draft contracts supplied in 2017, and the contention that by the time of resignation the Respondent had still not provided a contract reflecting the agreed terms.

68. The fact that a sale or transfer of the business is proposed may also, depending on the particular facts, be part of the relevant context which is material in assessing the seriousness of a failure to provide an accurate statement of terms. At the end of the first day of the hearing, I provided the parties with a copy of the decision in *Euro-Die (UK) Limited v Skidmore and*

another EAT/1158/98, 3 December 1999. I directed the parties to paragraph 16 of the decision in which the EAT expressed the following view:

> "Where an employer, in answer to a concerned employee, fails at a crucial juncture to give an assurance which asks no more that for the true employment position to be recognised on a subject as essential to the employee's ease of mind as continuity of employment it cannot be said, in our view, that that failure cannot represent so fundamental a breach of the implied terms as to trust and confidence to entitle the employee to treat himself as constructively dismissed."

69. The particular circumstances in that case were however not on all fours with the present case. There was an urgency in the assurance being sought because the transfer was to take place on the next working day and the issue of continuity of employment was also of particular importance because the Claimant was concerned that he might lose the benefit of his long service if he agreed to transfer. The relevance of a prospective transfer is necessarily fact-sensitive, but may be a significant juncture in the employment relationship.

70. The right to resign may be lost by virtue of express or implied affirmation of the contract. An employee is entitled to some time to decide how to respond to a repudiatory breach, but if the employee continues to perform the contract without protest there is liable to come a point when that conduct together with delay amounts to an implied affirmation.

71. Further, the resignation must be at least in part in response to the repudiatory breach of contract.

DISCUSSION

72. I turn first to the issue of whether the Respondent failed to provide a contract correctly reflecting the agreed terms. I then consider whether, having regard to the circumstances and also the correspondence in relation to resolving the dispute, including the offer of mediation, any such failure amounted to a repudiatory breach of contract.

Bonus

73. In relation to bonus, an issue arises as to the effect of what was discussed about this in 2006, of the Claimant having rejected the targets proposed by Mr Pulford and their having agreed to see how sales went, and the context of the bonus payments that had previously been made and continued to be made until 2008 in the Respondent's discretion.

74. The approach to this is complicated by difficulties in the evidence and recollection of both the Claimant and Mr Pulford. I accept that in each case this reflects genuine difficulties in recollecting what had been agreed or discussed so long ago.

75. Mr Pulford's evidence was inconsistent. He asserted that the salary increase was in lieu of the bonus, whereas it was due to the inclusion of fitting hours

(as reflected in the transcript of a recorded conversation between the Claimant and Mr Pulford in 2009) [**74**]. At different points in his evidence Mr Pulford also maintained that the £200,000 target remained in place and had not been objected to and then reversed that position. He was not a reliable witness on this issue.

76. However there were also difficulties with aspects of the Claimant's evidence. His contention was that matters were left in 2006 on the basis that they would see how sales went. Yet, his case was not that bonus should be determined merely on the basis of sales, but that there would be a broader discretion taking into account performance and profitability more generally. In his email of 29 April 2017 he contended that Mr Pulford had said that there would be a bonus "depending upon sales and performance" [**162**]. But that was not his evidence as to what had been said in 2006. Instead he contended that it was agreed that there would be a bonus if the sales figures were good. In cross-examination he put this differently, as being an "inference" that if sales were good there would be some bonus payment. This was an inference which, on his case, was to be drawn from the way matters had been left that they would see how sales went, having rejected the specific targets put forward. Further his case as to the broad nature of the discretion as to bonus is difficult to reconcile with the terms of his letter of 15 June 2009 which referred to a "bonus system based on sales" or the provision set out in the draft contract provided by the Claimant in 2012, which was the bonus system which on his own case he had rejected.

77. In considering the effect of what was discussed in 2006 and the context of bonus payments made until but not beyond 2009, broadly there are the following possibilities:

    77.1 The Respondent's contention was that there was no agreement to a bonus, discretionary or otherwise, being part of the Claimant's terms and conditions of employment. Having initially included a discretionary bonus in the first draft contract proposed in 2017, that was also the position later taken by the Respondent in the negotiations in 2017.

    77.2 The Claimant's contention was that there was a broad discretion as to bonus based on sales and performance. Essentially this reflected the terms of the contracts he put forward in 2017, adapting the provision contained in Draft 1 which, despite referring to a "sales based bonus", referred to taking into account not only the Claimant's own performance but his potential future contribution and profitability of the company.

    77.3 A third possibility might be that there was an obligation upon the Respondent to introduce a sales-based scheme, with targets to be set having taken stock in seeing how sales went. I address this below in the light of my findings as to how matters were left in 2006 and the terms of the letter of 15 June 2009. However neither party advanced their case on this basis.

78. On balance, I consider that the Respondent's position is correct. In reaching that conclusion I take into account the following considerations:

78.1 I note that the Claimant's case was advanced on the basis of what it was alleged was agreed in 2006, and not on the basis that the practice of paying a bonus for each year up to 2008, other than 2002, of itself gave rise to a contractual entitlement to a discretionary bonus. In any event, on the evidence before me I consider those payments are consistent with there having been a discretion exercised to pay a non-contractual bonus in relation to those years without a discretionary bonus being part of the contractual entitlement. The Claimant's own evidence was that the payments were merely described as a bonus for the business doing well. It was not suggested that anything was said which indicated an entitlement to a bonus being paid in future years. Further, when there was no bonus paid after 2008 there was no communication of any decision as to a bonus one way or another. Whilst I accept that the Claimant understood that the business faced difficult economic circumstances and as such did not consider it to be appropriate to press for a bonus, if there was an established right on the basis of custom to payment of a bonus, it is to be expected at least that there would be communication of the decision as to whether or not such a bonus would be paid.

78.2 Nor on the evidence before me was there anything in the discussions in 2006 (or otherwise) to communicate that the payments that had been made were pursuant to any contractual entitlement to a discretionary bonus (other than arising through the specific exercise of discretion to pay the bonus in any particular year) or to give rise to such an entitlement in the terms for which the Claimant contended. The gist of the proposal that had been put to the Claimant in 2006 concerned a more specific focus on the Claimant's own sales performance. An element of that scheme was that there would be no bonus if the Claimant brought in less than £200,000 in sales, and even if he achieved that the bonus would only be £1,000, which was less than had been paid in the previous years. It was in my judgment implicit in this that Mr Pulford did not wish to continue to make payments which were not specifically related to the Claimant's performance. Against that context, I do not consider that the fact that the bonus scheme had been put forward and rejected and that matters were left on the basis that they would see how sales went objectively conveyed a contractual entitlement to have bonus considered on the basis of the exercise of the broad discretion suggested on the Claimant's case. Nor is that consistent with the Claimant's own letter of 15 June 2009 which referred to there being "a bonus system based on sales" [**82**] or the Claimant's draft terms of 2012 which included the targets which he had rejected. Whilst a bonus continued to be paid in 2007 and 2008, that was consistent with continuing with the previous practice, given that the proposal put forward by Mr Pulford had been rejected. The only other factor pointing in favour of the provision for which the Claimant contended was the term which Mr Pulford himself included in Draft 1 in 2017. Given that this was some 11 years after the alleged agreement, that on the Claimant's own case a sales based commission approach had been put forward and rejected, and that in the next conversation Mr Pulford disputed that there was an entitlement, and that on its face it was self-contradictory to refer to a "sales based commission" but also to

the broader discretionary factors, on balance I do not accept that the inclusion of that provision persuasively shows that a term to this effect had been agreed.

78.3 I turn to the further alternative noted above, that there was agreement in principle that there would be a sales based commission as part of the Claimant's remuneration package, and that this was to be framed after seeing how sales went. This interpretation has the merit that it is consistent with what was said to have been agreed in the letter of 28 June 2009. It would also be consistent with the fact that in Draft 1 Mr Pulford put forward that the Claimant was eligible for a "sales based commission" but that the details were to be communicated to the Claimant and may change over time. On balance however I do not consider that this is the correct conclusion. I take into account that:

(a) Neither party put this forward as the correct analysis of what had been agreed.
(b) If this had been the gist of the agreement it is to be expected that at some point after 2006 it would have been followed up by the Claimant or the Respondent, raising the need to agree revised targets to be applied. The Claimant's explanation for not chasing up the bonus was his understanding as to the difficult financial position of the Respondent. That makes sense in the context of the exercise of a broad discretion as to whether to pay a bonus, but in my judgment has less force in relation to putting in place a scheme against which to measure whether sales which he made were sufficient to earn a bonus.
(c) I do not consider that the evidence before me supports there having been an oral agreement to this effect. The comment that they would see how sales went was equally consistent with there being no agreement at that time but that it was something that could be revisited in future depending on sales. It did not convey with sufficient certainty a commitment to implement a sales based bonus. I am not satisfied on the evidence before me that, aside from the comment about seeing how sales went, there was agreement to the principle of a sales based bonus as opposed to there merely having been the specific proposal put forward by Mr Pulford which the Claimant rejected.
(d) The principal factor which in my judgment weighs against the Respondent's position, and in favour of there having been agreement to the principle that there would be a sales based scheme, is the terms of the letter of 28 June 2009 and that Mr Pulford did not take issue with what was said in it in relation to bonus. On balance however, and taking into account the considerations set out above, I consider that this is explained on the basis that there had indeed been discussion of the introduction of a sales based bonus with a sales threshold of £200,000. Mr Pulford's reply did not specifically refer to that, and its rejection. But since the Claimant was a long way from the threshold that had been set for earning a bonus under the proposals that Mr Pulford had put forward, and nor was he pressing Mr Pulford to put

forward alternative proposals, it is understandable that this did not appear a priority at the time.

Flexibility to work unsocial hours after work and on Saturdays

79. I turn to the provision that the Claimant was required to exercise a degree of personal flexibility which could involve unsocial hours, including working evenings and Saturdays in line with the needs of the business. This was a provision included in each draft of the contract, save that it appeared in slightly different terms in Draft 1. Some of the drafts further emphasised the point by including a further clause to the effect that the Claimant could be required to visit clients in their homes to survey their kitchen outside of the working hours. However that did not appear in Draft 6 which immediately preceded the Claimant's resignation.

80. Given the nature of the Claimant's role and the Respondent's business, I accept that there was an implicit requirement for a degree of personal flexibility of the nature set out. Indeed in the context of this business and the Claimant's role, this was an aspect of the implied duty of fidelity, which entailed a degree of cooperation, taking into account the requirements of the business and the Claimant's role. As to this:

80.1 The Respondent was a small business, and by its nature required a degree of flexibility amongst the few members of staff so as to be able to function effectively. Typically there would be the Claimant, Mr Pulford and at times one other person to carry out the sales function. Because customers might on occasion not be available during working hours, in order to carry out that function effectively it might exceptionally be necessary to make appointments outside of working hours. In a large organisation it might be that arrangements could be made for others to cover this. But in such a small organisation as the Respondent it is likely that there would be an expectation of some flexibility to cover this.

80.2 There was a fairly loose arrangement when the Claimant was taken on, with him effectively being taken on as Mr Pulford's right hand man with a view to their together meeting the requirements of the business. That is suggestive of an expectation of flexibility in pitching in with what was necessary to meet the needs of the business. Consistently with this, the need for flexibility, albeit not specifically in relation to working hours, was a theme of Mr Pulford's correspondence with the Claimant when issues arose as to the terms of employment.

80.3 Although there was an agreement to change the Claimant's working hours in 2006, I do not consider that this was inconsistent with a degree of flexibility being implicit in the role. First this was agreed not on the basis that the Claimant had commitments on every evening but only two days a week. Second, the agreed hours did not provide a definitive account of the hours the Claimant in fact worked. His working practice was consistent with the expectation of a continuing degree of flexibility. As a matter of standard practice he would start work before 8am. I note also that in his email of 29 April 2017 he stated that when he was out

on site his hours would vary from day to day and he sometimes would work Wednesday afternoon and was quite flexible.

80.4 The clause did not go beyond that which had in practice applied during the Claimant's employment. It served to underline that he could not simply work to rule, simply refusing to carry out any after hours appointments irrespective of the needs of the business or the feasibility of doing so. The Claimant did in fact carry out such appointments without any objection been raised, or indeed overtime claimed. I regard that as consistent with there having been an understanding or expectation that at least if appointments could not be made at any other time they would be undertaken after hours, albeit that in practice the need for this was not common. I take into account that it can be said that when the Claimant made after hours appointments these were arranged by himself as an exercise of his own discretion. I do not regard that as inconsistent with a degree of personal flexibility being implicit in the role.

81. In reaching this conclusion I have focused on the particular context of the nature of the Respondent's business, the practice within it and the Claimant's role. I do not consider it necessary to rely on what was standard practice in the industry. It may well be that a requirement of personal flexibility was usual, and if it was a sufficiently clear, certain and well known practice that would further support the conclusion I have reached. However I heard only limited evidence of this.

82. Further, if contrary to my conclusion above, the personal flexibility provision was a new obligation going beyond that which was implicit in context in the implied term of fidelity, I do not consider that the inclusion of this provision was sufficiently serious to amount to give rise to a breach of the implied term of trust and confidence. As to this:

82.1 Whilst the Claimant had a concern that the provision might be open to abuse by the new owners, it was open to the Claimant to request some provision to make clear that such appointments would be rare and arranged at the Claimant's discretion. Mr Pulford had explained in his email of 12 June 2017 that he would expect most calls to be within working hours and had given assurance that he was referring only to the odd evening call where customers were otherwise not available. Again the letter of 19 June 2017 from DOHR had given assurance that any such calls would be infrequent.

82.2 There was provision added in Draft 6 that where such calls were undertaken overtime would be paid.

82.3 The need for such calls would only arise when required by the needs of the business (as was emphasised in DOHR's letter of 19 June 2017). The fact that such calls had rarely been made itself suggests that the needs of the business would rarely entail a need for such calls.

Hours of work

83. Draft 6 did not set out the hours of work. However this had been agreed in the previous draft. In my judgment this called out for clarification to be

sought as to whether it was really the intention to go back on this. That was particularly so in the context where the covering email from Ms Mendel indicated that requested amendments had been made and the changes were shown as tracked, whereas there was no deletion of the hours shown in tracked changes. The fact that the letter was mis-dated 1 March 2017 was a further objective indication that something may have gone wrong with the drafting due to using an earlier version of the contract.

Project manager

84. On its face the change to include "Project Manager" in the title was a retrograde step. In the prior draft it had been made clear what the Claimant's duties were and that the reference to project manager specifically referred to carrying out installations on the Claimant's own sales. The removal of the agreed section on duties was not tracked, and in my judgment called for clarification as to whether it was really intended to remove provisions that were agreed. In any event, given that it had previously been made clear what was meant by project manager it was open to the Claimant to request that the provision be reinstated making clear that it referred only to managing his own projects Had that been done there would have been little in the objection to the use of that term in the job title. Further, given that the title had previously been agreed, and taking this together with the other provisions which seemed surprising (the omission of the hours and the duties section and that there was still a covenant despite agreeing to its removal), in the context of the ongoing negotiations and Ms Mendel's covering email this called for clarification as to whether this was indeed intended.

Standard in trade

85. The inclusion of a provision for duties to include those that were standard in the trade was problematic given that it was introduced at a late stage of the negotiations. However the provision was in my judgment to be seen in the round. The Respondent's position was that it had been seeking to bring out only that which had been agreed or that was implicit in the role. The term on its face was an attempt to convey which duties included elements that were wholly standard. That was consistent with the degree of flexibility required to meet the needs of the business. It would have been better if the thinking behind this has been explained, but the failure to do so is properly to be seen in the context of the efforts to encourage the Claimant to meet up either in formal mediation or informally to resolve the dispute. It was open to the Claimant to explain any concerns about the provision and also to clarify whether it had indeed been intended to remove the more specific provision as to duties which had been agreed. In offering the suggestions including mediation and a roundtable meeting the Respondent had, objectively, conveyed a willingness to consider and explore such objections as might be raised. In evidence the Claimant's objection was that his role was not standard in the trade due to his fitting commitments. But it is not clear why that would make the clause more burdensome or inapplicable to his role. In any event that objection to the provision was not raised or explored before resigning. Whilst the Claimant was entitled to be frustrated at the delays previously experienced in being provided with contractual terms, matters had now entered a phase where the Respondent was striving to reach agreement

on the terms applicable to the Claimant's employment and was objectively indicating a willingness to seek to reach a satisfactory agreement, and to explore means of bridging the genuine differences over the contractual terms (including genuine differences over the currently prevailing terms of employment). In all, whilst the provision was not something that had been agreed, and was open to the criticism of lack of certainty, I do not consider that its inclusion, taken alone or with other matters, was sufficient to establish a breach of the implied term of trust and confidence.

Restrictive covenant

86. There was no question of the restrictive covenant having been part of any prior agreement. However it had been specifically emphasised on more than one occasion in advance of Draft 6 that the requirement for the covenant had been dropped. In those circumstances I consider that the fact that after having deleted the large covenant, there was still a (shorter) covenant remaining called for clarification to check whether that was indeed the intention. Had that been done it would have been confirmed that it was a drafting error and would have been removed.

Strictly private and confidential

87. On the Claimant's own evidence, the "Strictly Private and Confidential" heading did not go towards the alleged constructive dismissal. In any event, this was a further element which the Respondent had previously agreed to remove and, given that it was not tracked changed, called for an explanation as to whether it was indeed intended to retain it.

Ms Mendel's covering email of 29 June 2017

88. The wording of Ms Mendel's covering email was unfortunate to the extent that it incorrectly suggested that all amendments had been made. However it was apparent from the rest of the email that this was not what was intended, given that there was reference to some sentences that remained and to showing the extent to which the requests had been accommodated. Without clarification or seeking explanation for the discrepancy with what was in the contract, in my judgment it was premature to reach the conclusion that there had been an intention to mislead. Indeed, as set out above, the discrepancy between the tone of the covering email with a number of passages which appeared to go back on what had previously agreed, made it all the more important to seek clarification as to whether something had gone wrong with the drafting and whether it was really the intention to go back on what had previously been agreed.

Obligation to sign the contract

89. It was part of the Claimant's case that the breach lay in part in being required to sign a contract which did not include the terms previously agreed. I do not consider that, objectively, it was conveyed to the Claimant that he was required to sign the contract. On the contrary Mr Pulford had conveyed to the Claimant on 22 May 2017 that whether or not he signed, that would not stop the sale. There was an ongoing negotiation. It was the Claimant who

set the ultimatum that the next draft had to incorporate all the terms he contended had been agreed (including the bonus provision which I have found was not part of the contract, and the omission of the personal flexibility provision which I have concluded was permissibly included). The Claimant was not threatened with a detriment for refusing to sign the contract, whereas the Respondent invited the Claimant to explore mediation or other informal avenues to reach a mutually satisfactory resolution.

Respondent's objective intention

90. As part of the overall assessment, a relevant factor is what objectively was conveyed as to the Respondent's intention in relation to abiding by the agreement. It was clear from the fact that the Respondent had consistently since after Draft 1 refused to include a bonus, that by Draft 6 it was refusing to do so. The same applied for the provision consistently included in relation to personal flexibility. However I have found that neither entailed a breach of contract and nor was the personal flexibility requirement repudiatory. As to other terms in relation to hours of work and the covenant, as set out above I do not consider that it was made clear that the Respondent was not willing to comply.

91. More broadly there was a disagreement as to the effect of the terms orally agreed and what was implicitly required as part of the Claimant's role. The suggestions made by the Respondent towards exploring informal resolution, whether by round table meeting or mediation, objectively conveyed a willingness to seek to agree mutually satisfactory terms which the parties could agree upon. Whilst there was the suggestion of splitting costs of the mediation, it was reasonable to take the view that this would focus minds on reaching an agreement, and in any event alternative forms of dialogue were also suggested.

Delay in providing particulars of employment

92. The Claimant concluded his closing submissions with the contention that there was clearly a breach in failing to provide a statement of employment for 16 years despite frequent requests for this. However, the Claimant had not resigned in response to the failure to provide terms. In so far as there had been a repudiatory breach in failing to provide written terms in response to the Claimant's request I consider that the contract had been affirmed. I have considered whether that conclusion is negatived on the basis of a continuing breach. In my judgment, however, from February 2017 matters had moved into a new phase where there were discussions and negotiations with a view to seeking to agree written contractual terms, including resolving genuine disagreement as to the currently prevailing terms. The Respondent was then not refusing to provide a statement of terms but was striving to reach agreement on the detailed content. Concessions were made in the course of those discussions. Those included payment for overtime for work outside hours if there was the odd evening call, dropping the restrictive covenant, amendments to the provision in relation to the car, offering a pay rise if terms were agreed and proposals including mediation to resolve matters. There were genuine issues in dispute that it was seeking to resolve, and I have

found that on the issues of the personal flexibility provision and the bonus the Respondent was correct.

Context of the transfer

93. I accept that it is relevant to take into account the context of the transfer. This added importance to having particulars of employment in place. The Claimant's own evidence was that he believed he was being given no choice but to sign the contract, and if that had not been the case he would not have resigned and would have been content to continue in employment with the transferor on the basis of the orally agreed terms. Leaving aside that I have rejected the case that he was being forced to sign the contract, the fact that the Claimant's evidence was that he would have been content to remain in employment on the basis of there being no written contract cannot be determinative. As noted above, there is an objective test of whether the Respondent's conduct was such as to amount to a breach of the implied term of trust and confidence. However on my findings this was not a case of an employer simply failing to provide the required assurance as to the applicable terms. Mr Pulford had sought to assure the Claimant that his job was secure and that the prospective new owners wanted him to continue in the new role. The Claimant had not raised with Mr Pulford or the prospective new owners the advertisement that he had seen. Rather than simply seeking to impose terms, Mr Pulford had been seeking to explore with the Claimant ways to reach a mutually satisfactory conclusion through dialogue including the possibility of mediation or a round table meeting. The possibility of ACAS involvement had been floated. Further, in important respects I have found in favour of the Respondent on the substance of the dispute as to what were the terms of the agreement. In all, while taking into account the context of the prospective transfer, I do not accept that the effect was that the Respondent's conduct amounted to a repudiatory breach of contract.

Standing back: the picture as a whole

94. It is appropriate to stand back and consider the picture as a whole, set against the context of the serious delay in provision of particulars of employment to the Claimant. There was understandable frustration and annoyance on the part of the Claimant that he was being placed in the position of agreeing terms at the point of a sale of the business when he reasonably believed the issues should have been resolved long ago by the provision of written particulars. However through 2017 the parties were in negotiations to resolve written particulars which each party genuinely believed fairly reflected the existing express or implied terms of employment (save possibly for the covenant which was considered by the employer to be important for protection of the business but could not be said to be implicit, and was in any event dropped). Taking the position as a whole, along with the continued efforts to explore avenues to resolve the differences, whether by mediation or other informal meeting, and my findings as to the individual terms on which the Claimant relies, I am not satisfied that the Respondent's conduct was such as to amount to a breach of the implied trust and confidence term or that the email from Ms Mendel or the terms of Draft 6 were sufficient, in the absence of seeking clarification, to amount to a final

straw when taken in the context of the full period of delay but also the immediate history of negotiating to seek to resolve the differences over the contractual terms.

CONCLUSION

95. I have found that there were aspects of the Respondent's conduct which contributed to the problems encountered in 2017, notably in relation to the failure to provide particulars of employment. In all however I do not accept that the Claimant has established that there was a repudiatory breach of contract. Accordingly he was not dismissed and the claim therefore fails.

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Employment Judge Lewis, Watford
11.4.2018
JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS