EMPLOYMENT TRIBUNALS

Claimant: Mr O Price

Respondent: Telecom Service Centres Ltd t/a Webhelp UK

Heard at: Nottingham by Cloud Video Platform (Claimant attended in person)

On: 4 and 5 May 2021

Before: Employment Judge Broughton (sitting alone)

Representation

Claimant: In person (In Person)

Respondent: Mr A Maxwell, Solicitor (via CVP)

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

The decision of the Tribunal is that:

- The claim of unfair (constructive) dismissal is dismissed on withdrawal by the Claimant
- The Claimant's claim to a redundancy payment under section 135 (1) (a) of the Employment Rights Act 1996, is **not** well founded and is dismissed.
- The Claimant's claim to a redundancy payment under section 135 (1) (b) of the Employment Rights Act1996, is **not** well founded and is dismissed.
- The Claimant's claim of an unlawful deduction of wages pursuant to section 13 of the Employment Rights Act 1996 is **not** well founded and is dismissed.

REASONS

Background

1. The Claimant was employed by the Respondent from 4 September 2017 until 7 October 2020, following his resignation. He was employed as a Contact Centre Associate. He had accrued 3 full years' service as at the date of termination.

2. The Claimant makes a claim for unpaid wages for the period 10 April 2020 to 7 October 2020. It is not in dispute between the parties that he was not paid his salary during this period and it is not in dispute that the amount of salary that he would have otherwise been entitled to receive is a net figure of £7,787.57. That figure is not in dispute.

3. The Claimant also makes a claim for a redundancy payment and the parties are in agreement that the sum, if he is found to be entitled to a statutory redundancy payment, would be £1,553.99.

4. The Claimant issued his claim on 31 December 2020 following a period of ACAS Early Conciliation from 6 November 2020 to 6 December 2020.

5. The claims arise from the closure of the Claimant's place of work in Derby because of the Covid pandemic. The Claimant was not permitted to carry out his duties from the Derby site from 26 April 2019. He refused to carry out his work from his home address and was not, because of that, paid his salary for almost 6 months. The Claimant complains that the failure to pay him salary was an unlawful deduction and that he resigned in circumstances which amount to a constructive unfair dismissal on the grounds of redundancy and in the alternative he claims a redundancy payment under the layoff provisions in Chapter III Employment Rights Act 1996 (ERA).

6. The Claimant pursues the following claims in summary;

   6.1 Unauthorised deduction of wages: section 13 Employment Rights Act 1996 (ERA): for backpay during the period 10 April 2020 to the date of termination on 7 October 2020

   6.2 A redundancy Payment: section 135 (1) (a) or (b) ERA

<u>The issues</u>

7. The issues that were agreed between the parties, are as follows.

Unauthorised deductions – section 13 Employment Rights Act 1996

Were the wages paid to the Claimant during the period 10 April 2020 to 7 October 2020 less than the wages he should have been paid?

*Was any deduction required or authorised by a written term of the contract? The Respondent relies on clause 3 of the contract of employment (**Contract of Employment**).*

It is not in dispute that the Claimant received a copy of the Contract of Employment before the deduction.

It is not alleged by the Respondent that the Claimant agreed in writing to the deduction before it was made. The Respondent relies upon the terms of the Contract of Employment itself.

Redundancy payment

Statutory scheme –section 135 (1)(b) Employment Rights Act 1996

Is the employee employed under a contract on terms and conditions such that his remuneration under the contract depends on him being provided by the employer with work of a kind which he is employed to do pursuant to section 147(1)(a) of the Employment Rights Act 1996?

Was the employee not entitled to any remuneration under the contract in respect of the week because the employer did not provide work for him pursuant to section 147(1)(b) Employment Rights Act 1996?

Was the employee laid off for four or more consecutive weeks pursuant to section 148(2)(a) Employment Rights Act 1996?

Did the employee serve notice pursuant to section 148(2) on the employer?

Did the employer give to the Claimant within 7 days after service of that notice, a counternotice pursuant to section 149(a)?

Did the Claimant terminate his contract of employment by giving notice in accordance with section 150 of the Employment Rights Act 1996?

Was the Claimant required under section 150(2) to give notice - did he give the notice required under his contract of employment?

Claim under section 135 (1)(a) Employment Rights Act 1996

Did the Claimant terminate the contract of employment under which he was employed with or without notice in circumstances in which he was entitled to terminate it without by reason of the employer's conduct pursuant to section 136(1)(c) Employment Rights Act 1996?

The employee relies upon the following alleged breaches as reasons for resigning:

(i) Unfavourable treatment in that he was singled out and treated differently to a colleague, Stephen Barker because he is a socialist and had been holding Eurostar (the Respondent's client) to their conditions of carriage in that he had been offering customers refunds rather than vouchers – he relies on a breach of the implied duty of trust and confidence.

(ii) He should have been treated as laid off under the statutory scheme rather than put on unpaid leave and his manager refused to confirm this in writing –he relies on a breach of the implied duty of trust and confidence – during the course of the hearing, the Claimant refined this allegation to a refusal by his manager, to confirm to DWP that he was 'laid' off when the Claimant was applying for benefits.

(iii) The Claimant believed that he would be made to work for Eurostar in Kent following a proposed TUPE transfer in October 2020 or dismissed if he refused to do so.

He believed he had 'burnt his bridges' and all trust in his employer had gone for the above stated reasons.

Did the Respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent, and

Did the Respondent have reasonable and proper cause for doing so;

Did the Clamant resign in response to the breach? The tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation;

Did the Claimant affirm the contract before resigning? The tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

Was such a dismissal by reason of redundancy as defined by section 139 (1) ERA?

If so, is the Claimant entitled to a statutory redundancy payment under section 135 (1)(a) ERA?

8. The Tribunal will have to decide whether or not there was in fact a redundancy situation under section 139 of the Employment Rights Act 1996.

9. The Claimant had also indicated a claim for unfair dismissal. However, he confirmed at the outset of the hearing that he did not wish to pursue a claim for unfair dismissal under sections 94 and 98 of the Employment Rights Act 1996 because he informed the Tribunal, he accepts that his employment would have come to an end in any event because he was not prepared to work for Eurostar and was withdrawing this claim. The Claimant informed the Tribunal that he was only pursuing a redundancy payment under section 135 ERA and the unlawful deductions claim for backpay.

10. There was no claim for holiday pay. The Claimant confirmed that he was paid his accrued holiday on termination.

11. The Claimant has been in receipt of advice from ACAS. It was ACAS who had advised him that he has the right to a redundancy payment under the provisions of section 135 (1) (b) ERA.

The Evidence

12. The Tribunal was provided with a bundle of 91 pages.

13. The Claimant gave evidence and was cross examined. The Respondent called as witnesses; Mr Craig Smith, Head of Operations, Ms Laura Allen, Senior People Advisor and Mr Phillip Oxley, Team Leader who were all cross examined by the Claimant.

14. The parties made oral submissions. The Respondent also submitted written submissions. The Tribunal has taken into consideration all the evidence and submissions along with its notes of the hearing.

Facts

15. The facts in this case are relatively straightforward.

16. The Claimant in his role carried out work on behalf of Eurostar Travel. He took calls from customers of Eurostar wanting to purchase travel tickets and those who wanted to change their travel plans. He would be involved in providing vouchers or refunds to customers.

17. It is not in dispute that the Claimant throughout his employment worked solely for Eurostar, the client, or, as the Respondent refers to it, the 'Eurostar campaign'.

18. It is not in dispute that the Respondent nationally employs between 7,000 to 8,000 staff. At the Derby site where the Claimant worked, they employed between 250 and 280 people at the relevant time.

19. The Claimant, it is not in dispute, was issued with a statement of main terms and conditions of employment which was attached to an offer letter to him dated 17 August 2017 (pages 42 to 52).

20. The relevant provisions of that statement of main terms and conditions hereafter referred to as the Contract (although not containing exclusively all the terms of the contractual relationship) are;

Clause 3 – Place of Work – provides as follows:

You will be initially based at the Company's contact centre in Derby (Webhelp UK, Riverside Road, Pride Park, Derby, DE24 8HY). However, you may be required to transfer to a ***different*** *location, either temporarily or permanently, provided this is* ***within reasonable travelling distance of either this location or your home****. You may also be required to from time to time to travel to other locations within and occasionally outwith the UK to fulfil the requirements of your role.*"

[Emphasis Added]

Clause 4 – Salary:

Your basic salary is paid at the rate of £15,770.00 ***per annum, payable in 12 equal monthly*** *instalments by bank transfer on or around the last working day of each month.*

[Emphasis Added]

Clause 13 – Notice Period

In your first 28 days your employment can be terminated with immediate effect and without the provision of notice. thereafter for the remainder of your 12 weeks on boarding experience, and until you have completed 1 years' service with the Company the notice required by either the Company or yourself to terminate the employment shall be 1 week. Thereafter, an additional week of notice is due by you for every completed year of continuous service, up to a maximum of 4 weeks. …

Salaried Employee

21. The Claimant it is not in dispute was a salaried employee. The Claimant does not allege that the Respondent did not have to pay him if no work was available for him to do and neither does the Respondent allege this. The Claimant's case is that work was available in the Derby office and he should have been allowed to do it or be paid in circumstances where he was not prepared to do work from home because the Contract did not expressly give the Respondent the right to impose homeworking.

Homeworking

22. Following the UK Government announcement on 16 March 2020 that those who can work from home should do so, the Respondent began a process of transitioning its employees to home working at all sites across the UK. This included the Derby site where the Claimant was working. The Respondent's evidence is that on 9 April 2020, the Respondent closed the Derby site. There

was only one employee, Stephen Barker, who was working at the Derby site until 22 April 2020 as he was waiting for the delivery of a computer dongle to allow him to work from home and that once this was delivered, he began working from home and thereafter, the Respondent's case is that no employees of the Respondent worked from the Derby site.

23. Mr Oxley was the Claimant's direct line manager from the beginning of April 2020. He reports into Natasha Payne, the Operations Manager for the Eurostar Campaign.

24. Although the Claimant initially under cross-examination could not recall doing so, he later accepted under cross examination that he had given some indication initially that he would be prepared to work from home after being taken to an email dated 27 March 2020 (page 91) sent from the Claimant to Mr Oxley where he states:

"*…I have had second thoughts regarding working from home…"*

25. The Tribunal accept therefore that the Claimant had initially indicated that he was prepared to work from home hence the reference to having 'second thoughts. However, the Respondent does not allege that this initially indication that he was willing to work from home gave rise to any contractual obligation or any variation to the Contract, the Respondent relies on the existing paragraph 3 of the Contract as providing it with the necessary contractual right to impose homeworking.

26. The Claimant's evidence is that he had chosen redundancy with a previous employer rather than have the employer 'in my home'. This appeared to be a matter of principle to the Claimant.

27. The undisputed evidence of Mr Oxley was that he initiated a conversation with the Claimant on 27 March regarding working from home and that the Claimant confirmed that he was prepared to work from home but required equipment because he had no internet access at his house and it was therefore discussed with him that he would require a dongle which would be provided. The evidence of Mr Oxley, which was not disputed, was that he then confirmed the position to his own manager by email but thereafter at some point the Claimant retracted his agreement and stated that he was not in fact willing to work from home because he was concerned about the Respondent having access to his home if their equipment and property was located in his home. Mr Oxley's undisputed evidence is that Ms Payne then consulted with HR and he was informed that if the Claimant was not prepared to work from home, he would not be eligible for the furlough scheme because he would not be working despite work being available for him to do. It is not in dispute that the Claimant was then placed on unpaid leave on 9 April 2020 and did not receive his salary at any point thereafter.

28. The Respondent did not embark on a redundancy consultation exercise, nor at any time did they take steps to terminate the Claimant's employment. The Respondent do not accept that this situation gave rise to a redundancy situation.

29. The evidence of Mr Oxley, which was consistent with the Claimant's evidence, was that there was no discussion between him and the Claimant about the Claimant's contractual position. Mr Oxley did not know what the Contract said; his role was to support the Eurostar Campaign and whether the Claimant could contractually be required to work from home and not paid if he refused to do so, was not a matter that he was involved in or considered or communicated with the Claimant about.

30. In terms of Stephen Barker, the evidence of Mr Oxley was that he was not in a position to comment specifically about Mr Barker because Mr Barker worked on a different campaign, the Unilever

Campaign, and therefore the circumstances around his situation was not something which he had knowledge of.

31. The evidence of Mr Oxley, however, was that he believes that no one continued working at the Derby site after 11 April 2020. He also gave evidence that when the staff were consulted about homeworking in March and April, there was no indication at that point about how long the closure would be and the site has still not opened as at the date of this hearing. The site has now been closed for over a year. Some staff have been moved on to alternative accounts, some have been redeployed and others remain on furlough.

32. We also heard evidence from Mr Smith, the Head of Operations at the Derby site. The evidence of Mr Smith is that he is responsible for the Derby site of all of the accounts, including Unilever and Eurostar. His evidence in respect of Mr Barker is that Mr Barker had requested a dongle in order to work from home and one was provided to his address and that once that was provided, he worked from home. His evidence is that the dongle was ordered on either 9 or 10 April and by about the middle of April, Mr Barker was working from home.

33. The Claimant argues that he was treated unfavourably in that Mr Barker was allowed to continue working from the Derby office after April 2020 and up to October 2020, although he has no direct evidence of this. The Claimant had intended go to the site to check but did not do so. He complains that this alleged difference in treatment was because he is a socialist and specifically because of the way he managed the Eurostar Campaign in that he would give more refunds than vouchers to customers and he believes the Respondent did not approve of this.

34. The Claimant's evidence is that there was only himself and Mr Barker without internet access at home. He alleges that Mr Barker told him that he had been told by the Respondent that a USB internet dongle would not enable him to work from home. The Claimant alleges that he told Mr Barker that the Respondent had been told the opposite i.e. he could work from home with an internet dongle. Mr Barker had he alleges, marched off to 'sort it out' and later informed the Claimant later that he was going to be given a dongle and that he would be working from home. However, the Claimant believes that what Mr Barker had said to him about working from home seemed rehearsed and "*didn't ring true*". The implication being that Mr Barker had been told to tell the Claimant he was going to work from home when that was not the case. The Claimant accepted that he had no direct evidence that Mr Barker continued to work from the Derby site, he simply felt he had been lied to solely because of the rehearsed way in which he alleges Mr Barker had spoken to him on this occasion.

35. The Claimant further complains that if the Derby office was closed and he could work from home but refused to do so, he should have been 'laid off'.

36. With regard to Mr Barker, other than the conversation about the dongle in April, the Claimant provided no evidence whatsoever in support of his contention that Mr Barker (after he had been supplied with the dongle in April), carried on working from the Derby site and that the Claimant was therefore treated less favourably than he was. That Mr Barker was working from the Derby site from 11 April really amounts to little more than conjecture on the part of the Claimant. The Claimant did not put it to Mr Smith that he was not telling the truth about the arrangements.

37. The Claimant was not prepared to work from home. His evidence is that he did not believe it was possible for him to work from home with a USB internet dongle in that he has known that over the past year access to the internet can be very slow or even non-existent on a 4G network. Further, he did not want, as he put it, his employer in his home which the Tribunal find was the real reason he refused because the Claimant was not prepared to even trial homeworking.

38. It is not in dispute that there was some discussion with the Claimant about the Claimant potentially working at another site in Sheffield and he was prepared to commute however, a role at the Sheffield site did not become available as staff based there continued to work from home.

39. The undisputed evidence of the Respondent is that which employees were put on the furlough scheme and which were put on unpaid leave was a matter that was decided by a designated 'Furlough Board'. None of the Respondent's witnesses were in a position to comment on the extent to which, if any, the contractual right to require employees to work from home was discussed by the Furlough Board as they were not personally involved. There was no evidence presented to the Tribunal regarding the decision-making process of the' Furlough Board', and in particular how it applied to the Claimant.

40. In terms of the allegations that he was treated unfavourably because of his socialist views and his approach to the giving of refunds to Eurostar clients, the Claimant confirmed that the only act of bullying he is complaining about is not being allowed to work from the Derby site, he does not allege that there were other incidents of bullying. The Claimant also confirmed under cross-examination that he had never been spoken to about giving more refunds than vouchers. He confirmed that he had also never been subject to any performance management or disciplinary proceedings about the volume of vouchers he gave out. He had never been spoken to by management about his views about giving more refunds. The Claimant confirmed in cross-examination that he had no evidence to support his belief, (which really amounts to nothing more than an unfounded suspicion), that he was not allowed to continue working at the Derby office, because of giving more refunds than other colleagues.

41. The undisputed evidence of Mr Oxley was that if this practice of giving more refunds had been highlighted to him by Eurostar, depending on the amount of refunds provided, his first step would have been to have had a conversation with the member of staff concerned and thereafter he would have followed their normal conduct or capability process.

42. The Tribunal find that there is no evidence to support the Claimant's allegation that the Respondent had any issue or concern about the number of refunds that he gave let alone or that he was not paid when he refused to work from home, because of his socialist views and or the number of refunds he gave. There is no evidence that this played any part in the way the Claimant was treated. The Claimant does not allege any comments were made to him about the refunds that he gave, that any action was taken and nor does he allege that were any prior acts of 'bullying' before the homeworking issue which arose because, he accepts of the pandemic.

43. This Tribunal finds on a balance of probabilities that the remark by Mr Barker, lead the Claimant to *'jump'* to the what the Tribunal finds on the evidence, was an incorrect conclusion. Mr Barker did the Tribunal find on a balance of probabilities, work from home and that it was only those who were not able to carry out homeworking who were placed on the furlough scheme. The Claimant did not challenge Mr Oxley's or Mr Smith's evidence that other employees were placed on unpaid leave who could work from home but refused to do so, but that 98% percent of employees agreed to homeworking. Mr Smith's undisputed evidence is that here was only a handful of people, five or six, who were in a similar position to the Claimant i.e. those who could but chose not to work from home and they were also not paid their salary in those circumstances.

44. The Claimant's allegation that he was treated differently to Mr Barker the Tribunal find, is not supported by the evidence. The Tribunal do not find that there was any difference in treatment.

45. The Claimant accepts that he was contacted during the time that he was away from work to check whether his position had changed with regards to being prepared to do homeworking and he had confirmed that it did not.

Clause 3

46. Mr Smith's undisputed evidence was because of the exceptional circumstances of the pandemic, they did not want to discipline people for refusing to work from home and there was no discussion about the terms of the Contract. The Respondent had anticipated that the offices would only be closed for about three months, they did not envisage that this would be a longer-term situation.

47. The evidence of Ms Allen, Senior People Advisor and part of the HR team, with regards to clause 3 and its application, gave evidence that this was not something the Respondent made a decision about. She assumed the Furlough Board would have made a decision on the contractual position however she was not privy to those conversations. She joined the Respondent at the start of April 2020. There was no communication as far as she was aware about the contractual position in terms of clause 3 and in terms of how individuals were treated who did not agree to homeworking, "*They were not considered in breach of contract*".

Refusal to lay Claimant laid off

48. On 9 April 2020 the Claimant contacted Mr Oxley following a telephone conversation that morning and complained that Mr Oxley had refused to confirm that the Claimant was being laid off without pay in circumstances where the Claimant was now wanting to make an application to the DWP for universal credit. (p.56);

"*Further to our telephone conversation this morning and to the email sent to my work email address, I am at a loss as to why I cannot have in writing that I am being laid off without pay.*

I feel certain that the DWP will assume that I have been furloughed, and will require evidence that I have not been *furloughed…"*

49. Mr Oxley responded later that day on 9 April 2020 (page 57) stating;

"*I can confirm as the site is closing, and you are* ***unable*** *to work from home. Your salary will be* temporarily *stopped until the site re-opens and you are able to return to the office."*

[Emphasis Added]

50. Mr Oxley's evidence is that he had written on that email that the Claimant was unable to work from home because he was unable to do so without the equipment he needed and he was not prepared to allow the equipment in his home which, he says, explains the wording of the email. The Tribunal do not find that this email is evidence that the Respondent believed that the Claimant could not work from home with the right equipment i.e. with the dongle. The Tribunal consider it more likely that Mr Oxley worded the email as he did because he was attempting to steer a course between not stating that the Claimant and been laid off (when that was not how the Respondent was treating this time away from work) but also assisting the Claimant in terms of his position with the DWP. The Claimant confirmed in his resignation email (page 79) that he had; ". *received a short email confirmation to allow me to claim Job Seekers Allowance".*

51. The Claimant on receiving the email of the 19 April 2020 (with the wording which would allow him to claim benefits it seems) did not complain about the wording of that email or raise a grievance. There was no further complaint from the Claimant about his position until a number of months later when Eurostar proposed to transfer back in-house the service that was being provided by the Respondent. That is when matters then came to a head.

52. The Clamant does not allege that he protested about not being paid. He protested against the Respondent's right to force him to work from home and he protested (in the April 2020 email exchange with Mr Oxley) about the Respondent not being prepared to say he was 'laid off'. The Claimant did not present any evidence that he had raised a complaint or grievance about not being paid his salary while the Derby office was closed.

TUPE Transfer – 4 September 2020

53. There is a letter in the bundle of 4 September 2020 (page 60) notifying the Claimant of a recent announcement in respect of the work undertaken by the Respondent namely a proposal to transfer back the service to Eurostar on 19 October 2020. The letter is advising the Claimant that his role is within scope of this transfer and therefore the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) applies to him.

54. This letter confirmed that:

"…Eurostar has confirmed that they agree you are in-scope to transfer. It is proposed therefore, that you will become a direct employee of Eurostar with effect from 19th October 2020 with continuous service of employment and protected Terms and Conditions of Employment and benefits."

55. The letter goes on to deal with the Company's obligations to inform and, as necessary, consult with suitable employee representatives about the proposed transfer.

56. Although he did not receive the letter, he states he received a telephone call from Mr Oxley, who read the letter out to him so that he was aware of its contents.

Email Communication – 21 September 2020

57. The Claimant emailed Mr Oxley on 21 September 2020 (p.65) in which he stated; "I *write to apply for redundancy"…*and asked to be sent an email to confirm when he will receive his redundancy pay.

58. In reply Mr Oxley on 21 September 2021 wrote stating that; "This *is not how redundancy works and this will be discussed at your consultation meeting*…" (p.64)

59. The Claimant followed this up with an email that same morning stating; "*I'm afraid is it how redundancy works if the employee has been laid off for over 4 weeks. That's the law…"*

60. *Mr Oxley replied further on 21 September; "You haven't been laid off; you have chosen not to work as* you *did not want to work from home*…" (p.64)

TUPE consultation

61. There was a meeting conducted by telephone regarding the proposed transfer on 21 September 2020, which the Claimant does not dispute he attended.

62. There was also a letter in the bundle dated 21 September 2020 (page 66) providing information regarding the date and reasons for the transfer, the legal, economic and social implications of it and the measures envisaged. The letter stated that Eurostar had taken the decision to move the

work currently undertaken by the Respondent back in-house and the activities would be provided from Eurostar's location in Ashford, Kent post transfer. It states that Eurostar has confirmed to the Respondent that it is fully committed to honouring such employment rights, terms and conditions as are protected under TUPE:

"… As a result of the fundamental change in the provision of the Services, as ***EIL does not have any operational presence in or around Derby, it is envisaged that a place of work redundancy situation will exist in respect of the transferring employees.*** *This is because EIL will not have a business need for any employees to be situated in Derby to provide contact centre services (or any other services). This means that all transferring employees will be at risk of redundancy. EIL considers that such redundancies would constitute an economic, technical or organisational reason in accordance with TUPE.*"

[Emphasis Added]

63. The letter confirmed that the proposed date of the TUPE transfer was 19 October 2020, the 18 October being the last day of service with the Respondent.

64. The Claimant disputes having received a copy of this letter of 21 September and that evidence was not challenged and therefore it is accepted on a balance of probabilities that he did not receive it. The Claimant did accept however under cross examination, that he had attended the consultation meeting, on 21 September and he does not dispute that he was therefore aware of the information contained within the letter of 21 September. Further, he does not dispute the accuracy of the documents within the bundle at pages 68 to 70, which are notes of the meeting with him on 21 September 2020 carried out by Natasha Payne. His evidence was that he was aware of the business proposal and that he was told that if there was a TUPE situation, he would be able to claim redundancy. He accepts that he was told that if his employment was TUPE transferred to Eurostar, Eurostar would be making his role redundant.

65. For reasons which remain unclear to the Tribunal, the Claimant simply did not believe that he would be made redundant from Eurostar. His evidence under cross-examination was: "*It didn't ring true that I would be able to claim redundancy. Why would Eurostar TUPE me over to just give me a* redundancy *payment?*" The Claimant stated that he did not trust the Respondent and he was concerned that Eurostar would change his contract requiring him to work in Kent and relocate. He accepted that he was told by the Respondent that he would be made redundant by Eurostar but he stated: "*That seemed too far-fetched*". The Claimant did not however present any evidence to add substance to his doubts that Eurostar would make his role redundant post transfer.

66. The Claimant wrote an email on 23 September 2020 (page 72) stating that he had reconsidered moving over to Eurostar: "*as it seems too disingenuous to claim that I will be prepared to move or commute to Ashford in Kent, to actually work for Eurostar, so I shall be remaining with Webhelp*".

67. He therefore informed the Respondent that he was going to remain with the Respondent and did not want to transfer.

68. Ms Allen contacted the Claimant on 23 September a few minutes later referring back to the measures letters provided to him and informing him that Eurostar had confirmed that there are no available roles at the Ashford site therefore any employees who do not want to be redeployed will be made redundant by Eurostar if they TUPE over and that she hoped that clarified any confusion (page 73) .

69. Regardless of that clarity, the Claimant emailed again on 23 September stating: "*I still wish to*

remain *at Webhelp. I do not want to TUPE transfer to Eurostar*" (page 73)

70. The Claimant was then informed by Ms Allen by email of 23 September (page 72) that the Respondent was actively seeking redeployment opportunities and would update him as and when they would be available. She informed him that this would more likely be homeworking however as 90% of the campaigns were still homeworking at the moment.

Resignation

71. On 1 October 2020, the Claimant tendered his resignation by email to Ms Allen stating:

"*I shall be talking to ACAS to argue constructive dismissal, for workplace bullying: being singled out for unfavourable treatment at work. The issue will centre on management's* refusal *to provide written confirmation that I was laid off because 3 Centro Place, Derby DE24 8RF was to be closed for business for the foreseeable future and that I had asserted my right as a property owner not to allow my employer to conduct their business from my property.*

It is possible that my employer's client Eurostar would not have looked kindly on my work in that I made sure that the passengers I spoke to, knew their rights as per their conditions of carriage and refunded fares as a consequence. I am certain that the management at Webhelp would make every attempt to accommodate Eurostar in any request to stop me taking calls but could not discipline me for telling passengers the truth. ***It is also possible that Webhelp management simply took an opportunity that presented itself because they just don't like me.***

…

All trust is gone, so I will not be returning to work for Webhelp. All communication will be via ACAS, who will be in touch in due course."

[Emphasis Added]

72. It is a long resignation letter in which he again raised his belief that another employee, not named within the resignation letter but who he now confirms was Mr Barker, was allowed to continue working at the Derby site.

73. The Claimant did not indicate within his email letter whether he was serving notice of termination or not. Had he served his contractual 3 weeks' notice, this would have expired on 22 October, after the proposed transfer date.

74. On 2 October (page 87), Ms Allen contacted the Claimant informing him that there was a new campaign 'Simply Health' if he was interested in the role. There was no selection process and therefore if he expressed an interest he could be redeployed. It was a homeworking role however in the first instance. The Claimant did not respond.

75. Ms Allen wrote to him on 5 October expressing concern regarding his resignation given that the Respondent was in the process of TUPE consultation (page 77). Ms Allen asked the Claimant to contact her and that if he failed to do so, she would process him as a leaver on 7 October 2020. The Claimant, it is not in dispute did not reply and he was sent an email on 7October 2020 (page 77) confirming that he was processed as a leaver from that date. The Claimant does not dispute receiving that letter or that he did not reply to it. He did not therefore respond to those emails from Ms Allen, explaining that it was his intention to serve his contractual notice period.

76. The Claimant received a payment of £1,439.34 on 30 October. The end of the month is the normal

payroll date for accrued and untaken annual leave. In response to receiving that payment, he wrote and again set out the reason for his resignation:

"*On 1 October 2020, I sent the email below to my former employer. At The time I resigned I was given the option of a TUPE transfer to Eurostar, I was being told that Eurostar would make a redundancy payment to me.* ***I didn't believe this and could see that I could be dismissed for misconduct, for breach of contract, if I didn't commute from Nottingham to Ashford in Kent. When I refused this I was told that I could transfer to another campaign, leaving me with a probable option of a commute to Sheffield or dismissal for misconduct for not commuting.*** *I realised I had no other option but to resign*."

[Emphasis Added]

77. The Tribunal find on the evidence and on a balance of probabilities, that the reason the Claimant decided to resign when he did was to avoid a situation where he was transferred to Eurostar . For reasons which appear to this Tribunal to be without foundation, the Claimant did not believe that Eurostar would make him redundant post transfer and would dismiss him for gross misconduct if he refused to relocate to Kent. The Claimant also the Tribunal find, was concerned that if he stayed with the Respondent they would require him to work at another location or work from home and that if he refused, he would be dismissed. The Contract does have a mobility clause however it is restricted to locations within reasonable travelling distance. The Respondent had not told the Claimant that he would be dismissed if he was not prepared to travel to Sheffield or to a location outside a reasonable travelling distance of his home.

78. The Claimant had been advised by ACAS that he should have been laid off under the statutory scheme and was therefore entitled to a redundancy payment from the Respondent. Given his concern that Eurostar would not make him redundant the Tribunal find on a balance of probabilities, on the evidence before it, that the Claimant felt a safer option was to pursue a redundancy payment from the Respondent rather than risk not receiving a redundancy payment from Eurostar or being forced to take an alternative role working from home.

79. Had the TUPE situation not arisen, the Tribunal find that the Claimant would have been content to continue on unpaid leave. There was prior to the TUPE situation no indication that he was intending to resign, to protest about the non-payment of his salary and nor did he inform the Respondent at any stage that he believed he was entitled to be paid and was reserving his right to take action to recover the unpaid salary owed to him.

Notice

80. The Claimant did not in this letter of resignation refer to any intention to serve contractual notice or raise any query about the failure to pay him for what would have been the notice period (which it is not in dispute, was 3 weeks.)

81. The Claimant, under cross-examination, conceded that when giving his notice he was not specific about what, if any, notice he was giving, and he considered given he was at home and unpaid it was as a "*moot-point".* In answer to questions from the Tribunal, he confirmed that when his employment date was processed as 7 October, he did not challenge that date and that the notice period: "*didn't occur to me*".

82. The Tribunal find that the resignation letter , in which he refers to any further contact being with ACAS and his conduct immediately thereafter in not responding to Ms Allen, meant that it was reasonable for the Respondent to understand that he was resigning without serving his notice period. The Tribunal find on a balance of probabilities that the Claimant also did not intend to serve

3 weeks' notice and treated the email of the 1 October 2020 as an immediate resignation, hence his refusal to engage in the later correspondence from Ms Allen. That this was his intention is supported by his further communication when he makes no reference to the notice period or entitlement to notice pay. The Claimant has also given the of termination in the claim form as the 7 October and does not pursue any clam for wrongful dismissal. It was reasonable for the Respondent to take his notice as an intention to resign with immediate effect albeit they attempted given the circumstances, to discuss it with him before they processed him as a leaver.

Respondent's Submissions

83. Mr Maxwell submitted written submissions which I have considered. He augmented those with oral submissions.

84. In summary he submits that the Claimant fully admits he was offered work from home and refused it because he did not want the Respondent to carry out its business from his home.

85. The Claimant alleges that he was bullied and relies on the comparative treatment of a colleague Mr Barker but produced no evidence to support his claim. It is not in dispute that the Derby site was being closed due to the pandemic. The Respondent submits that he resigned based on what he believed would happen after the TUPE transfer and not on what he was told and his mistaken belief about Mr Barker.

Unlawful deduction from wages – section 13

86. Mr Maxwell submits that with reference to what is properly payable, this has to be determined by the Tribunal in interpreting the contractual position applying ordinary principles of common law and contract. **Greg May (Carpet Fitters and Contractors) Ltd v Dring ICR 188 EAT:**

87. The employee must be ready and willing to perform the contract for the employer to be under a duty to pay unless there is an express provision to the contrary such as sickness absence.

88. ***Batty v BSB Holdings (Cudworth) Ltd 2002 EWCA Civ 648, CA*****:** an employer is entitled to withhold pay where an employee is not willing to work and where an employee refuses to perform the full duties which can be required of him under the contract of service, the employer is entitled to refuse to accept partial performance: **Miles v Wakefield Metropolitan District Council [1987] 193.** The Respondent it is submitted, had work available which could be performed at home by the Claimant, and the Claimant refused to perform it. Mr Maxwell in his written submissions also relies on **Cresswell v Board of Inland Revenue [1984] IRLR 190** where there was a deliberate refusal by the employees to work.

89. It is submitted clause 3 of the Contract, gave the Respondent the contractual right to require the employee to work from him and he submits, although the Respondent's witnesses gave evidence that the Respondent did not treat the Claimant as if in breach of the Contract of Employment, it is submitted the contractual interpretation is a matter for the Tribunal and the Tribunal must have regard to *business efficacy* and refers to the statutory guidance from the Government at this time was that employers should facilitate homeworking where possible.

90. Mr Maxwell refers to **Courtaulds v Norther Spinning Ltd v Simpson and the Transport & General Workers Union [1988] IRLR 305**: where it was held that the was an implied terms in contracts of employment enabling an employer to direct an employee to work at any place within reasonable daily reach .

91. Mr Maxwell asserts that he key authority in determining whether or not the claimant was entitled **to** receive pay whilst he refused to work from home is: **Luke v Stoke on Trent City Council [2007] IRLR 777** where the claimant refused to work at a particular location not explicitly specified in her contract of employment.

92. Mr Maxwell referred to the government guidance and *The Health Protection (***Coronavirus***, Restrictions) (*England*) Regulations 2020 which were implemented from March 2020 and provided that:*

Restrictions on movement 6. —

(1) During **the** *emergency period, no person may leave the place where they are living without reasonable excuse.*

(2) For the purposes of paragraph (1), a reasonable excuse includes the need—

…

(f) to travel for the purposes of work or to provide voluntary or charitable services, where it is not **reasonably** *possible for that person to work, or to provide those services, from the place where they are living;*

93. The Respondent submits that the Respondent would have been committing a criminal offence by keeping the office open in Derby and if the Claimant is correct and he could not be required to work from home, neither could any of the Respondent's employees or millions of other employees working for other employers.

94. The Respondent submits that in any event clause 3 does not exclude homeworking and refers to being able to transfer the Claimant within **reasonable** distance and this must include as an alternative place of work, his own home.

95. The Claimant was not eligible for the furlough scheme, this is voluntary scheme and therefore it is **submitted** that the fact he was not placed on furlough is not a relevant consideration for this Tribunal.

96. The Respondent submits that the Claimant was not entitled to his wages in circumstances where he refused to work and thus has no claim under section 13 ERA.

Section 147 ERA

97. The Respondent submits that the Claimant was not laid off as defined by section 147.

98. Mr Maxwell referred to **Spinpress Ltd v Turner 1986 ICR 433, EAT** The employer 'provides' work if it offers the employee work within the terms of the contract of employment. The fact that no work is done does not mean that work has not been provided. He also relies upon ***Coombs v Total Security South West ET Case No.1402601/06*****,** where the tribunal rejected the claimant's claim for a redundancy payment, commenting that '*a worker cannot invoke the lay-off provisions simply by going to ground, staying out of contact, and then claiming that the respondent never actually offered work so there was no work to do. You cannot (metaphorically) lie in bed and switch the telephone off and claim you are laid off.'*

Section 148 ERA

99. If the Tribunal finds that he was laid off, it is submitted that the Claimant must have complied with the requirements of section 148.

100. It is assumed the 21 September 2020 emails are the notice relied upon and Mr Maxwell asserts they do not meet the statutory criteria in that they do not expressly refer to ' lay off' and that in any event the Respondent's response is a valid counter notice.

Section 150 ERA

101. Mr Maxwell submits that the Claimant did not terminate his contract of employment by giving the required period of 3 weeks contractual notice and referred to the case of **Walmsley v C and R Ferguson LTD 1989 SLT 258** and distinguishes it from this case, in that the Claimant did not refer to any period when serving notice. In Walmsley the employee wrote to his employer stating; "…*I am left with no option but to resign and instigate …tribunal proceedings against you. I look forward to hearing from you within seven days*." The Court of Session held that it was possible to read this letter as the claimant giving one week's notice because of the express reference to 7 days.

102. Mr Maxwell refers to the Claimant resigning when he could not have given notice because that would have taken him past the proposed TUPE transfer date of 18 October 2020.

103. Any redundancy Mr Maxwell argues could not happen pre-transfer as the Respondent was not proposing to make redundancies and he made it clear in his evidence that he did not want to transfer.

Section 136 – circumstances in which Claimant dismissed

104. The Respondent submits that there was no breach of the Claimant's contract of employment.

105. The Claimant was not laid off and thus it was not a breach by the Respondent to refuse to say so.

106. The Respondent submits given the circumstances of the pandemic, there was no breach of the implied term of trust and confidence in requiring employees to work from home.

107. The Respondent submits that there was no dismissal by reason of redundancy in that there was no closure of the business or workplace , the Derby site was closed on a *temporary basis* only and the intention was always to re-open it when it was possible to do so.

108. Mr Maxwell was directly asked by the Tribunal whether in light of the Respondent witnesses evidence that they did not force the Claimant to work from home and did not treat his actions in refusing as a breach, it was his submission that the Respondent exercised the mobility clause in the Contract. Mr Maxwell confirmed that he was not submitting that the Respondent had invoked the mobility clause under clause 3, but that its existence in the Contract is a factor to consider in light of the closure.

109. Mr Maxwell accepted that although a temporary closure of a workplace could be a redundancy situation, in this case because it was done to comply with public health restrictions and government guidance, it is an *exceptional situation* and he submits does not give rise to a redundancy situation.

110. Mr Maxwell referred to it 'as absurd' to treat workplace closures in these circumstances as a redundancy situation.

111. Mr Maxwell also referred to the offer of alternative employment following the Claimant's

resignation as suitable alternative employment and that his refusal was unreasonable however, Mr Maxwell conceded that he had not raised the Claimant having been offered alternative employment as on issue at any point during the hearing or when confirming the list of issues and invited the Tribunal to disregard that argument if it wished.

112. Mr Maxwell addressed the Tribunal at its invitation, on the case of **Whitbread plc t/a Whitbread Berni Inns v Flattery and ors EAT 287/94** and **Gemmell v Darngavil Brickworks Ltd 1967 ITR 20 ET,** he submitted that the cases can be distinguished in that in Gemmell there was no other work available during the closure of the workplace for 13 weeks. In Whitbread the workplace was closed for only four weeks during a refurbishment and this was held not to be a temporary *cessation.* Mr Maxwell argues that these cases are to be distinguished in that in this case, there continued to be work available for the employees to do.

Claimant's submissions

113. The Claimant referred to Mr Oxley contradicting the Respondent's position when he informed the DWP that the Claimant could not work from home.

114. He referred to Ms Allen not being able to explain why clause 3 allowed the Respondent to require the Claimant to work from home.

115. The Claimant stated in his submissions that he accepted that if Mr Barker was working from home then "*I should have been laid off – I should not be entitled to back pay*".Given that the Claimant is without legal representation, the Tribunal asked the Claimant to consider and explain how that concession fits with his argument that there was no legal right to require him to work from home and that clause 3 of the Contract did not give the Respondent the right to do that to which he stated; "*all I wanted when I embarked is to be treated the same as Steven Barker and to be given the same opportunity as Mr Barker .. I should have been laid off*". He was then asked by the Tribunal to clarify whether his position was therefore that if the Tribunal were to find that clause 3 did not give the Respondent the contractual right to require him to work from home, he was not seeking backpay, in circumstances where it also finds that Mr Barker was working from home; in response to which the Claimant stated that he was pursuing the backpay claim, that he had become confused and reaffirmed his position that his employer had no right to make him work from home.

Legal principles

116. The claimant seeks a redundancy payment on the grounds that he was dismissed by reason of redundancy or is eligible by reason of being laid off.

117. The relevant statutory provisions are as follows emboldened to add emphasis by the Tribunal;

*"**135 The right**.*

(1) An employer shall pay a redundancy payment to any employee of his if the employee—

*(a) is dismissed by the employer **by reason of redundancy**, or*

*(b) is eligible for a redundancy payment by reason of being **laid off** or kept on short-time.*

…"

"***136 Circumstances in which an employee is dismissed****.*

(1) Subject to the provisions of this section and sections 137 and 138, for the purposes of this Part an employee is dismissed by his employer if (and only if)—

(a) the contract under which he is employed by the employer is terminated by the employer (whether with or without notice),

(b) he is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(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.*****"**

"***139 Redundancy****.*

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed ***by reason of redundancy*** *if the dismissal is wholly or mainly attributable to—*

(a) *the fact that his employer has ceased or intends to cease—*

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind ***in the place where the employee was employed by the employer,***

have ceased or diminished or are expected to cease or diminish.

…

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

*"****147 Meaning of "lay-off" and "short-time****".*

(1) For the purposes of this Part an employee shall be taken to be laid off for a week if—

(a) *he is employed under a* ***contract on terms and conditions such that his***

remuneration under the contract depends on his being provided by the employer with work of the kind which he is employed to do, *but*

(b) he is not entitled to any remuneration under the contract in respect of the week because the employer does not provide such work for him.

…"

74. Section 148 – eligibility by reason of lay-off for short-time

*"**148 Eligibility by reason of lay-off or short-time**.*

(1) Subject to the following provisions of this Part, for the purposes of this Part an employee is eligible for a redundancy payment by reason of being laid off or kept on short-time if—

(a) ***he gives notice in writing to his employer indicating (in whatever terms) his intention to claim a redundancy payment in respect of lay-off*** *or short-time (referred to in this Part as "notice of intention to claim"), and*

(b) before the service of the notice he has been laid off or kept on short-time in circumstances in which subsection (2) applies.

(2) This subsection applies if the employee has been laid off or kept on short-time—

(a) *for four or more consecutive weeks of which the last before the service of the notice ended on, or not more than four weeks before, the date of service of the notice, or*

(b) for a series of six or more weeks (of which not more than three were consecutive) within a period of thirteen weeks, where the last week of the series before the service of the notice ended on, or not more than four weeks before, the date of service of the notice."

75. Section 149 – counter notices

*"**149 Counter-notices.***

Where an employee gives to his employer notice of intention to claim but—

(a) *the employer gives to the employee, within seven days after the service of that notice, notice in writing (referred to in this Part as a "counter-notice") that he will **contest any liability to pay** to the employee a redundancy payment **in pursuance of the employee's notice**, and*

(b) the employer does not withdraw the counter-notice by a subsequent notice in writing,

the employee is not entitled to a redundancy payment in pursuance of his notice of intention to claim except in accordance with a decision of an employment tribunal."

76. Section 150 – resignation

*"**150 Resignation**.*

*(1) An employee is not entitled to a redundancy payment by reason of being laid off or kept on short-time unless he terminates his **contract of employment by giving such period of notice as is required** for the purposes of this section before the end of the relevant period.*

(2) The period of notice required for the purposes of this section—

(a) *where the employee **is required by his contract of employment to give more than one week's notice to terminate the contract, is the minimum period which he is required to give,** and*

(b) otherwise, is one week."

A. <u>Entitlement to a redundancy payment: section 135 (1) (a) ERA</u>

Contractual Construction

118. The starting point in construing a contract is that words are to be given their ordinary and natural meaning. The interpretative exercise involves the court in identifying what the parties meant: "*Through the eyes of a reasonable reader, and, save perhaps in a very neutral case, that meaning is most obviously to be gleaned from the language of the provision*". ***Arnold v Britton 2015 UKSC 36 [2015] AC1619*** at [17].

119. Another principle of construction is that the contract shall be construed more strongly against the granter or maker. This is only to be applied to remove and not create a doubt or ambiguity - ***Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd [2018] EWHC 558 (TCC)***; the contra proferentem rule.

Business efficacy

120. There is a general presumption that the parties to a contract intended to create a workable agreement. If, therefore, it is necessary to imply a term in order to give business efficacy to the contract to make it workable, the courts will be prepared to do so: ***Reigate v Union Manufacturing Co (Ramsbottom) Ltd 1918 1 KB 592, CA*.**

121. The test is whether the term is *necessary*, not simply reasonable or desirable: ***Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anor 2016 AC 742, SC*** Lord Neuberger, pointed out that the test is not one of 'absolute necessity', and suggested that it might be more helpful to say that a term can only be implied if, without the term, the contract would lack 'commercial or practical coherence'.

122. In ***Ali v Petroleum Co of Trinidad and Tobago 2017 ICR 531, PC*,** Lord Hughes explained that: '*A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy.*

Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract *would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.'*

123. ***Jones v Associated Tunnelling Co Ltd 1981 IRLR 477, EAT*** **:** If is no express mention of the place of work, a term will have to be implied. The Employment Appeal Tribunal, in a judgment delivered by Browne-Wilkinson J. gave guidance on the question of implying "mobility" terms in contracts of employment (at p. 480):

"*The starting point must be that a contract of employment cannot simply be silent on the place of work; if there is no express term, there must be either some rule of law that in <u>all</u> contracts of employment the* employer *is (or alternatively is not) entitled to transfer the employee from his original place or work or some term regulating the matter must be implied into each contract. We know of no rule of law laying down the position in relation to all contracts of employment, nor do we think it either desirable or possible to lay down a single rule…Therefore, the position must be regulated by the express or implied agreement of the parties in each case. In order to give the contract business efficacy, it is necessary to imply some term into each contract of employment.*

"The term to be implied must depend on the circumstances of each case. The authorities show that it may be relevant *to consider the nature of the employer's business, whether or not the employee has in fact been moved during the employment, what the employee was told when he was employed, and whether there is any provision made to cover the employee's expenses when working away from daily reach of his home."*

124. Browne-Wilkinson J. then dealt with a submission that, before any term can be implied, it is necessary to show precisely what term the parties (if asked) would have said was obvious. Browne-Wilkinson J., however, rejected this submission, (with reference to the House of Lords decision in Trollope & Colls Ltd v North Western Metropolitan Regional Hospital Board (1973) 2 AER (at p. 481):

"In our judgment, that decision is distinguishable from the present case. In that case, there was no need to imply any term: ***the express terms of the contract were unambiguous and covered the event which had happened,*** *albeit in a way which was surprising in its result.* ***Therefore any term which was to be implied would be varying the unambiguous express terms of the contract****. In the case of contracts of employment containing no mobility clause, the position is quite different. As we have sought to show, it is essential to imply <u>some</u> term into the contract in order to give the contract business efficacy: there must be some term laying down the place of work. In such a case, it seems to us that there is no alternative but for the Tribunal or court to imply a term which the parties,* ***if reasonable, would probably have agreed*** *if they had directed their minds to the problem. Such a term* ***will not vary*** *the express contractual terms."*

[Emphasis Added]

125. In ***Aparau v Iceland Frozen Foods plc 1996 IRLR 119, EAT*****:** held that although there must be some term as to place of employment in a contract of employment, there was generally no necessity to have any clause about mobility in the contract. Where, the employee's job involves a degree of travelling however, it may be necessary to imply a mobility term: see **Jones** case above.

126. ***Courtaulds Northern Spinning Ltd v Sibson and anor 1988 ICR 451, CA***; the tribunal had

found that an employee had been constructively dismissed. The tribunal and EAT found that a term could be implied requiring the HGV driver to work from another depot provided it did so for 'genuine operational reasons. The Court of Appeal held that there had been no need for the tribunal to impose a requirement that the request must be 'reasonable' and for 'genuine operational reasons'. The employee spent most of his working day travelling and the location of his depot from was not of major importance, provided it was within reasonable daily reach of his home. It held the term should be implied to give it business efficacy, as such a term was what the parties would probably have agreed had they directed their minds to the issue at the outset.

127. In ***Luke v Stoke-on-Trent City Council 2007 ICR 1678, CA***, the issue was whether it was necessary to imply a term allowing an employer temporarily to redeploy an employee outside the 'unit' where she normally worked. There was no mobility clause in this case. The circumstances were held by the Tribunal and EAT to be exceptional (she refused to return to her usual job following complaints of bullying and harassment).The employment tribunal held that the employee's rejection of any temporary redeployment outside her normal place of work, entitled the Council to stop paying her, where she would not suffer a detriment and the place is within reasonable travelling distance of home. On appeal, the EAT considered that the tribunal had gone too far in assuming that the kind of implied term found in Courtaulds would be appropriate in all circumstances; Courtaulds focused purely on geographical location, while the Luke case involved change in the type of work the claimant was being asked to do. The Court of Appeal decided it was not necessary to imply a term, the Claimant would not return to work (as per the workplace set out in the existing terms) and was thus not entitled to pay. The Court of Appeal did not expressly rule out the possibility of implying a term as suggested by the EAT, where necessary to deal with *exceptional circumstances*.

128. In ***Millbrook Furnishing Industries Ltd v McIntosh and ors 1981 IRLR 309, EAT*****,** the EAT, in obiter comments, stated: '*We can accept that if an employer, under the stresses of the requirements of his business, directs an employee to transfer to other suitable work on a purely* ***temporary basis and at no diminution in wages,*** *that may, in the ordinary case, not constitute a breach of contract*.' [Tribunal Emphasis]

129. ***Tapere v South London and Maudsley NHS Trust 2009 ICR 1563, EAT*****,** The contract fell to be construed at the time that it was entered into.

Constructive dismissal

130. Section 136 (1) (c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct, a 'constructive dismissal' situation.

131. The leading case on constructive unfair dismissal is ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA***, where the Court of Appeal held that an employer is required to have committed a repudiatory breach of contract. As Lord Denning MR put it:

"'*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of* the *contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

132. The employee must establish that:

(i) A fundamental breach of contract by the employer

(ii) The breach caused the employee to resign

(iii) The employee did not delay too long before resigning. Otherwise he will be taken to have affirmed the contract thus losing the right to claim constructive dismissal.

Anticipatory breach.

133. An employee may resign in circumstances that amount to a constructive dismissal where the employer has indicated an intention to commit such a breach. ***Wellworthy Ltd v Ellis EAT 915/83***.

Affirming the contract.

134. An employee may continue to perform the employment contract under protest for a period without necessarily being taken to have affirmed the contract. The tribunal must consider the evidence to determine whether the employee's continued performance was indeed under protest: ***Novakovic v Tesco Stores Ltd EAT 0315/15*.**

135. ***WE Cox Toner (International) Ltd v Crook 1981 ICR 823, EAT***, The EAT held that the tribunal had misdirected itself. Mere delay by itself did not constitute an affirmation of the contract but if the delay went on for too long it could be very persuasive evidence of an affirmation;

"On balance we think that the industrial tribunal misdirected itself by concentrating on the delay as being the <u>only</u> evidence of affirmation of the contract by Mr. Crook, whereas the most cogent evidence of such affirmation was his continued performance of the contract which they did not advert to"

136. Where an employee is absent from work and not performing his duties under the contract, this may be evidence against a finding of affirmation: ***Hoch v Thor Atkinson Steel Fabrications Ltd ET Case No.2411086/18*** or where the employee is not in possession of the full facts and still trying to resolve the situation **Post Office v Roberts 1980 IRLR 347, EAT,**

Causation

137. A tribunal needs to find what caused the employee to resign, was caused by the breach of contract which is in issue.

138. Where there a number of reasons, a tribunal must determine whether the employer's repudiatory breach was an effective *cause* of the resignation although it need not be '***<u>the'</u>*** effective cause — ***Wright v North Ayrshire Council 2014 ICR 77, EAT*.**

139. ***Abbycars (West Horndon) Ltd v Ford EAT 0472/07*,** Mr Justice Elias, then President of the EAT 'the crucial question is whether the repudiatory breach *played a part* in the dismissal'.

140. A delay in resigning may indicate affirmation or that the repudiatory breach is not the effective cause of the resignation.

'Last straw' or continuing breaches

141. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident: ***Lewis v Motorworld Garages Ltd 1986 ICR 157, CA***

142. **Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA,** the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

143. An employee can however exercise his right to rely upon the breach at any time while it is continuing. **In Reid v Camphill Engravers 1990 ICR 435, EAT;**

"In our view, even if an employee does not react to an initial breach of contract, it is open to him to refer to that initial breach where, as in this case, the employer continues to commit further breaches…"

144. Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA,** If the conduct in question is continued by a further act or acts, in response to which the employee resigns, he or she can still rely on the totality of the conduct in order to establish a breach of the implied term. To hold otherwise would mean that, by failing to object at the first moment that the conduct reached the threshold for breaching the implied term of trust and confidence, the employee lost the right ever to rely on all conduct up to that point.

145. Where there is a genuine last straw that forms part of a cumulative breach of the implied term of trust and confidence, there is no need for any separate consideration of a possible previous affirmation because the effect of the final act is to revive the right to resign.

146. An employee can however be taken by his conduct to have impliedly agreed to a unilateral variation in the contract of employment and will then not be able to sue for breach of contract.

Constructive Unfair Dismissal on the grounds of redundancy

147. By virtue of S.136(1)(c) of the Employment Rights Act 1996 (ERA), there is a dismissal when 'the employee terminates the contract… (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct'.

148. A constructive dismissal will only amount to a dismissal on the ground of redundancy where the underlying reason for the breach of contract satisfies the statutory definition under section 139 (see above).

Temporary cessation

149. Whether a business is closed on a temporary basis, it is a question of fact for the tribunal.

150. **Gemmell v Darngavil Brickworks Ltd 1967 ITR 20, ET**: a closure lasting 13 weeks for machine repairs was a temporary cessation of the business which met the definition of redundancy.

151. **Whitbread plc t/a Whitbread Inns v Flattery and ors EAT 287/94:** four-week closure for

refurbishment was not a temporary *cessation* within the meaning of the statute.

B. <u>Redundancy Payment: by reason of being 'laid off'</u>

152. The statutory scheme only applies where the employee's pay is dependent on his or her being provided with work to do by the employer, ie the employer must have a contractual right to withhold remuneration if there is no work.

153. ***Cornwall Aluminium Windows Company Ltd v Dawidiuk [EAT 1405/96]***. The employee was laid off in June 1996 after 17 years. The employer's contract simply provided that: "*Your wage is £108 per week*". The EAT upheld the tribunal's decision that the employee was entitled to be paid during the period in which he remained an employee but was not being provided with work by the employer and that the layoff provisions did not therefore apply.

154. The statutory scheme only applies where the employer has a contractual right (whether express or implied) to withhold remuneration if there is no work.

Resignation

155. Once an employee has served a valid NIC, the final thing that he or she must do to be entitled to a redundancy is resign by giving *notice* pursuant to section 150 (1) ERA.

156. A resignation in response to a constructive dismissal does not count for the purposes of entitlement under this section because the scheme does not apply to employees who are dismissed (whether constructively or otherwise) pursuant to section 151 ERA (albeit it can be pleaded in the alternative).

C. Unlawful deduction of wages

Deduction from wages – section 13 Employment Rights Act 1996

The relevant statutory provisions are as follows;

"***13 Right not to suffer unauthorised deductions.***

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this *section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*

(a) in one or more ***written terms of the contract*** *of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

(b) *in one or more terms of the contract (**whether express or implied** and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

*(3 Where the total amount of wages paid on any occasion by an employer to a worker is employed by him is less then the total amount of the wages **properly payable** by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of the Part as a deduction made by the employer from the worker's wages on that occasion"*

[Tribunal Emphasis]

157. The only dispute in this case is whether the wages were *properly payable* and, as agreed between the parties, we are concerned with the interpretation of clause 3 of the contract of employment in determining whether the requirement of section 13 (2) were met.

158. House of Lords in ***Rigby v Ferodo Ltd 1988 ICR 29, HL***. The House of Lords held that the employees, in working *on under protest,* had not accepted the employer's purported change in the terms and conditions and were entitled to sue for the difference between the amount of wages they should have received. The House of Lords stressed that as long as there is a continuing contract, not terminated by either side, the employer will remain liable for any shortfall in contractual wages. If the employer wants to limit liability, it must bring the contract to an end, although in doing so it will run the risk of unfair dismissal claims being brought.

159. **MacRuary v Washington Irvine Ltd EAT 857/93:** The employee's claim for unpaid wages was upheld by the EAT because he *had expressly refused to accept the pay cut and had stated that he was working on under protest.* The employer had made unauthorised deductions from his wages.

Conclusions – analysis

160. The starting point in this case, is to reach a conclusion on the contractual position.

Clause 3 – interpretation

161. The Tribunal have considered first how the express terms of the contract of employment should be interpreted, applying ordinary principles of common law and contract.

162. The clause provides that the Claimant may be required to transfer to a different location, it provides that this other location must be within reasonable travelling distance *of either the Derby office or the Claimant's home.*

163. The wording, which refers to it being within reasonable travelling distance *of* the Derby office, is the Tribunal conclude, applying a natural and ordinary meaning to the words, referring to a location *other than* the Derby site itself but which is within travelling distance of the Derby office. Therefore, it must also follow that within reasonable travelling distance of 'your home', is not meant to include the Claimant's home, but rather his home is being used as the location from which what is reasonable, is to be determined/measured.

164. Giving these words their ordinary and natural meaning, a reasonable reader would the Tribunal conclude, interpret these words to mean that the Claimant may be required to work at a location

which is not Derby or his home, but is within reasonable travelling distance of either of those locations.

165. It seems to this Tribunal that the exercise in interpreting the words should not be influenced by the location, in that it may seem unobjectionable to most people to work from home. The literal reading of the express term is that home is not the location of work, but the location from which a measurement of what is reasonable is to be taken.

166. The Claimant did not want to work from home or more accurately, he did not want his home used by his employer as in effect, part of the workplace. That may in the Claimant's case be a point of principle but there may well be other reasons why an individual may not want to carry out his/her work from their home.

167. The Claimant's evidence is clear, he did not understand that the clause permitted the Respondent to require him to work from home. If there was an ambiguity and this Tribunal considers that the words are not ambiguous, but if there were, the Contract should be construed against the Respondent who drafted it. The Respondent could easily but did not, provide that the Claimant could be required on a temporary or permanent basis, to work from their own home address.

168. That it was not the intention that clause 3 may be relied upon to require employees (on a temporary or permanent basis) to work from home, is further supported the Tribunal find, by the absence of any clauses which address what would happen in that event. There is no provision for example about what may happen to ensure compliance with data protection in the employee's home, the payment of any related additional expenses the employee may incur, the provision of suitable equipment (not just computer equipment but a suitable workstation including chairs etc).

Implied Terms

169. Turning to the issue of implied terms; the Contract not only includes an express term about the place of work (**Jones v Associated Tunnelling: see above**) it also includes an express mobility clause, although there is generally no necessity to have one: **Aparau v Iceland Frozen Foods** . This is not a case where the Claimant is required to travel as part of his job**.**

170. The Contract had been perfectly workable without implying a term that the employer can require employees to work permanently or temporarily from home and did not lack commercial coherence without it.

171. There is no dispute that prior to the restrictions imposed in March 2020, there had been no need for the Claimant to work from home and it is not the Respondent's case that it had invoked this clause in the past to try and compel homeworking. The contract had therefore been perfectly workable in the past without implying a term about homeworking. To include such a requirement at least as far as the Respondent is concerned, would improve the Contract (at least from March 2020) but that is not the same as it being 'necessary'.

172. A term cannot be implied into a contract where it inconsistent with an express term: **Ali v Petroleum Co of Trinidad and Tobago** (above).

173. Would a term requiring the Claimant to work from home be inconsistent with the express terms? In this case the Tribunal do not find that to add the words; "…*and can be required to work from home*" would necessarily be inconsistent with the express terms, it would add to them but not conflict with them.

174. It would have been potentially open to the Respondent to offer new/amended contracts with such a term added, to its staff (at least for those not prepared to agree to work from home) and potentially terminate their employment for 'some other substantial reason', should they have refused to accept the new terms. However, it did not do so and now seeks to argue that the Tribunal should imply such a term to make the Contract 'workable' given the restrictions imposed by the public health requirements arising from the pandemic.

175. The Claimant does not suggest that there would have been any changes to his job and he does not raise any specific barrier to homeworking, other than not wanting his employer to use his home for this business.

176. The Tribunal has considered however whether given the unusual or exceptional circumstances which the Respondent faced in March 2020, whether a term could be implied in those circumstances allowing the Respondent to require its employees to work from home.

177. While the exceptional nature of the pandemic and the public health restrictions are persuasive and the Claimant does not argue any detriment in terms of the financial consequences, the Contract does contain an existing mobility clause which is unambiguous.

178. If the parties were reasonable, and directed their minds to the problem it does not follow the Tribunal find, that they would have included a term which would permit the Respondent without limitation in time, from requiring that the employee carrying out their duties from their home address.

179. In **Millbrook** the employer decided to transfer the employees to another factory on a temporary basis because of a downturn in work. It was held that the employers had no right to impose a change of location in circumstances where the 'temporary' nature of the transfer was uncertain. As set out in the judgement of Browne- Wilkinson;

"…we think it must be clear that the word, temporary means a period which is either defined as being a short fixed period, or which, as in Aveling Barford [1977] IRLR 419case, is in its nature one of limited durations."

180. What was also held to be relevant was the lack of certainty that the employees would suffer no diminution in wages.

181. In **Luke** the EAT commented that the occasions when a tribunal may find an implied term in a contract of employment that the employee is obliged to perform duties which go beyond, the contract of employment or perform them at a different workplace are "*rare"* and it is likely to be legitimate only if the circumstances are exceptional, the requirement is plainly justified **and** " *where all the conditions in Millbrook – namely that the work is suitable, that the employee suffers no detriment in terms of contractual benefits or status and that the change in duties is on a temporary basis – are satisfied".* The EAT referred to it being important that employers should not be permitted to resort to an implied term in order to impose "*what is in truth a unilateral permanent variation of the terms of the contract".* In Luke it was held that the Council were not insisting on permanent redeployment; "*there is every reason to believe, given the Tribunal's findings that if Mrs Luke had agreed to one of the Council's inchoate proposals subject to a condition that it should be limited to (say) three months, after which the position would have to be reviewed, that would have been acceptable."*

182. The circumstances of the pandemic were the Tribunal find exceptional. The work was to remain the same and there was no change in contractual benefits. While the Claimant had reasonable grounds for objecting, he was able to carry out the work from home and on balance the Tribunal

find that it was suitable work which being offered to him. However, although the evidence of the Respondent's witnesses is that they had not expected the restrictions to mean that the offices would remain closed for more than 3 months, they did not know with any certainty how long the offices would remain closed. In the event, the Derby office has remained closed for over a year. The Respondent was unaware at the outset how long the situation may last. There was never any certainty that the position would be temporary. This is not a case where the Respondent was seeking to impose homeworking for a short-fixed duration or where it was clear that the situation would be resolved within a limited duration. There was not even a review date of perhaps 3 months discussed. The home-working requirement, was absent any evidence to the contrary, presented by the Respondent as open ended.

183. Further, the Respondent did not set out what the amended term should be. It did not set out whether a clause should be inserted to allow it to impose permanent relocation of the employees duties to their home, whether this should have been for the duration of the pandemic as and when required or only during restrictions imposed by the health regulations.

184. The Tribunal therefore find that it does not meet the Millbrook criteria and that it is not one of the "rare" cases where a term should be implied.

185. The Claimant was prepared to continue to perform his duties in accordance with the terms of the contract of employment and therefore this was not the Tribunal find, a 'no work no pay' type situation.

186. In those circumstances where the Claimant was a salaried employee, willing to carry out his duties in accordance with the contractual terms, the Respondent was under a contractual obligation to pay his salary.

A. Redundancy Payment: section 135 ERA

Section 135 (1)(b) ERA – entitled by reason of being laid off

187. The Claimant was employed as a salaried employee and there is no express or implied right within the Contract, to not pay him if work is not available to do. The Respondent does not allege that there was such a right and nor does the Claimant. How the Claimant puts his case is that by not paying him, the Respondent made unlawful deductions from his wages because no work was available in accordance with the Contract but he was willing and able to work, thus he was contractually entitled to be paid.

188. The Claimant was not paid, not because work was unavailable but because it was available to be done from home and as far as the Respondent was concerned, he was unwilling to carry it out. Those who were willing but unable to carry out the work from home, were paid (under the furlough scheme).

189. The Claimant therefore is not employed under a contract on terms and conditions such that his remuneration depends on his being provided with work and thus he does not meet the eligibility criteria under section 147 ERA.

Notice

190. Regardless of the Tribunal findings that the scheme does not apply to the Claimant because he did not qualify under section 147 ERA the Tribunal has nonetheless gone on to consider the remaining requirements of section 135 (1) (b).

191. The Respondent argues that the Claimant did not serve the requisite notice required by section 148 because the first email only mentioned redundancy and not lay off. However, section 148 does not stipulate that all the information required to be given under section 148 (1)(a) has to be contained in one notice document. The Claimant sent two emails on 21 September in quick succession, within 13 Minutes of each other (p.65 and 64). It is clear that this was one email message/trail to be read together. Taken together the notice refers to wanting a redundancy payment and that he understands he is entitled to this because of lay off. Section 148 is not overly prescriptive in terms of what must be said, indeed it expressly states; "in *whatever terms*". It is meant to be capable of being complied with by a layperson, it is not prescriptive over the exact terminology.

192. The Tribunal conclude that section 148 would have been complied with had the Claimant qualified under section 147 ERA.

Counter Notice

193. The Respondent submits that the Respondent in any event served a counter notice under section 149 in its response on 21 September (p.64 and 63). Did this email give the Claimant notice in writing that it will *contest any liability* to pay a redundancy payment?

194. Neither the Respondent nor the Claimant took the Tribunal to any authorities on what may constitute a valid notice or counter notice. The statutory wording however does not require reference to the legislation to be made in the notice but that it sets out that the employer will contest **any** liability to pay a **redundancy payment pursuant to the notice** served by the employee.

195. The Tribunal conclude that the emails of the 12 September 2020 from Mr Oxley, although they do not use the words 'contest liability' to pay redundancy, clearly state that the Respondent is denying that the Claimant had been laid off and that he is entitled to a redundancy payment. On balance the Tribunal find that the Respondent had served a valid counter notice. The Claimant was left in no doubt that the Respondent would not be paying a redundancy payment to him under the lay- off provisions.

Resignation with notice or without notice

196. The Claimant as set out in the Tribunal's findings above, did not serve 3 weeks' notice of termination as required by the terms of the Contract of Employment and thus as required by section 150.

197. The Tribunal has considered whether the absence of an explicit termination date in the email was sufficient to constitute effective notice and is satisfied that the email contained enough information from which the termination date could be ascertained, namely with immediate effect. The Claimant's own evidence is that he considered notice a 'moot point', he did not really apply his mind to it and thus did not make it clear that he was serving any notice. If anything, the Respondent reasonably understood him to be resigning with immediate effect but took further steps nonetheless to try and engage with him before processing his resignation. He did not serve his contractual notice of 3 weeks.

198. The Claimant failed to comply therefore with section 150 ERA and in any event, does not qualify under section 147 ERA.

The Claimant's claim to a redundancy payment under section 135 (1) (b) ERA by reason of being laid off, is not well founded and is dismissed.

Redundancy Payment: section 135 ERA

B. Section 135 (1)(a) ERA – entitled because he was dismissed by the employer by reason of redundancy

Was there a (constructive) dismissal pursuant to section 136 ERA?

199. The claimant is not pursuing a claim of unfair dismissal. He seeks to establish a constructive unfair dismissal on the grounds of redundancy in order to claim a redundancy payment (in the alternative to a right under the layoff provisions).

200. The Claimant resigned from his employment. He argues that he did so in circumstances in which pursuant to section 136 ERA, he was entitled to terminate without notice by reason of the Respondent's conduct. He relies on a number of alleged breaches of the implied duty of mutual trust and confidence which he says lead him to resign;

1.Unfavourable treatment in that he was singled out and treated differently to Stephen Barker because he is a socialist and had *been holding Eurostar (the client) to their conditions of carriage in that he had been offering customers refunds rather than vouchers – he relies on a breach of implied duty of trust and confidence.*

201. The Tribunal do not find for the reasons set out above in the findings, that the Claimant was treated less favourably or in any material respect, differently to Mr Baker. The Claimant was not singled out because of his socialist views or because he gave customers more refunds. The Tribunal find that he was treated consistently with other employees. There was not unfavourable treatment as alleged and no breach of the implied duty of mutual trust and confidence.

202. Further, the Claimant did not until his resignation, complain that Mr Barker had been allowed to work at Derby. Although he believed that this situation has been ongoing since April 2020, he did not raise a complain about it until he resigned.

2. He should have been treated as laid off under the statutory scheme rather than put on unpaid leave and his manager refused to confirm this in writing –he relies on a breach of implied duty of trust and confidence*.*

203. The Claimant was not entitled to be laid off under the statutory scheme and therefore it cannot be a breach to have failed to implement the statutory lay off scheme.

204. As the Respondent had not laid off the Claimant, it also cannot amount to a breach of mutual trust and confidence when in April 2020 Mr Oxley refused to say that they had (page.57). The Tribunal do not find that the refusal to state that he had been laid off under the statutory scheme was therefore a breach.

205. Further, this incident had happened in April 2020, approximately 6 months before the Claimant resigned. In that period the Claimant raised no complaints about the email of the 9 April 2020 from Mr Oxley nor about him remaining on unpaid leave.

206. Not only does the Tribunal not consider the allegation which the Claimant makes, (specifically that he was not put on the statutory scheme and that Mr Oxley had refused to say he was) was not a

breach in the circumstances, the Tribunal do not accept on the facts that this was a reason for the decision by the Claimant to resign. Mr Oxley had provided an email which stated that the Claimant could not work from home and this appears to have been sufficient for the Claimant's needs. Even if this were a breach (which the Tribunal do not accept it was), the Tribunal consider that the Claimant had affirmed the Contract.

207. The Claimant was the Tribunal find, content with the situation of being on unpaid leave. He was not protesting about not being paid (his only complaint was about the wording of an email to be able to access benefits) until the TUPE transfer situation.

3.He believed he would be made to work for Eurostar in Kent following a proposed TUPE transfer in October 2020 *or dismissed if he refused to do so.*

208. The Tribunal accept that the Claimant was concerned that Eurostar would not make his role redundant and that he would be dismissed if he refused to move to Kent however, there was no substance to his concerns that he would be required to move to Kent (which would be outside the scope of the mobility clause of course) and that his role would not be made redundant. It had been made clear to him in the letter of the 21 September 2020 (page.66) that Eurostar envisaged that a redundancy situation would exist because it did not have a business need for any employees to be situated in Derby. The Claimant had been told this clearly and therefore there was no sensible basis for his ongoing concern about how he may be treated by Eurostar. Indeed, Ms Owen emailed the Claimant again on 23 September 2020 (page73) to clarify the situation and provide him with further reassurance.

209. The Tribunal do not find that there was any sensible basis for the Claimant to believe that he would be made to work for Eurostar or that he would be dismissed and if that is what he believed, the Tribunal find that the Respondent took all reasonable steps to reassure him of the position. His belief and concerns were not reasonable and cannot amount to a breach by the employer of the implied term of mutual trust and confidence. In terms of any anticipatory breach; neither the Respondent nor Eurostar had indicated an intention to breach the Contract of Employment, quite the opposite, Eurostar had made it clear that it intended to honour the existing terms and conditions of transferring staff.

210. The Tribunal find therefore that on the grounds as put forward by the Claimant, as the reasons why he resigned, there was no breach of the implied duty of mutual trust and confidence and thus no dismissal pursuant to section 136 ERA.

Constructive Unfair Dismissal on the grounds of redundancy

211. If the Claimant had established that he had been dismissed for the purposes of section 136 ERA, the Tribunal must find that he was dismissed by reason of redundancy.

212. Putting an employee on unpaid leave because of a site closure, in circumstances where the employer has no contractual right to do so and where the employee resigns because of that, would be the type of breach that could lead to constructive dismissal on the ground of redundancy.

213. The Respondent submits that there was no underlying redundancy situation because there was still work for people to do and the closure of the Derby site, was only temporary. It is not the Respondent's case that it invoked the mobility clause. The Tribunal have found that the closure was intended to be temporary but that the requirements of the Respondent for employees to carry out the work carried out by the Claimant at the Derby site where the Claimant was employed, had *ceased* on a temporary basis within the meaning of section 139 (1) (b) (ii). The Tribunal find that it is a situation more akin to the case of **Gemmell** than to **Whitbread** (above), in that it was not for

a short-defined period of perhaps only a few weeks. It was not known from the outset of the closure how long it would last. Although it was anticipated it would last 3 months, (not only is 3 months quite a substantial period of time), that was not a fixed duration and the closure has continued for in excess of a year.

214. Were the underlying reasons for the alleged breaches of contract on the ground of redundancy?

215. First alleged breach; The Claimant complains that he was treated differently by not being allowed to work at the Derby site. It is not the closure itself that he complains about (hence his statement in submissions that if he was treated the same as Mr Barker, he should not have been paid while off work) however, the underlying reason for the breach, is the Tribunal conclude the closure of the Derby site which lead to the requirement for homeworking.

216. Second alleged breach; With respect to whether he should have been laid off under the statutory scheme and this should have been confirmed in writing, again the Tribunal find that the underlying reason was to do with the closure of the Derby site and the redundancy situation.

217. Third alleged breach; With regards to his concerns about working for Eurostar, the alleged breach is not the redundancy situation with the Claimant but the redundancy situation which was likely to exist post transfer. The Tribunal do not find that any alleged breach based on his concerns about what may happen post transfer, related to the closure of the Derby site, but were because of the decision by Eurostar to bring the service in house.

218. With respect to the issue about alternative employment being offered to defeat a claim to a redundancy payment; this was not within the agreed list of issues and only raised by the Respondent in its submissions with no application to amend the response. That has not been considered by the Tribunal.

219. However, and in any event, the Tribunal do not find that the Respondent breached the implied duty of mutual trust and confidence as alleged by the Claimant.

220. Had the Claimant's case been that he had resigned because of the Respondent's failure to pay him his salary, that would have amounted to a breach of the express term of clause 4 of the Contract, so fundamental as to amount to a potential constructive unfair dismissal subject to issues of affirmation (see below). Surprisingly however, that was not what the Claimant appears to have been upset about and not what he alleges prompted him to resign. He had endured the failure to receive any salary for months without protest or complaint. He had protested about being made to work from home (which was not enforced) and he had protested about Mr Oxley not informing to DWP that he was 'laid off'. He had not protested or complained about not being paid. He felt the injustice was if Mr Barker had been treated differently and allowed to work at the Derby site and if he had not been, the Claimant considered he had no cause for complaint about not being paid.

221. The Claimant had been given advice from ACAS which lead him to understand that he should have been 'laid off' and this may well explain why he did not raise any complaint, because he believed that the Respondent had the right to impose a 'lay off' situation.

222. There was however, no breach of the implied term of trust and confidence as alleged by the Claimant and thus no constructive dismissal.

The Claimant's claim to a redundancy payment under section 135 (1) (a) ERA by reason of dismissal by reason of redundancy, is not well founded and is dismissed.

C. Unlawful deduction of wages: section 13 ERA

223. The Tribunal have found that the Respondent had no contractual (express or implied) right to require the Claimant to work from home. When the Claimant refused to work from home but was prepared to work from the Derby site or an office within reasonable travelling distance of his home or Derby office, he was complying with the terms of his Contract and was entitled to be paid his salary. The Respondent did not take steps to terminate his Contract and offer re- engagement, they simply did not pay him.

224. Where an employee makes it clear that he is not agreeing to the change but affirms the contract by continuing in employment, he may as a result lose the right to claim constructive unfair dismissal but could still claim for damage for the breach (i.e. for the shortfall in wages). An employee can 'elect not to accept the breach as ending the contract, but protest about the breach and thus agree/affirm the employment contract but reserve his rights to sue under it.

225. This is an usual case, given that the Claimant did not protest about not being paid. It seems that despite the seriousness of the breach i.e. not being paid, the Claimant nonetheless continued with the situation, without protesting about it, possibly because he had secured some financial support with benefits from DWP and was prepared to wait for the Derby site to re-open.

226. In his claim form he states that; "I *was uncertain of how to proceed and so did nothing*" (p.2).

227. This Tribunal has considered that the impact of the breach was immediate in that the Claimant was not being paid. It continued over many months, from April 2020 until he resigned in October 2020. He did not make it clear that he was remaining employed under protest.

228. In his submissions, the Claimant stated that he did not consider he had a right to be paid if Mr Barker had not been working at the Derby site either and the Tribunal understand from that statement that he did not consider the non-payment at the time to be a breach, he considered a potential difference in treatment to be a breach and that was what he was unhappy about, rather than the non-payment of itself.

229. Had the Claimant raised a protest or otherwise made it clear that he was not accepting the situation about not being paid his salary, the Tribunal would have found in his favour in respect of the unlawful deduction from wages claim however, he did not in his evidence, allege that he had done this at any point. He had never indicated that he was remaining in the Respondent's employment under protest. The Claimant does not allege that at any stage he informed the Respondent that he was refusing to accept being placed on unpaid leave and that he considered he was entitled to his salary while off work waiting for the Derby site to open.

230. Given the lack of protest over a period of approximately 5 months, the Tribunal find that the Claimant had agreed to the unilateral variation to the Contract terms i.e. agreed to remain at home on unpaid leave until the Derby site opened again in circumstances where he was not prepared to carry out his duties from home. That he changed his mind and resigned was only prompted by the change in the Respondent's circumstances i.e. the TUPE transfer and his concern that he would not receive a redundancy payment and/or may be dismissed if he did not accept a relocation to Kent.

231. In these circumstances, the Tribunal conclude that the Claimant by his conduct, impliedly agreed to the variation of the Contract. The purported change was not covered by the terms of the

Contract but the Claimant by his actions, accepted the change. The wages for the period 10 April 2020 to the date of termination on 7 October 2020, are therefore not properly payable under section 13 ERA. The Claimant has lost the right to recover the salary which he would otherwise have been paid during that 5-month period.

The claim for unlawful deduction of wages is not well founded and is dismissed.

Employment Judge R Broughton

Date: 26 July 2021

JUDGMENT SENT TO THE PARTIES ON

29 July 2021
FOR THE TRIBUNAL OFFICE

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