Case Number 1305098/2020
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr J Barr		**Pegasus Grab Hire Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 17 – 19 March 2021

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **Ms A Williams (Counsel)**
For Respondent: **Mr D Ward (Consultant)**

JUDGMENT

The judgment of the tribunal is that:

The claimant was not dismissed by the respondent. The claimant's claims for unfair and wrongful dismissal are not well-founded and are dismissed.

REASONS

Introduction

1 The claimant in this case is Mr John Barr who was employed by the respondent, Pegasus Grab Hire Limited, and predecessor organisations, as a General Operative, from 8 November 2008 until 16 December 2019 when he resigned.

2 By a claim form presented to the tribunal on 23 March 2020, the claimant claims that he was constructively dismissed and that such dismissal was an unfair dismissal applying the principles contained in Section 98 of the Employment Rights Act 1996 (ERA) and/or it was an unfair dismissal within the meaning of Regulation 4(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and/or the dismissal was automatically unfair pursuant to Regulation 7(1) TUPE and that he was wrongfully dismissed and is entitled to be paid his contractual notice.

3 All of the claims are denied. It is the respondent's principal case that the claimant simply was not dismissed. It follows that he cannot have been unfairly dismissed on any basis and that he cannot have been wrongfully dismissed.

4 It is for the claimant to establish that the respondent acted in repudiatory breach of the employment contract and that he resigned in response to such breach. If the claimant succeeds in establishing these things, and raises an evidential basis to suggest that the reason for the respondent's repudiatory conduct was a relevant transfer, it would be for the respondent to prove that there was some other reason for its conduct.

5 The hearing was conducted remotely by Cloud Video Platform (CVP). Although there were some passing technical difficulties from time to time, I am satisfied that all parties and witnesses were able to join the hearing and fully participate.

The Evidence

6 The claimant gave evidence on his own account and called a former colleague Mr Steve O'Mahoney as a witness. For the respondent, I heard evidence from Mr Tony Hall - Managing Director; Mr Jamie Endres - Transport Manager and Mr Steve Hand - Operations Manager. I was also provided with an agreed electronic bundle of documents running to some 220 pages I have considered the documents from within the bundle to which I was referred by the parties during the course of the Hearing. The claimant presented his case first and for convenience Mr O'Mahony was the first witness.

7 Mr O'Mahony was a truthful and straightforward witness. He confirmed the night-time working arrangements and also the practice at the Pershore depot of going home early when work was complete - but to indicate on a timesheet that he had remained at work until 5pm. He knew nothing of the claimant also indicating a 6am start time on his timesheet - he confirmed that they both started work at 7am. Mr O'Mahony also confirmed the arrangements for working nights one week in five; and that he had never been informed that those working arrangements were thought to be unlawful.

8 I found the claimant to be an unsatisfactory witness. His evidence was based very largely on assertion: which, if it were true, could easily have been supported by other evidence - not merely from his former colleague Mr O'Mahony, but from his former manager at Pegasus. I found that the claimant had been less than transparent regarding the circumstances under which he received an allowance of one hour per day for travelling time. And, during his period of employment with the respondent, he was less than straightforward with regard to his domestic living arrangements: allowing the respondent to believe

that he travelled each day from Cheltenham rather than from a holiday home near to the Pershore depot.

9 With one slight concern, I accept the evidence of Mr Hand; Mr Endres and Mr Hall. Their evidence was consistent with each other and with contemporaneous documents. My slight concern is that, whilst I accept Mr Endres conclusion that he believed that the night-time working arrangements for the claimant to be unlawful, I do not accept that this explanation was given to the claimant at the time when he was first told she was no longer required to work nights.

10 I have considered all of the evidence in the round when making my findings of fact.

The Facts

11 The claimant's continuous service started with Balfour Beatty on 8 November 2008. Throughout this period, the claimant underwent five TUPE transfers: from Balfour Beatty through Enterprise; Amey; Morgan Sindall Group and Kier to the respondent. The transfer to the respondent was effective from 19 August 2019. The claimant resigned from the respondent on 16 December 2019.

12 At a consultation meeting held on 14 August 2019, just prior to the transfer from Kier to the respondent, the claimant provided a home address in Cheltenham and he asserted that he was entitled to be paid one hour per day for travel time. He did not inform the respondent that ,in fact, on a daily basis, he did not travel from Cheltenham but from a nearby holiday home. Following the meeting, the respondent made enquiries with Kier and was informed that the claimant's manager with Kier did not believe that the one hour's pay per day for travel time was a contractual entitlement - and Kier were uncertain how long the claimant had been receiving that allowance.

13 Prior to the transfer, the respondent had also been informed by Kier that the claimant is working hours were 10.5 hours per day, five days, and working nights one in five weeks.

14 During August and September 2019, whilst still unsure of the basis for it, respondent continued to pay the claimant a travelling allowance of one hour per day. The first difficulty to arise post transfer was on 4 September 2019: Mr Hand visited the Pershore site that day and was reminded by the claimant that he and Mr O'Mahony were due to work nights the following week. Mr Hand explained that the respondent would only be running full-time night drivers and that accordingly the claimant and Mr O'Mahony would not be required to work nights. Mr O'Mahony was quite pleased to be relieved of night-time working, but the

claimant was understandably concerned that this might detrimentally affect his overall income.

15 Over the following weeks there were ongoing communications between the claimant and Mr Hand with escalating tensions. Firstly, because of the claimant's concern about his night-time working hours; and secondly, on Mr Hand's part, concerns that the claimant (in an effort to ensure that he was paid one hour per day travelling time) was completing his timesheet incorrectly - stating that he was commencing work at 6am each day rather than 7am. Further, it became clear that there were days where the claimant's timesheet showed him finishing work at 5pm when in fact he had finished work much earlier in the day. (This latter point applied equally to Mr O'Mahony.) I accept this Mr Hand's evidence that the claimant was repeatedly told that whatever his entitlement or otherwise to the additional hour each day his timesheet must be accurately completed to show his actual working hours each day.

16 The claimant's concerns were not ignored: Mr Hand asked Mr Endres to investigate how the claimant could be allocated night-time working. On considering the issue, Mr Endres concluded that the night-time working pattern claimed to have been worked by the claimant under Kier was in fact unlawful - as it did not provide for adequate rest breaks.

17 On 10 October 2019, the claimant had a meeting with Mr Hall to try and resolve the issue: Mr Hall explained that the claimant working nights was presenting difficulties to the respondent. He suggested three possible solutions:

(a) For the claimant to stop working nights as Mr O'Mahony had done.
(b) For the claimant to work permanent nights.
(c) For the claimant to work a moderately adjusted nightshift one week in five so as to comply with Regulations.

The claimant's account of this meeting is that he was offered financial recompense for loss of earnings which might arise. However, no agreement was reached.

18 On 25 October 2019, remaining concerned regarding the accuracy of the claimant's timesheets, Mr Hand had a meeting with the claimant to investigate what he regarded as fraudulent activity. When the claimant was asked why he continued to submit timesheets for 55 hours per week but was only working 50, the claimant asserted that he was entitled to do so because of the one hour travel time. Mr hand responded that the timesheet is a legal document which should accurately record the hours worked. The claimant readily admitted that he booked his start time as 6am each day but actually started at 7am. When asked why the claimant was claiming one hours travel time each day, the response was

simply that he "*was entitled to it*". The claimant still did not inform Mr Hand as to the reason why this was being paid; nor did he explain that on a daily basis he only travelled from his holiday home near Pershore.

19 On 27 October 2019, the claimant wrote to Mr Hall advising him that he would be seeking ACAS assistance regarding a breach of his terms and conditions both in regard to his night-time working hours and his five hours per week travel time. On the same day the claimant lodged a more detailed letter both with the respondent and with Kier. On 30 October 2019, Mr Hall responded stating that the matters raised would be investigated and that he would make contact in due course.

20 On 31 October 2019, Mr Hall responded to the claimant in the following terms:

(a) The respondent was by now satisfied that the claimant had no entitlement to 1 hour per day travel time. They had no information as to the history of this payment. And the opinion previously expressed by Kier was that it was non-contractual. In an effort to assist however, Mr Hall informed the claimant that his travelling arrangements could be made easier by a transfer to the respondent's Gloucester depot - much nearer to the claimant's home. The claimant's transfer would be effective from Monday 4 November 2019.
(b) It was made clear that the claimant is working hours were 7am – 5pm and he was not expected to leave early.
(c) Finally Mr Hall confirmed that the respondent would accommodate the claimant's one in five night-time working request with effect from 11 November 2019 but with some adjustments to the hours to reflect the respondent's understanding of the Regulations.

21 On 1 November 2019, the claimant responded asserting that his contractual location was Pershore; and refusing to report to the Gloucester depot on Monday 4 November 2019. It was only in an email dated 3 November 2019, that the claimant explained his refusal to move to Gloucester: namely that he did not live in the Cheltenham address previously provided to the respondent; this was simply a correspondence address; he lived in his holiday home near Pershore. Mr Hall responded on the same day asserting that it was clearly unreasonable for the claimant to be paid one hour per day travel time if he was not in fact travelling from Cheltenham as was previously understood to be the case.

22 In evidence before me, for the very first time, the claimant offered an explanation for his entitlement to 1 hour per day travel time. It had been granted to him in return for an agreement that, when required, he would in fact work from

the Gloucester depot; it was intended to cover his travel time and expenses on such occasions. I did not find this to be a particularly convincing explanation: it seemed unreasonable and unlikely to give someone a permanent benefit for only occasional travel requirements. But, even if this was a true account, the claimant clearly did not feel bound by such an arrangement as he refused to report to Gloucester when requested to do so on 4 November 2019.

23 On 4 November 2019, the claimant attended work Pershore. There was no work there scheduled for him to do as he had been expected at Gloucester. Mr Hand agreed to go to Pershore to speak to him; but received a telephone call at 3pm to say that the claimant had left for the day.

24 On 5 November 2019, the claimant was certified by his GP as unfit for work due to Stress. He did not return to work prior to his resignation on 16 December 2019.

25 The claimant consulted solicitors. On 12 November 2019, the solicitors contacted the respondent and requested them not to make contact with the claimant during his sickness absence but to conduct all correspondence through them. On 19 November 2019, the solicitors wrote to the respondent setting out the facts as they understood them; and giving notice of prospective claims for constructive unfair dismissal and breach of TUPE Regulations.

26 On 29 November 2019, Mr Hall responded: denying any breach of contract or of TUPE. Mr Hall made clear that, upon his return to work, the claimant could lodge a formal grievance and all matters would be investigated.

27 On 10 December 2019, Mr Hall wrote to the claimant inviting him to a welfare meeting on 16 December 2019 - to discuss his well-being and how the respondent might support him in returning to work.

28 On 16 December 2019, the claimant resigned with immediate effect. On 19 December 2019, Mr Hall responded - accepting the claimant's resignation; and answering the points of complaint which were contained in the resignation letter.

The Law

TUPE

29 Under Regulation 7(1) TUPE, an employee will be treated 'as unfairly dismissed if the sole or principal reason for the dismissal is the transfer'.

30 Regulation 4 TUPE provides:

(1) Except where objection is made under Paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to Paragraph (1), but subject to Paragraph (6), and Regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this Regulation to the transferee….

(9) Subject to Regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under Paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer….

(11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer.

31 Once an employee has produced some evidence that the transfer was the reason for dismissal, the burden is on the employer to establish that the transfer was not the reason for dismissal: ***Marshall v Game Retail Ltd*** **UKEAT/0276/13/DA**.

32 In assessing whether a dismissal was for the reason of the transfer, proximity in time is a relevant factor: ***Hare Wines Ltd v Kaur*** **[2019] IRLR 555**. The mere fact that some of the circumstances of dismissal were 'personal' to the Claimant does not preclude a finding that the transfer was the reason for dismissal.

33 In relation to Regulation 4(9) TUPE, 'working conditions' include 'contractual terms and conditions as well as physical conditions': ***Tapere v South London and Maudsley NHS Trust*** **[2009] IRLR 972**. Whether there has been a change in conditions, and whether that is a change of substance, are questions of fact. However, 'the character of the change is likely to be the most important

aspect of determining whether the change is substantial'. The impact of the proposed change is to be assessed from the 'employee's point of view'.

Constructive Dismissal

34 **The Employment Rights Act 1996 (ERA)**

Section 94 - The right [not to be unfairly dismissed]

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 95 - Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice) - *Direct dismissal,*
(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 - *Constructive dismissal.*

Section 98 - General Fairness

(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.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), 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.

35 **Decided Cases**

There are many decided cases which provide guidance to employment tribunals with regard to the law of dismissal and of constructive dismissal. We found the following to be particularly relevant when considering the facts of this case:-

Western Excavating (ECC) Ltd, -v - Sharpe **[1978] IRLR 27 (CA)**
An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. The employee must make up his mind to leave soon after the conduct of which he complains if he continues the any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

Garner -v- Grange Furnishing Ltd. **[1977] IRLR 206 (EAT)**
Conduct amounting to a repudiation can be a series of small incidents over a period of time. If the conduct of the employer is making it impossible for the employee to go on working that is plainly a repudiation of the contract of employment.

Woods -v- WM Car Services (Peterborough) Ltd. **[1981] IRLR 347 (EAT)**
It is clearly established that there is implied in a contract of employment a term that employers 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. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal's function is to look at the

employer's conduct as a whole and determine whether it is such that it's cumulative effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it.

WE Cox Toner (International) Ltd. –v- Crook **[1981] IRLR 443 (EAT)**
The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation in which case the contract is at an end. The innocent party must at some stage elect between those two possible courses. If he once affirms the contract his right to accept the repudiation is at an end, but he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract, but if it is prolonged, it may be evidence of an implied affirmation. Affirmation of the contract can be implied if the innocent party calls on the guilty party for further performance of the contract since his conduct is only consistent with the continued existence of the contractual obligations.

Malik –v- BCCI **[1997] IRLR 462 (HL)**
The obligation (to observe the implied contractual term of mutual trust and confidence), extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. If conduct, objectively considered, is likely to cause damage to the relationship between employer and employee a breach of the implied obligation may arise. The motives of the employer cannot be determinative or even relevant.

BCCI –v- Ali (No.3) **[1999] IRLR 508 (HC)**
The conduct must impinge on the relationship of employer and employee in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is entitled to have in his employer. The term "likely" requires a higher degree of certainty than a reasonable prospect or indeed a 51% probability.

Nottinghamshire County Council –v- Meikle **[2004] IRLR 703 (CA)**
Once the repudiation of the contract by the employer has been established, the proper approach is to ask whether the employee has accepted the repudiation by treating the contract of employment as at an end. It is enough that the employee resigned in response, at least in part, to fundamental breaches by the employer.

GAB Robins (UK) Ltd. –v- Gillian Triggs **[2007] UKEAT/0111/07RN**
The question to be addressed is whether, taken alone or cumulatively, the respondent's actions amount to a breach of any express and/or implied terms of

the claimant's contract of employment amounting to a repudiation of that contract.

Bournemouth University Higher Education Corporation –v- Buckland **[2010] IRLR 445 (CA)**
The conduct of an employer, who is said to have committed a repudiatory breach of the contract of employment, is to be judged by an objective test rather than a range of reasonable responses test. Reasonableness may be one factor in the employment tribunal's analysis as to whether or not there has been a fundamental breach but it is not a legal requirement. Once there has been a repudiatory breach, it is not open to the employer to cure the breach by making amends, and thereby preclude the employee from accepting the breach as terminating the contract. What the employer can do is to invite affirmation, by making or offering amends.

Fereday –v- South Staffordshire Primary Care Trust **UKEAT/0513/10/ZT**
The claimant considered she was treated in a way which was in fundamental breach of the contract of employment. She invoked grievance procedure, which resulted in a decision adverse to her on 13 February 2009, but she only resigned by a letter dated 24 March 2009. The employment tribunal was entitled to hold that the claimant had affirmed the contract. The six-week delay between 13 February 2009 and 24 March 2009 was evidence of such affirmation.

Tullet Prebon PLC & Others -v- BCG Brokers LP & Others
[2011] IRLR 420 (CA)
A repudiatory breach of contract; conduct likely to damage the relationship of trust and confidence must be so serious that looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the putative innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.

Hadji -v- St Lukes Plymouth **(2013) UKEAT 0095/12**
The employee must make up his/her mind whether or not to resign soon after the conduct of which he/she complains. If he/she does not do so he/she may be regarded as having elected to affirm the contract, or as having lost the right to treat himself/herself as dismissed.

The Claimant's Case

36 The claimant contends that in the following respects his contract of employment has been breached by the respondent - and in response to these breaches, he resigned: -

(a) The Claimant's right to claim travelling time of 1 hour per day.

(b) The Claimant's place of work; and/or
(c) The Claimant's overall rate of pay; and/or
(d) The Claimant's 1 in 5 shift pattern.

In the alternative it is the claimant's case that the proposed changes to his travelling allowance; and/or his place of work and his night-time working arrangements involved a substantial change in working conditions to his material detriment and that accordingly pursuant to Regulation 4(9) TUPE, he was entitled to treat the contract as having been terminated. The claimant's reference to the overall rate of refund to the adverse impact on his earnings of (a) the removal of the one hour per day travelling allowance, and (b) the changes to night-time working arrangements.

The Respondent's Case

37 In respect of each of the above the respondent's case is: -

(a) The respondent does not accept that the claimant was entitled to a one hour per day travelling allowance. The respondent was expressly told by Kier that this was non-contractual and the respondent was unable to obtain a coherent explanation from any source as to why the payment was being made. Regardless of the claimant's entitlement, to the allowance respondent was entitled to insist on the return of accurate timesheets.
(b) The proposed change of location was in response to the respondent's conclusion that the claimant was not contractually entitled to the travelling allowance. The respondent concluded that at some time in history the claimant had been asked to move from Gloucester (near to where he lived in Cheltenham) to Pershore; and that the allowance had arisen then. The respondent was content to reverse that change such that the allowance would not be required. The claimant behaved in a less than straightforward manner in his failure to disclose that he actually lived in a holiday home close to the Pershore depot.
(c) The respondent does not accept that there was any express or implied term as to the claimant's overall rate of pay. The contended for overall rate of pay has never been identified.
(d) So far as night-time hours are concerned, these were initially removed on 4 September 2019. But, having attempted without success to reach a compromise with the claimant on this point on 10 October 2019, and upon recognising that this was important to the claimant, the respondent offered to restore the night-time working in its letter of 31 October 2019. The claimant did not resign until 16 December 2019.

Discussion & Conclusions

38 In Paragraph 4 above, I set out the principal issue in the case and how the burden of proof applies. The claimant must establish that the respondent, by its conduct acted in repudiatory breach of the employment contract; and has an evidential burden to establish that the reason for such conduct was the transfer. If the claimant discharges these burdens, it would be for the respondent to prove some reason other than the transfer for its repudiatory conduct.

39 In any event, if the respondent did act in repudiatory breach of the contract, and the claimant resigned in response to such breach. That will be sufficient to establish his constructive dismissal claim on ordinary principles pursuant to Sections 95 and 98 ERA.

40 With regard to Regulation 4(9) TUPE, the burden is on the claimant to prove that there were *substantial* changes in his working conditions which were to his *material detriment* and that he resigned in response thereto.

41 I remind myself that, following the transfer to the respondent, the claimant was entitled to the same terms and conditions as before the transfer. Accordingly, if there were any changes which Kier could lawfully have made without itself being in breach of contract, then the respondent is entitled to make those same change without being in breach. The transfer merely preserves, and does not enhance, the claimant's contractual position. I further remind myself that this is a constructive dismissal case: the respondent must have behaved in such a way as to breach the employment contract - absent a repudiatory breach of the contract, there can be no dismissal.

42 Under Regulation 4(9) TUPE, there must be a substantial change to working conditions to the claimant's material detriment. If the claimant was enjoying some privilege to which he was not entitled; and the privilege were removed, in my judgement, this does not constitute a substantial change or one which is materially to the claimant's detriment. He is being treated exactly as he could have been treated before the transfer.

43 Dealing in turn with those matters relied upon by the claimant and set out at Paragraph 38 above: -

(a) I am not persuaded on the evidence that the claimant was entitled to a one hour per day travel allowance. The information provided to the respondent was that this payment had been made in the past but was non-contractual. The respondent received no information from any source for as to the basis upon which the payment was being made. It has all the hallmarks of something put in place to meet a particular set of

circumstances which thereafter had not been reviewed as it should have been. Inevitably, a transfer such as this leads to scrutiny of such matters: and the respondent concluded that the claimant was not entitled to the allowance. My judgement is, that if such proper scrutiny had taken place before the transfer, Kier would have removed the allowance. It is in order to preserve the apparent entitlement to the allowance that the claimant maintained as his home address, the address in Cheltenham and did not disclose that he lived in his holiday home in Pershore. It is my judgement therefore, that a decision by the respondent to remove this allowance would not have been a breach of the employment contract. Neither indeed, would it have been a substantial change in working conditions to the claimant's material benefit as I find that it was an allowance to which he was simply not entitled.

(b) With regard to the change of location: respondent accepts that the claimant's contractual place of work was Pershore - and I have no hesitation in finding this to be the case. The proposed change of location (which was actually never enforced) accompanied the respondent's decision to remove the travel allowance. And, in the genuine belief that the claimant lived in Cheltenham, was a proposed change to the claimant's material benefit. In my judgement, the respondent's conduct in this regard displayed an intention to behave with integrity towards its employee and is not evidence of any breach or any attempt to undermine trust and confidence. Trust and confidence in this case was undermined by the claimant's lack of candour with regard to his living arrangements - which he believed would impact on his entitlement or otherwise to receive the travel allowance.

(c) The claimant contends for a contractual entitlement to maintain a particular rate of pay but gives no details of what this might be. Certainly, at the time of the transfer he asserted no such contractual entitlement and non-could be implied from information provided by Kier. Essentially, what the claimant seems to be saying is that he would have no objection to the removal of the travel allowance or to the changing night-time working arrangements provided he received appropriate financial recompense. I find no evidence of here any breach of the contract.

(d) With regard to the claimant's night-time working arrangements, I accept that it was certainly the intention of the respondent that the claimant and Mr O'Mahony would no longer work nights - because the respondent employed full-time night drivers. Mr O'Mahony was pleased by this change; but the claimant was not. What is clear however, is that the respondent was happy to maintain dialogue with the claimant to find a solution to the issue. Mr Hall engaged the claimant in discussion on 10 October 2019; and by the time of his letter of 31 October 2019 was willing to restore the night-time working. There would be a modest change in the

particular arrangements but this was because the respondent had concluded that the arrangements operative under Kier were actually unlawful. Again, there is nothing in the respondent's conduct here to suggest the undermining of trust and confidence (and a contractual arrangement which was unlawful would inevitably be void). The claimant has adduced no evidence that the modest change in arrangements would be detrimental to him. And, even after the intervention of the claimant's solicitors, Mr Hall indicated an intention to keep dialogue open to find a solution by inviting the claimant to lodge a grievance when he returned to work. My judgement is that there is nothing in the respondent's conduct around the night-time working arrangement which was either in repudiatory breach of the contract or which has been shown to be to the claimant's material disadvantage. Furthermore, Mr Hall offered to restore night-time working in his letter of 31 October 2019, but the claimant did not resign until 16 December 2019. I am not persuaded that it was these arrangements (as opposed to the recent scrutiny of his timesheets) which prompted the resignation.

44 For these reasons, my judgement is, that the claimant was not dismissed by the respondent. Neither was there a substantial change in working conditions which was to his material detriment. Accordingly, the claims for automatic unfair dismissal; constructive dismissal; and wrongful dismissal are not well-founded and are dismissed.

Employment Judge Gaskell
15 June 2021