EMPLOYMENT TRIBUNALS

Claimant: Mr S Mavadia

Respondent: WLMG Ltd

Heard at: Watford Employment Tribunal (In person)

On: **16 January 2023**

Before: Employment Judge Quill (sitting alone)

Appearances

For the claimant: Mr Eguae, counsel
For the respondent: Mr J Tunley, counsel

RESERVED JUDGMENT

1. By agreement, the claimant is entitled to a payment in lieu of holiday pay for 1.3 days.

2. The Claimant was not underpaid for bonus or commission or for vehicle health checks. His complaint of unauthorised deduction fails (as does any claim for breach of contract based on those matters).

3. The Claimant was not dismissed by the Respondent.

4. The complaint of entitlement to damages for failure to give notice fails.

5. The complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

The Claims and The Issues

1. The claims brought were for (constructive) unfair dismissal [under s100(1)(c) and/or (d) &/or (e) of the Employment Rights Act 1996) ("ERA")] and for notice pay and for holiday pay and for bonuses.

2. It was agreed that if the Claimant was entitled to notice at all, then the notice period was to one month. On the Respondent's case, the Claimant was not entitled to notice because he resigned. On the Claimant's case, the entitlement to notice arises from his argument that he was constructively dismissed.

3. The holiday pay issue fell away. There was agreement between the parties over it.

4. Therefore, I had to decide what contractual entitlement the Claimant had to remuneration (including bonuses) and to decide whether there had either been an unauthorised deduction on any occasion and/or (in the alternative) whether the Respondent had breached the Claimant's contract by failing to pay him according to his contractual entitlement.

5. I had to decide whether the claimant dismissed. That is, I had to decide:

    5.1.1. did the respondent breach the so-called "trust and confidence term" (sometimes called the "Malik term"). Did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?
    5.1.2. did the claimant affirm the contract of employment before resigning?
    5.1.3. did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation – it need not be the only, or the principal, reason for the resignation)?

6. If he was dismissed, then he would be entitled to a finding of breach of contract, and, therefore, damages for failure to give notice. However, I would have to decide if the dismissal reason was within the relevant sub-sections of section 100 ERA.

The Hearing and The Evidence

7. This was listed for one day. The hearing took place in person.

8. I had a bundle of approximately 131 pages. There were three witnesses, each of whom had produced a written statement, and swore to the contents, and answered questions on oath. These were the claimant and, for the Respondent, Mr Obali and Mr Patel.

9. By the time the evidence and submissions were concluded, there was insufficient time to deliberate and give oral judgment, and so I reserved my decision.

The Findings of Fact

10. The Claimant is a mechanic. He had worked for father's company for a number of years. The Respondent operates some garages. The Claimant accepted an offer to start employment with effect from 12 July 2021 as a service technician. His employment ended in November 2021 in circumstances which the Respondent alleges was a resignation and the Claimant alleges was a constructive dismissal.

11. Mr Mehmet Obali is a director of the company. Having originally started working at premises in High Wycombe, the Claimant later moved (at his request) to the

Respondent's premises in Ruislip. Mr Obali was not based at those premises, and the senior person on site was usually Mr Dino Patel, sales director.

Money Claims

12. The Claimant's contractual salary was £24000 per annum, plus the opportunity to earn bonuses/commission.

13. The maximum commission bonus was £12,000 per year. The claimant was not told that the respondent would pay him a bonus of £1000 per month for £12,000 a year. He was not told that there was any guaranteed minimum at all. He was aware that it was fully performance based and that it could be zero in a given month.

14. I do accept the claimant's evidence that it was implied to him that he would be able to achieve the maximum, or close to it. However, the claimant knew that the bonus was not guaranteed and it was (at least partly) for that reason that he requested a move from the High Wycombe branch to the Ruislip branch. It was his opinion that there was not much work at High Wycombe, and – therefore – not a good chance to earn bonuses. He thought a move to Ruislip would be lucrative because it was – in his opinion – a busier location, with greater bonus opportunities.

15. From the Claimant's oral evidence in cross-examination, and from the contemporaneous WhatsApp messages between him and Mr Obali. It is clear that the claimant was aware that the bonus was dependent on the amount of work that he did. It was clear that he knew that if (for any reason, including through no fault of the Claimant's) there was not enough work to do for him to earn the bonus, then it would not be paid to him. He asked to move to Ruislip and that was approved.

16. One of the Claimant's duties was to do "health checks" on vehicles. The claimant could be paid a bonus of up to £15 per health check, depending on the number that he did, and when he did them.

17. The claimant accepts that, as of the dates of his WhatsApp discussion with Mr Obali in October 2021, he was owed for five checks. So, at that time, he was owed a total of £75. Further, he accepts that he was paid for those five health checks in his October pay. He does not allege that he was owed any further sums for health checks. His complaint of unauthorised deduction from wages in relation to payments for health checks is, therefore, not well-founded. He was paid everything that he was entitled to for those.

18. The October payslip shows total bonus as £175 without breakdown. It follows that in addition to the £75 for health checks, he was paid a further bonus sum of £100 for that month.

19. A version of the bonus scheme is the last page of the physical bundle. It was discretionary in the sense that the employer could withdraw the scheme if it wished to do so. The claimant states (and I accept) that he had not seen this particular document and it had not been (expressly) agreed between the parties that this document covered his own bonus arrangements with the Respondent.

20. However, as I have already said, I reject his assertion that there was an agreement that he was to be paid a guaranteed bonus of £1000 per month. The Claimant has not alleged that there was some other bonus scheme (that is, a different one shown to that in the bundle) that governed what bonuses he might achieve based on the amounts of work done.

21. Based on the document in the bundle, while the scheme was (arguably) something which the Respondent could cancel/withdraw at any time (or possibly after reasonable notice), it seems clear that if a worker to whom the scheme applied achieved the targets as set out in these pages, then he became, he or she became entitled to achieve a bonus to be paid the bonus in that particular month. So while the employer could withdraw the scheme for future months that would not remove the worker's entitlement to receive the payments that they had already earned by hitting the targets in the months before the scheme was withdrawn.

22. However, the claimant has not proven to me that he was entitled to any more bonus payments than he actually received. If the scheme in the bundle applied to the Claimant, then he has not proven that he hit targets such that he would be entitled to a higher payment than actually paid to him in any month. Further, if that scheme did not apply to him, he has not proven either (a) the terms and conditions of an alternative scheme, or (b) that he achieved the targets under that hypothetical alternative scheme.

23. Other than the assertion that he was entitled to £1000 per month, every month, which I have rejected, he has not put forward evidence (or an explanation) of the particular reasons that he claims to have been entitled to a higher bonus. His complaints in relation to underpayment of bonus therefore also fail on the facts.

<u>Unfair dismissal</u>

24. "Siphoning" is a process that can be used to transfer a liquid from one container to another by means of a tube or hose (or similar) connecting the containers. It is common ground between the parties that, once the process is up and running, no pump or power source is needed to keep it running. It is necessary for the receiving container to be lower than the source container, but the process (once up and running, at least) allows the liquid, in the course of its journey, to go higher than the source container. In other words, the highest point of the connecting tube can be higher than either of the containers.

25. A source of dispute between the parties was whether the siphoning process will start automatically provided the tube and container are positioned correctly (which was Mr Obali's claim) or whether it needs to be kickstarted by a pump or by suction applied via a person's mouth (which was the Claimant's claim). As I said to the parties during the hearing, I will only be considering the evidence presented during the hearing, and I will not be taking judicial notice of what any text books (or other sources of information) state about the physics of siphoning.

26. The Claimant had seen siphoning several times before starting work with the Respondent. He could not put an exact number on it but it was a few times per year. Each time he had seen it at his father's garage it had been done using a pump.

27. The Claimant was familiar with the method of using a mouth to start the siphoning process in the sense that he had heard people (including his family and relatives) discussing it. He knew it could theoretically be done, but he had not actually done it himself, or witnessed it first hand.

28. Mr Obali is a qualified and experienced mechanic has been doing such work since around 1994. However, Mr Patel is a sales director, and is not a qualified or experienced mechanic.

29. On 18 October 2021, a car came into the Ruislip garage and the claimant was allocated to do the work.

30. I weighed up the conflicting versions of what happened on 18 October, in light of all of the evidence, including the fact that as discussed in more detail below, I decided that I did not accept parts of the respondent's witnesses evidence about the later events, following the Claimant's return to work in November. However, ultimately I decided that, for the events of 18 October 2021, the Respondent's version (given by Mr Patel) was, on balance of probabilities, closer to what actually happened. I decided that, in some important respects, the Claimant's assertions about what happened that day, and why, were incorrect.

31. My finding is that the claimant was required to use his skills and experience as a mechanic in relation to the vehicles that he was allocated, including the vehicle allocated on 18 October 2021. He was expected by the Respondent to inspect the car and to decide what faults (if any) existed and what recommendations (if any) for proposed remedial action should be made to the customer.

32. A decision was made that it was necessary to extract the fuel from the car. There is a dispute between the parties about who made this decision. On the respondent's case, it was the claimant who made the decision that draining the fuel was necessary. The Claimant says Mr Patel instructed him to do it.

    32.1. My finding is that it was the Claimant who decided that it was necessary to drain the fuel. It is far more plausible that the mechanic in charge of investigating the problem with the vehicle would have made that decision than that either (a) Mr Patel, the sales director, would have made the decision of his own initiative and/or (b) the customer would have made the decision, and asked Mr Patel to arrange it. The Claimant's case is that Mr Patel did not offer any reason/justification for the opinion that there was fuel contamination, and instruction to drain the fuel. That is something that I also consider to be implausible. If Mr Patel was simply passing on the customer's request/opinion, then he would have been likely to have said so. Whereas, if he had his own theory for what the defect was, then he would have been likely to explain his reasoning.

32.2. In rejecting the Claimant's account, I have taken into account that the impression that the Grounds of Complaint seeks to give is that the Claimant knew nothing about siphoning and was reliant on Mr Patel's instructions about the process. That is not correct; further, it seemed to me that the Claimant was, at first, reluctant to accept that he was an experienced mechanic who understood siphoning from the work that had been done by his previous employer.

32.3. My finding is that the conversation about siphoning did not occur (as alleged by the Claimant) when Mr Patel came to find him in the car inspection area to instruct him to drain the fuel. The conversation occurred (as claimed by Mr Patel) in Mr Patel's office, when the Claimant informed Mr Patel that he wanted to siphon off the fuel and asked where the Respondent kept the pump that was needed to kickstart the siphoning process.

32.4. I reject the Claimant's assertion that Mr Patel said that the Respondent did not have a pump, and that he stated (or implied) that the Claimant should use his mouth. Amongst other things, I take into account that, in the tribunal hearing, the Claimant asserted that, on being told the Respondent did not have a pump, the Claimant offered to go to purchase one using petty cash, and Mr Patel refused this offer. If that were true, I think it more likely than not that the Claimant would have mentioned that fact in his witness statement (or claim form).

32.5. On the balance of probabilities, Mr Patel's account is more plausible. My finding is that Mr Patel told the Claimant where the pump was usually kept, and that he, Mr Patel, thought it a matter of common sense that if the Claimant went to look in the usual location, and the pump was not there, then the Claimant could look around other locations, and/or ask colleagues if they had seen it. There was not a lengthy or detailed conversation about it, and, at the time, Mr Patel did not necessarily anticipate that the Claimant would have any difficulty in locating the item; however, in any event, Mr Patel did not see it as part of his responsibilities to actually find the pump for the Claimant, and Mr Patel believed that he had given a sufficiently detailed and helpful response.

33. After the short conversation in Mr Patel's office, the Claimant did not come back to Mr Patel to report that he had been unable to find the pump, or to ask any further questions. Mr Patel remained in his office, and it was only later on, when the claimant came to him said he had ingested some fuel, that Mr Patel became aware that, rather than use the pump (as per the intention discussed in the office), the Claimant had, in fact, used (or considered using) his mouth.

34. My finding is that it was the Claimant's own decision to abandon the search for the pump, and to use his mouth instead to kickstart the siphoning process. The Claimant stated (in answering questions about why – on his case – he did not refuse to obey Mr Patel's instructions) that he was busy and under a lot of pressure to get through the number of inspections that needed doing. I have rejected the claim that he was given the instruction to drain the fuel by Mr Patel, but my inference is that, when he could not find the pump quickly, the Claimant decided it would be quicker to start the siphoning with his mouth. He made this decision of his own accord because, as a

conscientious employee, he wanted to do the work quickly (and possibly because he wanted to maximise the bonus opportunities) and deal with as many vehicles as he could that day.

35. The claimant names another colleague who supplied him with the tube and bucket for the Claimant to use in order to perform the siphoning. I have no evidence to contradict this assertion, and I accept it to be true. However, my finding is that this other person was not someone giving an instruction to the Claimant to perform the task in a particular way, but rather a colleague assisting the Claimant by providing items which the Claimant had decided he was going to use for the siphoning, once he had decided to abandon the search for the pump. In rejecting the Claimant's version of events, I have taken into account that the impression that the Grounds of Complaint sought to give was that there was an ongoing conversation, involving Mr Patel, in which the Claimant was supplied with the bucket, in Mr Patel's presence, as part of an instruction from Mr Patel that the Claimant must use his mouth, the opaque tube and the bucket. That is not what happened.

36. Having obtained the equipment, the Claimant put one end of the tube in the fuel tank, and sucked on the other end to draw up the liquid. He did this because he believed that was necessary to kickstart the process. Once he had done this, he intended to put the end of the tube into the bucket. Because the tube was opaque, the Claimant could not see the fuel as it approached his mouth and some went into his mouth and he swallowed some. He later described in WhatsApp messages as about half a gulp. He felt very ill and went to buy some mouthwash from a nearby shop and returned. He discussed with a colleague what had happened, and also told Mr Patel.

37. Later in the day, the Claimant was still not feeling well, and so he told Mr Patel that he was going to go to hospital, which he did. Mr Patel did not hear from the Claimant again that day.

38. At around 22:34 that evening (bundle pages 87 and 62), the Claimant notified Mr Obali that he had just got home from hospital. To the extent that the Claimant's credibility is challenged on the basis of the content of this text message, I reject that argument. The Claimant's comment that he had been 9 hours in A&E was not an attempt to mislead. The hospital records note that his time of arrival was 17:49, and of discharge was 21:57. Firstly, I accept the Claimant's suggestion that it is at least conceivable that 17:49 is not the time that he arrived in A&E, but is the time he first saw a treating clinician. In any event, the discharge document includes the phrase "observed for 9 hours post ingestion". So the author believed, based on what the Claimant had said, that the ingestion was slightly earlier than 1pm. (This is consistent with what Mr Patel and the Claimant both recollect, in that it was around lunchtime, shortly before the Claimant was due to go to take his own lunch break). Thus the discharge time from hospital was being measured at 9 hours after the ingestion, rather than 9 hours from the arrival time at A&E. It seems likely that the Claimant slightly misunderstood the document, and that is why he told Mr Obali that he had been in A&E for 9 hours. There was no ulterior motive.

39. The Claimant did not report for work the following day, which was a Tuesday, 19 October 2021. It was not until the evening of Thursday 21 October 2021 that Mr Obali texted him saying:

    we haven't heard anything last 2 days from you, hope you ok, can you please update us

40. I infer that there had probably been some discussion between Mr Obali and Mr Patel by now. I make no criticism of Mr Obali for failing to reply on the night of 18 October 2021. However, I think it likely that he would have read the Claimant's message by no later than the Tuesday, 19 October. Since he did not seek any information from the Claimant at that stage, I think it more likely that he would have had some discussion with Mr Patel about it, rather than simply ignored it; in my opinion, he would have been curious about what the Claimant was referring to, and whether Mr Patel was aware of the incident and/or agreed with the Claimant's description of events. (It is important to note that, at this stage, the Claimant had only said that he had ingested fuel, and not made any suggestion that Mr Patel had said or done anything to contribute to that.) Furthermore, it is significant that the contact with the Claimant is from Mr Obali rather than Mr Patel. This, in itself, might imply that Mr Patel was aware of the Claimant's text message to Mr Obali (that is, that might be a reason that Mr Patel did not contact the Claimant to ask him for an update). However, in any event, the fact that Mr Obali says "we haven't heard from you" leads me to conclude that Mr Obali and Mr Patel had had discussions about the Claimant and the fact that he was absent.

41. The Claimant replied the same evening to say that he was still unwell, and would return to work the following week. The next day, Friday 22 October 2021, there was an exchange of further messages (page 87 and 88 of bundle). The Claimant did not have a GP letter, at that stage, but did supply a copy of the hospital discharge form. Amongst other things, it included the following information.

    Information for GP: Ingestion of 50mls of petrol/diesel - Observed for 9 hours post ingestion - Given gaviscon for abdominal discomfort - Bloods showed nil acute concerns - Advised to report employment incident with health and safety

    Triage Notes: Pt accidently swallowed mouth full of petrol @ work around 13:30 – initially experienced burning sensation to the throat which has resolved, now having burning sensation to the abdo. Pt has vomited x 1. has been gagging and burping of petrol.

42. Thus, at this stage, Mr Obali had still not received any information that alleged Mr Patel had instructed the Claimant to use his mouth.

43. A fit note dated 25 October 2021 by the GP did not make such an assertion either. That note was sent by text to Mr Obali just after 3pm on Monday 25 October. It said the Claimant would be unfit for work until at least Sunday 7 November 2021.

44. This prompted Mr Obali to reply by text, and express some surprise, and ask some further questions, including about the amount. The Claimant still did not, initially, assert that Mr Patel had been involved. This was until:

44.1. At 15:25, the Claimant wrote: "Has it also been noted down in the health and safety book as the doctor at a&e told me to make sure the company is aware of the accident"

44.2. At 15:46, Mr Obali replied: "Did you tell them it's not an accident"

44.3. In the following 3 messages, the Claimant queried this comment, and, at 15:55 wrote: "I'm not sure why you mentioned it's not a accident as it was Dino that instructed me to siphon fuel using my mouth"

44.4. This was the first time the Claimant had said anything along those lines. Mr Obali did not comment directly on the assertion, but, in his next two messages, a few minutes later, wrote: "I will go through with you upon your return to work and fill up the accident form as it needs to be signed by you and Dino as the manager on site" and "I need the statement from you to fill the book and Dino needs to sign"

44.5. The Claimant said "Okay"

45. The following day, the Claimant had an exchange with an employee who dealt with HR, etc. At the Claimant's request, she sent him his contract, and asked him if he was feeling better. In other words, she was aware of his absence. Mr Obali also had a brief exchange of text messages (later) that day.

46. The bundle contains no further written correspondence prior to the Claimant's return to work, which was on Monday 8 November 2021.

47. I observe that, although it is the Respondent's case that there was a pump available for him to use, there is no mention of that fact in the contemporaneous exchanges (and, further, as the Claimant's representative points out, nor has any documentary evidence of the existence of such an item being provided during this litigation). Furthermore, for what it is worth, there is no suggestion in the contemporaneous correspondence that the Claimant might be disciplined for breach of health and safety, or that he might require further training.

48. It is common ground that the Claimant attended work on both 8 November and 9 November. It is common ground that he did not work on any dates after 9 November.

49. There are significant disputes of fact about what happened on 8 and 9 November. These include details about what happened in connection with filling out the accident report form, and about whether the Claimant was insulted/mocked by Mr Obali. The specific details of what happened on those dates are very relevant to the Claimant's contention that the Respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

50. In making my findings of fact about the events of those two days, I have take into account the following two matters, which adversely reflect on the credibility of the Respondent and its witnesses.

51. The first matter is that:

51.1. Paragraph 14 of the Grounds of Resistance states: "The Respondent conducted a full investigation in relation to the allegations, following which, they were not substantiated." This did not occur.

51.2. Paragraph 18 refers to a conversation between the Claimant and Human Resources. The date is not stated, but by implication it was immediately after 18 October 2019. It is claimed to have been "some three weeks" before the Claimant alleged Mr Patel's involvement, but it cannot have been 3 weeks before 25 October, so perhaps the suggestion was that the conversation was three weeks before 8 or 9 November. This conversation with HR did not occur.

51.3. Paragraphs 19 and 20 refer to an investigation said to have taken place (by implication) soon after 8 or 9 November, and the findings of that investigation. There was no formal investigation, and there were no formal written findings. Although I do accept that the Respondent came to the view, at some stage, after Mr Patel's version had been considered, that what happened matched paragraph 21 of the Grounds of Resistance, which read:

> The Claimant is correct that the Respondent did not sign off the accident report form once he had filled it out upon his return to work. This is because in it the Claimant states that his manager had insisted that he use his mouth and a pipe to siphon the fuel (which is denied) due to the Respondent not having the correct equipment available (which is denied) - however - as above, the Claimant's story was not substantiated following the investigation and could thus not be agreed to constitute an accurate record.

52. The second matter which adversely affects the Respondent's credibility (and Mr Obali's in particular) is that I disbelieve Mr Obali's denials about meeting the claimant on 8 or 9 November 2021 for the following reasons:

52.1. Paragraph 7 of his witness statement referred to discussions with the Claimant. It was were Mr Obali suggested that what the Claimant was apparently trying to suggest were mocking comments were (a) not the precise words used by him and (b) part of an innocent/appropriate conversation between Mr Obali and Mr Patel (only) which the Claimant had (partially) overheard, but not been part of.

52.2. At the start of his evidence before confirming the contents were true. He initially said, there was something that he wanted to change about paragraph 7 of his statement. This was not a change that he had previously flagged up to the respondent's own legal adviser. Mr Obali was starting his evidence after the claimant had already been cross-examined on the basis that the respondent was denying that there was any meeting or discussion between the two of them on Monday 8 or Tuesday 9 November.

52.3. It was already apparent to me, and I am sure it was already apparent to Mr Obali, that part of the respondent's case – as indicated by the cross-examination of the Claimant – was going to be that the alleged comments towards the claimant could not have been made since 8 and 9 November 2021 were the only possible dates, and the Respondent was going to be argung that Mr Obali was not at Ruislip on either date.

52.4. I formed the clear impression that Mr Obali had become concerned that what he had written in paragraph 7 of his witness statement might conflict with the position the respondent had adopted during cross-examination. I am sure that he thought that there might be a need to change something in his witness statement, and that he was going to say that he was mistaken about the date in paragraph 7. It seemed to me that once he read paragraph 7 carefully and noted it did not specify any particular date(s), he was satisfied that he did not need to make any amendments or clarifications. At that point, he told me and respondent's counsel that the statement was accurate, and he could swear to it without any amendment.

53. Mr Obali was then cross-examined on the basis that, amongst other things, paragraph 7 of his statement did contain admissions that he had been on site at Ruislip on at least one of 8 or 9 November. Mr Obali denied this and said what he had been referring to in paragraph 7, was an earlier conversation. In other words, by implication, was earlier than 18th of October 2021 (because it is common ground between the parties that Mr Obali was not on site on 18 October 2021 and also common ground that the claimant was absent after 18 October until 8 November.)

54. However, the statement was prepared after this litigation been ongoing for some time and after the issues had been clarified at the case management hearing and after EJ Anstiss ordered the respondent to provide further and specific information about whether it admitted or denied the particular comments had been made.

55. I am satisfied that, when he wrote the statement, Mr Obali was clearly intending paragraph 7 to refer to an event which happened after the claimant's return to work. For one thing, that is the inference that would be drawn on the assumption that paragraph 7 is part of a narrative dealing with matters chronologically. However, more importantly, the respondent and Mr Obali were well aware that the claimant was alleging (and that it was an important part of his case) that comments about creating (and making staff use) a home made fuel pump were made after the Claimant had (i) ingested the fuel, and (ii) complained to the respondent about it, and (iii) asked for the matter to be investigated. Had Mr Obama genuinely - when he wrote the statement - been intending to refer to a conversation that took place before 18 October 2021 then he would have said so expressly. That would have been an important fact to refer to in an attempt to refute the Claimant’s contention that the (disputed) remarks were made in a conversation after the Claimant had made an accident report.

56. I am satisfied, taking into account paragraph 7 of his statement, that Mr Obali was at the Ruislip site after the claimant had returned to work and there was at least one occasion on which Mr Obali and Mr Patel and the claimant were in close proximity to each other. Further, I am satisfied that, at that time, Mr Obali was discussing the siphon pumps and whether or not they were being used correctly at Ruislip.

57. My further finding is that Mr Obama knew that he had had such a conversation following the claimant’s return to work at the time he wrote his witness statement and that he knew that at the time of the hearing before me in January 2023. Therefore, his attempts to explain away paragraph 7 of his statement as a reference to a much

earlier conversation is a very significant matter for me when weighing up his denials about the exact words which the Claimant attributes to him.

58. I return now, in the findings of fact, to 8 and 9 November.

59. In the bundle - at pages 70 and 82 respectively - there are two versions of an accident form. Page 70 is the version produced from the respondent's records, and page 82 is the version disclosed by the claimant as part of this litigation.

60. Both versions show that the Claimant signed the form twice (boxes 3 and 4) and dated each signature 9 November 2021.

61. I think it likely that the claimant did ask for the form on Monday, 8 November because it is clear from the correspondence during his absence that this was a matter of some importance to the claimant. I think it unlikely that he would have just waited silently to see what happened on Monday and waited until Tuesday to proactively ask about completing the form. I accept the Claimant's evidence that he asked for it (at least) once on the Monday. I do not accept his assertion that he asked for it 30 or 40 times until it was given to him.

62. Mr Patel's own account is that the claimant completed the form immediately after it was given to him. If Mr Patel is right about that (and the Claimant does not dispute) then, since the form was signed on Tuesday 9 November, the form was not given to the Claimant until that day.

63. Therefore my finding is that that the claimant asked for the form to be completed at least once, and possibly more than once on the Monday and had to ask again on the Tuesday before it was given to him. Furthermore, although Mr Obali had said in the texts on 25 October that he, Mr Obali, would have the Claimant complete the form, on 8 and 9 November, neither Mr Patel nor the Claimant thought it was necessary to defer things until Mr Obali was available to meet the Claimant to deal with the accident form completion.

64. Thus the Claimant's preference was for the form to be completed on 8 November, but that was not done. There was nothing preventing the Respondent/Mr Patel handing the form to the Claimant on the Monday. However, the Claimant did not ask many times for the form, and he did not contact HR or Mr Obali about it. The Claimant had already been told by Mr Obali that the accident form would be completed, and my finding is that the Claimant was not especially annoyed or upset that the form was not completed on the Monday (though that would have been his preference).

65. The complainant, the claimant completed the form, and what he wrote about the accident was:

> The manager insisted I siphon the fuel using my mouth and a pipe due to the company not having the correct equipment which [led] to me drinking fuel by accident

66. Based on my findings of fact about 18 October 2021, this version of events was not true. Mr Patel had not "insisted" that the Claimant siphon the fuel that way. (Further,

based on my findings, Mr Patel had not known that, after leaving his office, the Claimant had decided to do it.) Mr Patel had not told the Claimant that the company did not have the correct equipment (and had, on the contrary, expressly told the Claimant that they did have it, and told the Claimant where it was normally kept).

67. Box 7 of the form is for the employer to complete, or, at least, it is to be completed if – as stated on the form – the accident is considered to be "reportable under the Reporting of Injuries Diseases and Dangerous Occurrences 1995 (RIDDOR)".

68. Mr Patel did not sign that box. I accept that his reasons for not doing do are as set out in paragraph 21 of the Grounds of Resistance and his witness evidence to the tribunal, namely he thought that what the Claimant had written was false, and he did not wish to be seen as agreeing with it.

69. Mr Patel did not form any view at the time that the matter was, or else was not, "reportable under the Reporting of Injuries Diseases and Dangerous Occurrences 1995 (RIDDOR)". That had nothing to do with his refusal to sign Box 7.

70. The difference between pages 70 and 82 of the bundle is that page 70 (the version from the Respondent's disclosure/records) shows only one signature (the claimant's) at Box 3, whereas the one on page 82 (disclosed by the Claimant) contains a second, different signature, which also has a date of 9 November 2021.

71. The top space in Box 3 (the one signed by the Claimant) is for the signature of the person completing the form in the accident book. This could either be the person who had had the accident, or it could be someone else. It seems to me that, if the person filling out the accident form is the same person who had the accident, then the lower signature space in Box 3 can be left blank. Certainly it is clear to me that the only person who should sign in that space is the person who had the accident; furthermore, they would only do so if (i) someone else had completed the form and (ii) they wished to signify agreement to what had been written in the form by that other person.

72. Thus, it seems clear to me that there would be no good reason for the employer, or Mr Patel, to complete that signature space. Put another way, if that space was signed by the employer or Mr Patel, then it was an error and/or showed a lack of understanding of the printed information on the form.

73. The Claimant's explanation of the second signature in Box 3 is that it was indeed Mr Patel's, and happened as follows. The claimant completed and then photocopied the form. He handed one of them (either the photocopy or the original, it does not matter) to Mr Patel for Mr Patel to sign. Mr Patel then scrunched up the form and threw it in the bin. The Claimant alleges that he said he would need a copy and Mr Patel said "no you won't". The claimant's account is that he was persistent about Mr Patel having to sign the copy (or the original, it does not matter) which he had retained. He says Mr Patel was very reluctant, but he continued to press and Mr Patel eventually agreed to sign the Claimant's document, and that is – according to the Claimant – the reason that a version appears at page 82, including what the claimant says Mr Patel's signature in Box 3.

74. Mr Patel's version is that claimant presented him with a copy of the form (or the original, it does not matter) for it to be signed, having taken a copy for himself and that he, Mr Patel refused to do so on the basis that, as he claims to have told the Claimant, the claimant's version of events in the form was not accurate and Mr Patel would not sign unless and until it was corrected.

75. Mr Patel denies scrunching the document up and throwing it into the bin. On his case, the Claimant refused to amend it, and left the form with him, and he put it (without any further signatures) into the Respondent's records.

76. He denied signing the version of the form which the Claimant took away with him (that is the document which is now at page 82 in the bundle).

77. It would follow as a matter of logic, that if Mr Patel's signature is not shown on page 82, then it must have been the claimant who added that signature (either by writing it himself or by getting somebody else to do it for him) and that the Claimant is barefacedly and deliberately lying by claiming that Mr Patel signed it. Furthermore, not only would be deliberately giving false testimony on oath, he would have deliberately put forward a document which had been doctored by him.

78. There is the corresponding possibility that if the signature is indeed that of Mr Patel, then it is Mr Patel who is barefacedly and deliberately lying.

79. However, that is not the only possibility, in my opinion, if the signature is indeed that of Mr Patel. Because, the other possibility is that Mr Patel did sign, but later did not remember doing so. My finding is that this is, in fact, the most likely explanation.

    79.1. The Claimant would have very little to gain by forging the signature. His basic case is that the Respondent brushed off his concerns, and he could make that argument just as easily by using an unsigned accident report as a signed one.

    79.2. If the Claimant was going to forge a signature, it is not obvious to me why he would forge it in Box 3 rather than Box 7.

    79.3. The signature is very similar to that placed on his witness statement by Mr Patel. I think this carries less weight than was suggested by the claimant's representative. (While I accept – of course – that the Claimant would not have received that signed witness statement until after he had already written his own, there's no reason for me to think it impossible that the Claimant might have had Mr Patel's signature from other documents, created during the time they worked together). I am not claiming to be a handwriting expert. However, my finding of fact is that it is sufficiently similar that, it is more likely to have been done by Mr Patel than another person.

    79.4. It is common ground that the Claimant asked more than once for Mr Patel's signature. I think that Mr Patel decided that it was reasonable to sign the Claimant's copy so that the Claimant had a receipt that it had been handed in, while remaining unwilling to sign the document that was going into records. I think it has simply later slipped his mind.

79.5. Although neither side argues for Mr Patel having innocently forgotten (the Claimant's case being that the signature was an admission that the facts stated in the report were true, and Mr Patel is seeking to resile from the admission by falsely denying that the signature is his), I think this the most likely explanation.

79.6. I reject the Claimant's account of the form having been scrunched up and thrown in the bin. For that to be true, it would – of course – imply that after the Claimant had left (and before the bins were emptied), Mr Patel decided to retrieve the form and flatten it out and place it in the Respondent's files. (To the extent that the Claimant invites me to draw the inference that that is exactly what happened based on the appearance of page 70, I do not do so). This is implausible.

79.7. More generally, the overall assertion that Mr Patel signed the Claimant's copy [intending to admit that the Claimant's account was true], but did so after having thrown the Respondent's unsigned copy in the bin [intending to signify to the Claimant that the Claimant's account would not be investigated] makes no sense.

80. My finding is that Mr Patel took the form from the Claimant, making clear to the Claimant that he, Mr Patel, did not agree the contents. He intended to refer the matter to Mr Obali (and/or other colleagues) for further advice and decision-making. He intended to, and did, tell his colleagues that he disputed the Claimant's version of events.

81. For the reasons just stated I have not found that this particular denial by Mr Patel (about signing the form) adversely affects his credibility as a whole. Nor have I found that the claimant has attempted to deceive the employment tribunal on that point and (on the contrary) the Claimant is correct that the signature is that of Mr Patel.

82. Following his return to work, the claimant alleges he was mistreated on 8 and 9 November and then was off sick the remainder of the week (so, from the Wednesday onwards).

83. The Claimant alleges that on 8 or 9 November 2019 (he is not sure which) the following comments were made:

83.1. In the corridor, when it was just him and Mr Obali present, Mr Obali said he was going to make a "crème-de-la-crème" fuel pump with crocodile clips, wires and pipes. He said he would get someone else to build it, as it might spark and be dangerous.

83.2. In the workshop, with others present, Mr Obali said to be careful not to drink fuel.

84. As mentioned above, I do not believe Mr Obali when he denies having been in Ruislip at all on 8 or 9 November 2021. I accept the Claimant's evidence that these two comments/conversations occurred.

85. In terms of the latter, even on the Claimant's own case, this was not an instruction to do something dangerous.

86. In terms of the former, to the extent that the Claimant seeks to argue that this was Mr Obali being serious, and informing the Claimant that he, the Claimant, would have to use a dangerous home-made bit of kit, which might spark and cause an explosion of fuel, I reject that. I am satisfied that the Claimant knew at the time that this was in the same vein as the other comment, telling him to be careful not to drink the fuel. Mr Obali was being sarcastic in both cases. As the Claimant says, he was making fun of the Claimant, and of the fact that the Claimant had ingested the fuel.

87. Having been absent from 10 November 2019 onwards, the Claimant resigned the following Monday, 15 November 2021, at 8:51am, by email. The email was sent with the heading “resignation from WLMG” and was sent to the same HR employee whom he had asked for the contract, and to Mr Obali and Mr Patel. It said.

> Dear to whom it may concern,
>
> I hereby hand in my final notice of employment. With immediate effect due to how circumstances have been dealt with after the misconduct of health and safety rules.
>
> I would like to thank WLMG for the experience initially, however given recent circumstances and conducts at the company I no longer feel it is the right fit for myself.
>
> Kind regards,

88. Mr Obali replied a few minutes later, expressing surprise, asking if the Claimant was at work, and suggesting there would be an exit meeting. At about 9.19am, having checked the position, he wrote again to say that the Claimant appeared to have resigned without notice and that, if that was the case, asking the Claimant to confirm that he had already left all company property at the workplace.

89. In other words, the Claimant did not, in express terms, either refer to the ingestion of fuel, or to a dispute over what happened on 18 October, or to any alleged failure to investigate, or to any alleged remarks made to him, as a specific reason for resigning. That being said, it is clear to me, and would have been clear to the Respondent on 15 November 2021, that the reference to (alleged) “misconduct of health and safety rules” had to be in some way connected to the fuel incident and/or the subsequent discussions about it.

90. When the Claimant resigned, he did not have another job lined up.

The Law

91. Part II of the Employment Rights Act 1996 deals with Protection of Wages. The right not to suffer unauthorised deductions is described in section 13. Wages are defined by section 27. Employees (and other workers) have the right to receive the wages properly payable on each pay date. Deciding what wages are actually properly payable may require the Tribunal to analyse the meaning of the contract, and to find facts.

92. Employment tribunals have jurisdiction to award damages for breach of contract, subject to the requirements of the Extension of Jurisdiction Order. The tribunal has

jurisdiction to consider the Claimant's complaint that he was entitled to notice, and that, in breach of contract, he did not receive that (because, according to the Claimant, he was constructively dismissed and the termination was with immediate effect).

93. In the absence of gross misconduct, an employee who is dismissed, has the right to receive notice which is either the statutory minimum (section 86 the Employment Rights Act 1996) or the contractual notice period, whichever is greater. However, if provided for by the contract, employers can terminate with immediate effect and make a payment in lieu of notice.

94. The Working Time Regulations 1998 set out minimum entitlements to holiday, and holiday pay. Regulation 14 provides details of the entitlement to a sum in lieu of entitlement which had accrued, but not been used up, during the partial leave year which includes the termination date.

95. Regulation 16 sets out that, when working out entitlements related to holiday pay, and payment in lieu of holiday, the definition of a week's pay from the Employment Rights Act 1996 is used, except that, instead of using a reference period of 12 weeks, a reference period of 52 weeks is used.

96. For the unfair dismissal claim, the claimant relies on section 95(1)(c) of the Employment Rights Act 1996 ("ERA") to establish that he was dismissed. It reads:

> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

97. Section 95(1)(c) is colloquially referred to as constructive dismissal. In order to prove constructive dismissal the employee must prove

97.1. that the employer has committed a serious breach of contract and

97.2. that the employee resigned because of that breach (or at least partly because of that breach; it does not necessarily have to be the only reason) and

97.3. that the employee must also prove they has not waived the breach by affirming the contract.

98. In London Borough of Waltham Forest v Folu Omilaju [2004] EWCA Civ 1493, the court, at paragraph 14, stated that:

The following basic propositions of law can be derived from the authorities:

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761*
2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy

or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA [1998] AC 20* , 34H–35D (Lord Nicholls) and 45C–46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666* , 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship (emphasis added).
4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively , it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).
5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at paragraph [480] of Harvey on Industrial Relations and Employment Law:

   "[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

99. The last straw might be relatively insignificant, but it must not be utterly trivial. 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.

100. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, the Court of Appeal clarified the analysis in Omilaju and added to it. It reiterated that the last straw doctrine is only relevant to cases where the repudiation relied on by the employee takes the form of a cumulative breach and that the last straw doctrine does not have any application to a case where the alleged repudiation consists of a one-off serious breach of contract.

101. In Kaur, the Court of Appeal made clear that in a last straw case the fact that the employee might have affirmed a contract after some of the earlier conduct does not mean that it is not possible for the claimant to rely on that earlier conduct as part of a cumulative breach argument and in paragraph 55 of its decision it summarised the correct approach.

   (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
   (2) Has he or she affirmed the contract since that act?
   (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
   (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation ...)
   (5) Did the employee resign in response (or partly in response) to that breach?

102. Where the answer at point (4) is "no" (for example the act that triggered the resignation was entirely innocuous), it is necessary to go back and see whether there was any earlier breach of contract that has not been affirmed, and which was a cause of the resignation. See Williams v Governing Body of Alderman Davies Church in Wales Primary School EAT 0108/19

103. In considering whether a contract has been affirmed after a breach, it is necessary to have regard to the entirety of the circumstances. A gap in time between the act relied on and the resignation is a significant factor but it is by no means the only factor; in other words, a delay is not necessarily fatal to the employee's argument for constructive dismissal. The reasons for the delay would be relevant as would consideration of what had happened in the intervening period, such as was the employee working and receiving pay amongst other things.

104. Where an employee alleges constructive dismissal and succeeds in the argument then the dismissal reason for the purposes of the Employment Rights Act is the employer's reason for the conduct which caused the employee to treat themselves as dismissed. (Berriman v Delabole Slate Ltd, Court of Appeal, 1985 WL 310942)

105. In this case, there is no argument about whether the dismissal (if any) might have been for a potentially fair reason. The Claimant did not have two years' continuity of employment, and therefore the argument is whether the reason for the dismissal (if I find that there was a dismissal) fell within any of the definitions in s100(1)(c), (d) and (e) of the Employment Rights Act 1996. The relevant parts of section 100 are:

100.— Health and safety cases.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the

employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

106. Given that the Claimant did not have two years' service, the onus is on him to demonstrate that the dismissal reason did fall within one those definitions. (Smith v Hayle Town Council 1978 ICR 996, CA; Tedeschi v Hosiden Besson Ltd EAT 959/95; Parks v Lansdowne Club EAT 310/95).

107. In Balfour Kilpatrick Ltd v Acheson 2003 IRLR 683, EAT, the EAT identified three requirements that need to be satisfied for a claim under S.100(1)(c) to be made out. It must be established that:

107.1. it was not reasonably practicable for the employee to raise the health and safety matters through the safety representative or safety committee (or else there was none)

107.2. the employee must have brought to the employer's attention by reasonable means the circumstances that he or she reasonably believes are harmful or potentially harmful to health or safety, and

107.3. the reason, or principal reason, for the dismissal must be the fact that the employee was exercising his or her rights.

108. There is a significant difference between the dismissal reason defined in s100(1)(c) and those in sections 100(1)(d) and 100(1)(e). The former relates to the bringing of a matter to the employer's attention (and do not require the danger to be serious and imminent). The latter relate to actions which the employee took, or proposed to take, and require the danger to be serious and imminent. It might be the case, of course, that an employee has both (i) brought something to the employer's attention (which might fall within section 100(1)(c), potentially) and (ii) taken some action to avert the danger, and/or refused to be at work, (which might fall within section 100(1)(d) &/or (e), potentially). Where that is the case, it is important for the tribunal to take care to specifically identify the actual dismissal reason. That is, was the dismissal reason that he brought the matter to the employer's attention? Because, if not, then it cannot fall within section 100(1)(c).

109. In Rogers v Leeds Laser Cutting Ltd [2022] EWCA Civ 1659, the court of appeal noted that section 100(1)(d) (and thus also 100(1)(e) given the similarity of the wording) should be construed purposively rather than literally. It is therefore sufficient that the employee has a (reasonable) belief in the existence of the danger as well as in its seriousness and imminence. At paragraph 21, it identified the steps for analysing a section 100(1)(d) complaint:

(1) Did the employee believe that there were circumstances of serious and imminent danger at the workplace? If so:

(2) Was that belief reasonable? If so:

(3) Could they reasonably have averted that danger? If not:

(4) Did they leave, or propose to leave or refuse to return to, the workplace, or the relevant part, because of the (perceived) serious and imminent danger? If so:

(5) Was that the reason (or principal reason) for the dismissal?

110. At paragraph 20, the court had cited, without disagreement, a passage from Von Goetz v St George's Healthcare NHS Trust EAT/1395/97 to the effect that, for section 100(1)(c) and 100(1)(e), the relevant matter (risk of harm to health and safety, or serious and imminent danger, as the case may be) might not necessarily be at the workplace. However, the court of appeal decided that the wording of section 100(1)(d) clearly did imply that the danger in question would have to be one at the workplace.

Analysis and Conclusions

111. In terms of holiday's agreed that the claimant and was underpaid for payment in lieu of holiday. Upon termination, and is entitled to a further 1.3 days.

112. As discussed in the findings of fact, the Claimant has not proven that there was any shortfall in pay or bonuses. Therefore the unauthorised deduction claim fails, as does any complaint of breach of contract in relation to payments of wages or bonuses.

<u>Alleged Dismissal</u>

113. There are several examples of alleged conduct by the Respondent (Mr Patel and Mr Obali, specifically) that I have to analyse in order to decide if the Respondent has without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

114. To the extent, if at all, that the Claimant relies on being instructed by Mr Patel to use his mouth to start the siphoning, I have found that Mr Patel did not do that.

115. To the extent that the Claimant relies on Mr Patel crumpling up the accident report form, and throwing it in the bin, I have found that Mr Patel did not do that. He placed the document (unsigned by him) into the Respondent's records.

116. To the extent that the Claimant relies on Mr Patel being reluctant to fill out the form with him, I have found that the Claimant did ask on the Monday for the form to be handed to him so he could complete it, but it was only made available to him on the Tuesday. However, the Claimant's assertion to have asked 40 or 50 times on the Monday is false. Furthermore, the Claimant had already been told in writing (on 25 October) that Mr Obali would go through it with him on his return to work, and the Claimant did not raise the matter with Mr Obali on either 8 or 9 November 2021. I do think the Respondent should have acted more quickly to make formal records of the incident. However, I do not consider that the slight delay from the Monday to the Tuesday caused the Claimant to believe that Mr Obali had changed his mind about the need for the accident form to be completed.

117. To the extent that the Claimant relies on Mr Patel disagreeing with the contents of the accident form, there was proper cause for that. Mr Patel did genuinely disagree with the Claimant's version of events and, based on my findings of fact, he was justified in doing so.

118. In paragraph 13 of his witness statement, the Claimant says that, by 12 November 2021 he had "unsuccessfully asked for the health and safety form and procedures to be completed several times on multiple days". He says that the only answer he had received was that it would be done later. He says that he resigned by email later that day. There are several problems with these assertions:

118.1. 12 November was the Friday. The Claimant did not resign that day.

118.2. Although, as discussed above, it is partially correct that he had asked for the form several times (or more than once, at least, given he asked for it on the Monday, and again on the Tuesday), the form itself had been completed on 9 November.

118.3. It is not correct that he asked on 10 or 11 or 12 November about the procedure. He did not speak to Mr Obali about it at all in the week commencing 8 November. To the extent that he is referring to Mr Patel as the person who said "it will be done later", then that is entirely consistent with my findings about the meeting between the Claimant and Mr Patel on 9 November. Mr Patel was going to refer the form to others within the organisation. The Respondent has not necessarily proven that it has got a good excuse for not carrying out a formal investigation. However, the Claimant was not in work (and was on sickness absence) following 9 November 2021, and the fact that the Claimant had not been contacted for further information during his sickness absence is not unreasonable.

119. To the extent that the Claimant relies on the remarks made to him by Mr Obali, I do think these were, at best, unsympathetic given that the ingestion of fuel had caused the Claimant to be on sickness absence for three weeks. The comments were unprofessional, and it would have been more appropriate for him to have adhered to the more serious tone of the text exchanges where he had indicated that the Claimant should fill out paperwork and matters would proceed from there. Better still, a reasonable employer would have taken some proactive steps to ensure that the Claimant knew what he should do in future when he needed to drain fuel. Since Mr Obali has denied making the comments at all, he has not sought to explain why he made them. However, my decision is that

119.1. Firstly the Claimant knew that Mr Obali was joking. They may well have been slightly cruel jokes, and they were certainly at the Claimant's expense. However, they were not intended to be taken literally, and the Claimant knew that.

119.2. Secondly, even to the extent that these remarks might imply that Mr Obali believed the fuel consumption was the result of a mistake by the Claimant's, not as a result of wrongdoing by Mr Patel, based on my findings, the Claimant knew that his own version of events was not accurate, and Mr Patel had not, in fact, instructed him to siphon with his mouth.

120. I do not regard the Respondent's conduct as amounting to an assertion (express or implied) that it would not deliver a formal outcome to the Claimant in relation to the accident form, and the events of 18 October 2019.

121. The Respondent's actions (including Mr Patel's express denials that the form was accurate, and Mr Obali's mocking comments) did indicate a degree of scepticism about the Claimant's account. However, that was not without reasonable and proper cause. The Claimant's account was not accurate.

122. Mr Obali's mocking comments were unprofessional. However, they were not, in themselves, calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

123. My decision is, therefore, that there was no breach of the so-called "Malik term". Therefore, the Claimant was not dismissed.

124. Had I found that the Respondent's conduct in the week of 8 November 2019 (or its conduct from 18 October 2019 onwards) had amounted to a breach of the term requiring trust and confidence, then I would not have decided that the Claimant had affirmed the contract by waiting until 15 November 2021 to resign.

125. I do think it likely that at least part of the Claimant's reason for resigning was that he had become disillusioned by the fact that it was more difficult to earn the maximum bonus than he had anticipated. However, had I decided that the Respondent's conduct did in fact breach the relevant implied term, then I would have found that the Claimant's resignation was, at least partly, in response to it. I do think that Mr Obali's comments formed part of his reason for resigning.

126. Given that I have decided there was no dismissal, then the unfair dismissal claim fails for that reason in any event.

127. For completeness, on any view, the claim relying on section 100(1)(e) ERA fails. The Claimant has not identified actions which he took (or proposed to take) that were the cause of the conduct that (on his case) breached the "Malik term". In my judgment, there were no steps by the Claimant that fell within the definition in the section.

128. Similarly, the complaint under section 100(1)(d) fails, as the Claimant's absence from work on the afternoon of 18 October was to go to hospital. His absence from 19 October to 7 November was sick leave. His absence from 10 November to 14 November was sick leave. Further, in my judgment, the cause of the conduct that (on his case) breached the "Malik term" was not his absence.

129. For both the section 100(1)(e) and (d) claims, an additional reason that they fail is that there was not "serious and imminent" danger and nor could the Claimant have reasonably believed that there was. Even at its highest, there would be no danger until the next time a fuel tank had to be siphoned, and this was not on 8 or 9 November 2021, or on any later date up to and including 15 November 2021.

130. In terms of section 100(1)(c), Mr Obali's conduct in making the two remarks mentioned above was not because the Claimant had filled out the accident form, or because he had said, in text message exchanges, that he wanted to formally record the matter as an accident at work. Mr Obali's conduct (it seems to me; Mr Obali having denied making the remarks at all) was because he thought that ingesting the fuel in the first place was a laughing matter. He was not, in my judgment, seeking to retaliate because the Claimant was seeking to raise the matter formally.

131. Mr Patel was also not seeking to retaliate when he told the Claimant (truthfully, I have found) that he disputed the Claimant's version of events.

132. I would have been satisfied that there was no safety committee, and that raising the matter by text and completion of accident form was bringing something to the Respondent's attention by reasonable means. However, the section 100(1)(c) claim would fail in any event because the circumstances which the Claimant sought to bring to the Respondent's attention were that "the manager insisted I siphon fuel using my mouth". Since that statement was untrue, the Claimant did not reasonably believe that what he wrote was describing "circumstances connected with his work" which were harmful.

133. The Claimant is not entitled to damages for failure to give him notice. He is not entitled to damages for one month's loss of notice, either in terms of the remuneration he would have earned, or in terms of the holiday entitlement he would have accrued.

Next Steps

134. The provisional remedy hearing is cancelled. My understanding is that the parties are in agreement in relation to the amount of holiday pay. That sum, if not paid already, should be paid within 14 days.

Employment Judge Quill

Date: 6 March 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

9 March 2023.

NG

FOR EMPLOYMENT TRIBUNALS