EMPLOYMENT TRIBUNALS

Claimant: Mr J M Wallace

Respondent: Royal Mail Group Limited

Heard at: Leeds **On:** 27, 28 and 29 November 2018

Before: Employment Judge Licorish (sitting alone)

Representation
Claimant: in person
Respondent: Mr P Bownes, Solicitor

RESERVED JUDGMENT

1. The claimant was not dismissed by the respondent. His claim for constructive unfair dismissal therefore fails and is dismissed.
2. The remedy hearing provisionally listed to take place at Leeds on **22 February 2019** is cancelled.

REASONS

1. The claimant was employed by the respondent limited company as an operational grade postal worker from 8 May 2000 until 19 March 2018. By a claim form presented on 9 May 2018, he complains of constructive unfair dismissal. The respondent denies the claimant's claim. Its position is that the claimant was not dismissed, but chose to resign on short notice.

The evidence

2. During the hearing, the Tribunal first heard evidence from Andrew Tarpy, a trade union workplace representative, and the claimant. For the respondent the Tribunal heard from Phil Jackson (deputy collections manager), Paul Wright (collections manager), Pam Wright (area collections manager), Julie Fisher (an independent casework manager) and Roberto Petrillo (deputy collections manager). All the witnesses' written statements were read by the Tribunal before the claimant called his first witness.
3. The claimant also submitted a signed witness statement by another trade union representative, Michael Roberts, who accompanied the claimant to a

sickness absence review meeting and two grievance appeal hearings. Unfortunately, Mr Roberts was unable to attend the Tribunal hearing owing to compelling personal circumstances. The Tribunal explained to the parties that it could attach only such weight to Mr Robert's statement as was appropriate in the circumstances, in view of the fact that he was unable to confirm under oath the accuracy of his evidence, and he was not available in person to be cross-examined by the respondent or questioned by the Tribunal.

4. The Tribunal was also provided with an agreed bundle of documents (initially comprising 276 pages). The claimant's fit notes issued in January and February 2018 were added to the bundle at pages 277 and 278 by consent at the beginning of the hearing. At the claimant's request, a previous version of the claimant's sickness absence "storyboard" disclosed by the respondent earlier in these proceedings was also added to the bundle at pages 267A to 271A. However, it became clear during the respondent's evidence that the entries in the previous version of the storyboard simply stopped short at December 2017, whereas the entries in the version at pages 267 to 271 of the bundle continued until the termination of the claimant's employment in March 2018. There was otherwise no material difference between the two documents.

5. The Tribunal read the documents referred to in the witness statements, during oral evidence and in submissions. References to page numbers in these Reasons correspond to the page numbers in the complete bundle of documents before the Tribunal.

The issues

6. At the beginning of the hearing, the issues in respect of the unfair dismissal complaint (as first identified during a preliminary hearing on 10 August 2018) were confirmed and agreed. Having also reviewed the evidence and submissions presented during the hearing, the issues to be determined can be summarised as follows:

   6.1 Has the claimant proved a breach of contract by the respondent, and if so, was that breach sufficiently important to justify the claimant resigning, or else was it the last in a series of incidents which justified his leaving? In this respect, the claimant alleges that the respondent was in breach of an express term in his contract relating to company sick pay, in that on around 15 December 2017 it decided to withhold such pay even though his GP had certified that he was not fit for work. The claimant also alleges that the respondent was in breach of the implied term that it would not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. According to the annexe of complaints identified at the preliminary hearing, he relies on the following allegations:

      6.1.1 On around 15 April 2014, the claimant's manager Tim Wilson informed him that his previous role at Keighley local delivery office was not available to return to following a career break (even though Mr Wilson had previously promised that the claimant would be able to return to the same job and location), and that he would have to relocate to another role in Halifax.

      6.1.2 On around 16 April 2014, Tim Wilson told the claimant that there was not in fact another role at Halifax.

6.1.3 In around April 2014, the respondent failed to advise the claimant that his previous role in Keighley had been advertised as vacant.

6.1.4 From around 2016, the respondent permitted a private arrangement whereby a collections driver was offered enhancements to carry out overtime at Keighley.

6.1.5 The respondent permitted that arrangement to continue while the claimant was on sick leave between 28 November 2016 and 3 January 2017.

6.1.6 In January 2017 the respondent passed the claimant's grievance about enhanced overtime payments to the claimant's second line manager, Pam Wright, to deal with even though the matters complained of fell within her responsibility as area manager.

6.1.7 On around 6 September 2017, the respondent suspended the claimant because he had been unable or unwilling to carry out an instruction owing to health concerns.

6.1.8 On around 4 October 2017, Pam Wright awarded the claimant a two-year suspended dismissal for insubordination (failing to follow a reasonable instruction).

6.1.9 On around 29 November 2017, Julie Fisher upheld that decision on appeal.

6.1.10 On around 15 December 2017, Roberto Petrillo took the decision to stop the claimant's company sick pay even though the claimant's absence was certified by his GP.

6.1.11 On around 4 January 2018, Pam Wright failed to review Mr Petrillo's original decision.

6.1.12 During the preliminary hearing In August 2018, the claimant identified the alleged final act or omission as having taken place on 6 March 2018, on the basis that the respondent was "*maintaining [that] the claimant must return to work and a refusal to accept that the sick notes were genuine*" (page 35-3). Although the claimant agreed that summary at the beginning of the hearing, during his evidence it appeared that no specific act or omission took place on 6 March 2018. In his claim (page 9), the claimant identifies a grievance he submitted in January 2018 in respect of Mr Petrillo's original decision. According to the evidence before the Tribunal, that grievance was rejected by the respondent by letter on 5 February 2018. As at his resignation, a grievance appeal submitted on 9 February 2018 was outstanding. In his claim, the claimant states that he decided to resign by letter on 13 March 2018 "*due to the intransigence of [the respondent] over the removal of sick pay*". In the event, both parties made submissions, and the Tribunal has analysed the breach of trust and confidence issue, on the basis of the timeline contained in the claimant's claim.

6.2 If the claimant has proved a sufficiently important breach of contract by the respondent, did the claimant resign at least in part because of that breach?

6.3 If so, did the claimant delay too long in terminating his contract?

6.4 If the claimant was constructively dismissed, has the respondent shown that the reason for dismissal was potentially fair – i.e, what was the reason for the respondent's conduct?

6.5 If so, did the respondent otherwise act reasonably in dismissing the claimant for that reason – i.e., was the respondent's reason for its conduct sufficient to justify the breach?

Factual background

7. Having considered all of the evidence, the Tribunal makes the following findings of fact, on the balance of probabilities, which are relevant to the issues to be determined. Some of the Tribunal's findings are also set out in the Conclusion below to avoid unnecessary repetition.

8. The claimant started to work for the respondent as an operational grade postal worker (OPG) on 8 May 2000. Throughout his employment the claimant was based at the local delivery office in Keighley (apart from a short period working in Halifax in 2014). From 2002 the claimant worked in the Keighley collections hub. Following a review, the claimant then became a postal worker higher grade (PGH) and carried out a largely indoor-based supervisory role. That role became known as Keighley hub support.

9. The claimant essentially ran the Keighley collections hub in the absence of a manager. The hub was otherwise managed centrally by collections managers and their deputies based in Halifax and later Bradford. Part of the claimant's duties was to ensure that any staff absences were covered by others working overtime, and to input overtime claims and send them to Halifax and later Bradford to be processed for payment. Occasionally the claimant would be required personally to cover a collection duty. The Keighley hub at that time was relatively small, comprising eight members of staff.

10. The Postal Service Act 2011 sets out the requirements for universal mail delivery. The respondent is the designated service provider. The statutory requirements include at least one letter delivery and collection from Monday to Saturday, and a parcel delivery and collection from Monday to Friday. This is known as the universal service obligation (USO). Accordingly, the claimant's contract contains the following provision at clause 9 (page 55):

"The Royal Mail has the responsibility of providing a public service. This puts a special obligation on all employees to play their part in maintaining the kind of service which the public has the right to expect. For this reason, it is a condition of your employment that you are liable to work overtime and to attend at varying times on weekdays, Sundays and Bank and Public Holidays as the needs of the service demand."

11. The claimant's contract (at clause 15) also states that he was subject to the respondent's conduct code (page 57). The version dated August 2015 states that employees are obliged "*to follow any reasonable instructions of their manager*" (page 49). It also sets out an approach to conduct matters which comprises informal resolution followed by a formal process. The formal process involves investigation by the employee's first line manager, followed by a meeting with a different manager according to the likely penalty. Second line managers are (among other things) authorised to award suspended dismissals of up to 24 months (pages 49 to 50 and 52).

12. The conduct code also sets out the procedure for precautionary suspension with pay. It states that such a suspension may be appropriate in cases involving "*alleged inappropriate behaviour; for example refusal to carry out a*

reasonable instruction" (pages 50 to 51). The manager is advised to first meet with the employee to obtain an explanation of the facts of the case. Where the employee has refused to carry out a reasonable instruction, it is also recommended that the manager allows a 10-minute cooling off period for the employee to reconsider their actions and see their trade union representative where possible (page 50).

13. The respondent also has a contractual sick pay and sick pay conditions policy. That policy contains the following (page 38):

"*Entitlement to sick pay is always subject to strict observance of the following conditions:*

- *Self-certificates or medical certificates, including 'fit notes', must be received by the business for all sick absences*
- *The business must be satisfied that an employee's absence is necessary and due to genuine illness*
- *The business reserves the right to refuse sick pay if an absence is due to, or aggravated by, causes within the employee's control, or if the employee has neglected instructions given by a Doctor …*"

14. The respondent also has a non-contractual career break policy, which allows employees to apply for a break of up to two years. As part of that policy the respondent "*guarantees the right to return following a career break to an employee's former function or business unit only and not necessarily to the same job*" (page 43). In the claimant's case, his business unit was Keighley and Halifax.

The career break issue

15. In March 2013, the claimant agreed a year's career break with his then first line manager, Tim Wilson, from May 2013. Andrew Tarpy, the Communication Workers' Union (CWU) representative at the time at Keighley, explained in evidence that Mr Wilson agreed to release the claimant on the basis that Mr Tarpy would cover his role, and the claimant would thereafter return to the same job. A confirmation letter dated 7 May 2013 from the respondent's HR services, however, stated:

"*You have the right to return to your former Business Unit (or the equivalent in the event of a reorganisation). It is very important to note that it is unlikely that you will be able to return to your current job, and perhaps also to your current location or function*" (page 62).

16. In the event, towards the end of 2013 Andrew Tarpy was appointed as lead CWU learning representative and released from his OPG duties for three days a week. In December 2013 the claimant's role was advertised on a temporary basis and filled by another OPG from January 2014.

17. In March 2014, the claimant asked to extend his career break by another year. By letter dated 14 March 2014, that request was refused by the sector collections manager on the basis that the respondent was "*unable to hold your position open for the extended period requested*" (page 64). The claimant was contacted a short time later by Tim Wilson and told that he would be returning to Keighley as its hub support (pages 78 and 88).

18. Pam Wright is the respondent's area collections manager and was the claimant's second line manager. She explained that towards the end of March 2014 Tim Wilson asked for advice on the basis that he wanted the

OPG covering Keighley hub support to remain in that position because he was doing very well. Miss Wright proceeded to advise Tim Wilson on the basis that the career break policy did not entitle the claimant to return to the same job. At this point, Pam Wright was unaware of any previous arrangement between Tim Wilson and the claimant in this respect.

19. By letter dated 15 April 2014, Tim Wilson invited the claimant to a meeting to discuss his imminent return (page 71). Among other things, Mr Wilson stated that the claimant would be assigned to the Halifax collection hub because there were no vacancies at Keighley. Tim Wilson then wrote to the claimant the following day to explain that the transfer to Halifax "*will not go ahead …. Currently your return to work location is not decided*" (page 72).

20. The claimant was subsequently told by Tim Wilson that a job had in fact been found for him at the Halifax. The claimant accordingly returned to work in May 2014 but was unhappy, particularly about the extended commute to work each day. In June 2014, the claimant raised a grievance on the basis that he had been unfairly displaced from his original role, citing recent events as "*a subtle and insidious form of bullying by … management in the person of Pam [Wright] instructing Tim Wilson*" (pages 77 to 79).

21. In his grievance, the claimant explained that he had tried to resolve the matter informally by meeting with Tim Wilson. Both the claimant and Mr Tarpy recall Mr Wilson stating during this meeting that he was "*acting on instructions*" from Pam Wright and therefore could do nothing further. By the time of his grievance, the claimant had also learned that since speaking to Tim Wilson at the beginning of April 2014, the hub support role had been advertised and the covering OPG confirmed in post (page 79). During the grievance investigation, Tim Wilson stated that Pam Wright had told him to keep the OPG in the position because "*she had read the career break documents and came to the conclusion that we did not have to offer the role back to [the claimant]*" (page 88). Pam Wright thought that it was enough to offer the claimant a job in either Keighley or Halifax, and she had not seen the letter refusing an extension of the claimant's career break. Miss Wright maintained that she was advising rather than instructing Tim Wilson as his line manager (pages 98 to 99).

22. By letter dated 10 July 2014, David Haigh upheld the claimant's grievance relating to unfair displacement but rejected the bullying complaint (pages 102 to 103). As part of his deliberations, Mr Haigh concluded that the hub support role was still technically vacant at the beginning of April 2014 and the OPG covering that role was moved to "*temp improved contract status*" three days after the claimant was due to return to work (page 107). Mr Haigh also concluded that Pam Wright had been simply supporting Tim Wilson with advice based on the career break policy and the "*confused information*" given to her by Mr Wilson. The claimant did not appeal that part of Mr Haigh's decision.

23. Following a meeting with the claimant, Pam Wright confirmed that he would return to his original role on 8 September 2014 and apologised on behalf of the respondent (pages 110 to 111). From this time, the claimant's first line manager was Paul Wright who was based in Bradford.

<u>The overtime issue</u>

24. During 2016/2017, the claimant says that he realised that none of the OPGs at Keighley were willingly volunteering for overtime on certain bank holidays.

On several occasions, he was told by a particular driver that he had agreed with Paul Wright to cover unallocated shifts. Paul Wright would then tell the claimant that there was no need for him to submit those overtime details in the usual way. Overtime was usually paid at a slightly higher hourly rate for the first 10 hours worked, and at basic rate thereafter. The claimant suspects that Paul Wright was offering enhanced overtime rates to this particular driver, but otherwise had no proof in this respect.

25. Paul Wright explained in evidence (and the Tribunal accepts) that he did not have any such arrangement in place. He would occasionally process last-minute weekend overtime claims himself, because the claimant did not work on a Saturday. Usually the claimant would send any claims to Paul Wright's administrative support in Bradford. Because Mr Wright was based in Bradford on Mondays, it made more sense for him to "*cut out the middle man*" (as he put it) and lodge the claims himself. During his evidence, Paul Wright also explained that on a couple of occasions he told the claimant that he would input bank holiday claims because the cut-off point for payment in the same week would have passed by the time the claimant started work on the following Tuesday.

26. The claimant was away from work following surgery from 28 November 2016 until 3 January 2017. During his absence his role was covered by the same OPG who had covered the role during his career break. When the claimant returned to work in January 2017, he saw that the OPG had inputted a claim for double time on 24 December 2016 for the driver the claimant had suspected of having an arrangement with Paul Wright, and another such claim for himself and the driver on 31 December 2016. In other words, each OPG was recorded as working double the hours they had in fact worked as overtime.

27. On 6 January 2017, the claimant needed to find cover for a collection for the following day, a Saturday. He was told by Phil Jackson (deputy collections manager) to offer the same driver in question double time if he agreed to work the shift. Mr Jackson contacted Pam Wright on the same day to explain that he had got into a "*predicament*" and the claimant was unhappy. Miss Wright therefore instructed Mr Jackson to withdraw the offer and explore other ways in which to cover the shift.

28. On 11 January 2017, the claimant submitted a grievance to Peter Salter (distributions manager) about the overtime issue (pages 115 to 118). He named Phil Jackson and Paul Wright in the subject matter of his complaint. The claimant's main objection was that the named managers would offer overtime at the normal rate to the entire shift, but offer only one driver enhancements if any shifts were not covered. The claimant believed that enhanced rates should be offered to the entire shift. The practice of offering a higher rate of or extra pay is known as "ghost overtime". That practice is unofficial and not sanctioned by the respondent.

29. Peter Salter passed the claimant's grievance to Pam Wright to investigate because she was responsible for the named managers. Miss Wright interviewed the claimant by telephone on 24 January 2017. The respondent's People System Portal (PSP) records the hours worked and salary paid to all OPGs. The claimant did not have access to PSP and therefore asked whether someone "*more independent*" could check it for anomalies. Pam Wright replied that she would do so as part of her investigation. She did so and found the claimant to be right about the dates he had identified. During

her evidence, Pam Wright explained that when she accessed PSP she thought that she went back about a year but found no other incidents of double-time payments.

30. Pam Wright upheld the claimant's grievance (pages 120 to 123). As part of her investigation, on 25 January 2017 she arrived at the Bradford hub unannounced and interviewed Phil Jackson, Paul Wright and his admin support who inputs the overtime figures. She also interviewed the Keighley collections driver. Pam Wright concluded that the payments and offers of double time made in December 2016 and January 2017 had been an isolated occurrence as the result of an error of judgement on Phil Jackson's part. Her report also records Paul Wright as admitting that in the past he had offered an additional hour's pay because "*cover is difficult*" but he recognised that "*a different approach needed to be taken*". In evidence, Mr Wright confirmed that was the case, but would offer the additional hours to all OPGs including the claimant.

31. An announcement by Pam Wright was accordingly displayed at Keighley to the effect that no ghost overtime would be paid in the future and "*payments will reflect the hours scheduled*" (page 124). Paul Wright explained to the Tribunal that he understood that this referred to the extra-hour incentive as well as double time. Pam Wright also made various recommendations in her grievance report to facilitate better resource planning and "*equity*" in overtime allocation (page 123).

The disciplinary issue

32. On 5 September 2017, Roberto Petrillo (deputy collections manager at Bradford) was informed that the collections driver who had been involved in the overtime issue was ill and unlikely to be in work for the rest of the week. Mr Petrillo therefore emailed the claimant just after 11:00am to advise him that the driver "*will not be in today and possibly off for the remainder of the week. Can you cover his collection and I will come over this afternoon [from Bradford] to cover the Locker*" (page 129).

33. The claimant replied to Roberto Petrillo at around 12:30pm: "*I will not be covering [the driver's] duty as sitting in a damp vehicle in the current wet conditions will aggravate my lumbago. Please see attached email which sets a precedence regarding this situation*." Below the claimant's email was another from Phil Jackson to the claimant dated 9 August 2017 explaining that the same collections driver "*won't be able to do your duty inside next Monday as it aggravates his sciatica. As this was the only potential avenue of cover I can't see any alternative option other than to say no to you having next Monday off, sorry*" (pages 126 to 127).

34. Roberto Petrillo replied to the claimant by email some 15 minutes later. In summary, he explained that he was unaware of either the circumstances of the "precedent" or the claimant's lumbago. He further explained that he was on his way to Keighley: "*We can discuss how we are able to cover [the driver's collection] then to avoid USO failure. In the meantime, are you telling me you are not able to perform due to the weather conditions? It is currently dry outside and the sun is shining*." The claimant replied a few minutes later: "*On the strength of the precedence set, yes, I am not willing to cover [the driver's] duty*" (page 125).

35. Robert Petrillo subsequently gave an account to HR following an initial conversation with the claimant at Keighley (page 129). He says that when he

arrived at the Keighley hub just before 2:00pm, he reiterated to the claimant what he had said in his last email. He again asked if the claimant was able and willing to cover the collection, but the claimant "*flatly refused pointing to the 'precedent' of seemingly preferential treatment*". Mr Petrillo told the claimant that he had covered collection duties on numerous occasions in the past and failed to understand how this situation differed. He also advised the claimant that conduct proceedings could follow because he had "*failed to follow a reasonable request*".

36. A second conversation took place just after 3:00pm (pages 130 and 132). Roberto Petrillo asked the claimant whether he was prepared to reconsider his position having twice refused to follow his instructions. He also asked the claimant whether he would be willing and able to cover the driver's duty if required during the remainder of the week. The claimant replied that "*it was not a matter of being able but more a matter of being willing*" and a precedent had been set. Mr Petrillo explained that he considered the claimant's reasoning to be flawed and sent the claimant home to once more reconsider his position and asked him to report for duty the following day.

37. On 6 September 2017, the claimant reported to Roberto Petrillo for work in the presence of Andrew Tarpy. The claimant again stated that he would not cover a collection if required that week, at which point Mr Petrillo suspended him for failure to follow a reasonable instruction. Mr Petrillo thereafter confirmed the claimant's suspension in writing (pages 133 to 135).

38. On 12 September 2017, Roberto Petrillo conducted a fact-finding interview with the claimant accompanied by Andrew Tarpy (pages 140 to 147). The claimant signed those notes as an accurate record of the interview. Most importantly, the claimant stated the following:

    38.1 He refused to carry out the collection because it would aggravate his back condition. He thought that he had told Roberto Petrillo on the day in question that he feeling some discomfort, but Mr Petrillo disputed that this was the case.

    38.2 He had tolerated back discomfort in the past, but on this occasion he decided: "*I would use what someone else had done in my situation … I put forward the same reasoning and used the same grounds* (emphasis added)."

    38.3 As hub support, he did not take any steps to find an alternative option to cover the collection.

    38.4 He described lumbago as "*low back pain ... Pain and discomfort results particularly when in a low seat vehicle and aggravated further in wet conditions*". He also explained "*getting in and out of the vehicle*" was the issue, rather than driving.

    38.5 He had never before refused to perform a collection because of his lumbago and it had never prevented him from attending work, but the condition had "*worsened over the last 5 years or so*".

    38.6 On the day in question, he did not dispute that he had stated that "*it was not a matter of being able, more a matter of being willing*" to cover the collection. By way of further explanation, the stated that "*although the weather does not prevent me from attending work, due to a duty of care to myself I felt that I was not willing to do so*". He also stated that "*duty of care comes first*" even if it results in USO failure.

38.7 He confirmed that he was "*making a stand on a point of principle … I am not willing to accept discomfort. I believe it was a reasonable excuse*."

38.8 He was sure that his lumbago would flare up if he covered the collection because he had had "*two soakings (got caught in the rain), earlier that morning*".

38.9 On the day in question he had cited "*current wet weather conditions*" as the reason for his refusal, but the following day told Robert Petrillo that he would not cover any of the driver's collections that week if asked. When this was put to the claimant, he replied: "*Sorry, I did not make it clear. I meant that under the same circumstances I would not be willing to cover a collection … I mean if the condition is playing up [not damp weather]* (emphasis added)."

39. Andrew Tarpy also conceded at the end of the interview that no supporting medical evidence had been provided by the claimant, but suggested a referral to ATOS, the respondent's occupational health (OH) provider, to suggest a way forward. Roberto Petrillo replied that his immediate task was to take time and HR advice to decide whether there was a conduct case to answer.

40. Pam Wright subsequently invited the claimant to a formal conduct meeting to answer the allegation: "*Failure to follow a reasonable instruction (insubordination) in that you were asked to go out on a collection but refused as a point of principle rather than because you could not complete the work being asked*" (pages 154 to 155). The allegation was to be considered as gross misconduct.

41. On 28 September 2017, the claimant attended the formal conduct meeting with Andrew Tarpy (pages 157 to 160). Both understood that this was their chance to put forward any "*mitigation*". In this respect, they stated:

41.1 Mr Petrillo's request was unreasonable because it would entail sitting in a damp vehicle which would aggravate the claimant's condition.

41.2 It was not a point of principle, but the "*precedent*" showed that the claimant should not be required to suffer discomfort if another member of staff had been allowed "*the same privilege*".

41.3 Too much emphasis had been placed on the "*point of principle*" issue (rather than the claimant's back condition) as the reason for the claimant's refusal to cover the collection, which had been a misunderstanding on Roberto Petrillo's part.

41.4 The claimant will assess his own fitness each time he is asked to cover a duty which involved driving, and "*would not simply not do it just because someone else would not do it*".

42. Pam Wright also asked the claimant about his back condition. He stated that it had "*not felt serious enough*" to raise with his GP and he had not previously told his managers about it. He also confirmed that it was no longer raining by the time of his face-to-face discussion with Roberto Petrillo at Keighley, but he had twice "*got a soaking*" earlier that day taking his dog for a walk. When Pam Wright suggested that the claimant could take steps to avoid getting wet in such circumstances, he took this to mean that the respondent "*should come first with everything in his life and he probably should not even have a dog*". He also thought that Mr Petrillo was "*calling his integrity into account when he was simply trying to exercise his duty of care to himself*".

43. Andrew Tarpy also asked Pam Wright whether a referral had been made to ATOS. She considered that to be irrelevant in respect of the conduct interview, which Mr Tarpy took as a refusal to make the referral. Pam Wright explained:

    "*it was not a case of refusing; since April this year the process has changed and I would need to provide reasons to refer. It would be unlikely that the case would be accepted through the process at this time as [the claimant] had not been to his GP to get the correct diagnosis. Also the business no longer funds physio so again, without a clear diagnosis the referral is unlikely to be accepted*."

    The claimant thereafter stated that *"he visits the Dr regularly … and therefore may mention his back at the next appointment in October".*

44. By letter and a report dated 5 October 2017, Pam Wright upheld the allegation as a major offence and awarded the claimant a two-year suspended dismissal (pages 162 to 169). In conclusion, she found that the claimant's behaviour had seriously undermined faith in him to complete his role as hub support with the full flexibility required. There had been no helpful suggestion from the claimant to address the failed collection, and a lack of personal responsibility in terms of any preventative measures he could take. There was also no acknowledgement as to how he could have behaved differently, but only an attempt to "*twist*" the reasons for his actions after the event. Most importantly, Pam Wright also concluded:

    44.1 The claimant's initial response to Roberto Petrillo's request in citing a precedent was a "*tit for tat approach … a retort to another member of staff's position and not due to physical incapability*". The claimant had thereafter tried to shift his position in this respect.

    44.2 The main reason for the claimant's refusal was to make a point. If it had been about his back, she would have expected the claimant to pick up the telephone and discuss his difficulties with his manager rather than search for an old email in order to justify a rebuttal.

    44.3 The claimant's lumbago was cited in his initial email, but the delay in his response and search for the old email suggested that that did not in fact prevent him from covering the duty.

    44.4 The contemporaneous documents did not suggest that Roberto Petrillo had misunderstood or failed to understand anything the claimant had said at the time.

    44.5 If the claimant had a genuine issue with his back, the usual procedures and support would be available rather than allowing the claimant to make his own assessment each time he was asked to drive.

    44.6 The reason the claimant had refused to cover the collection was because someone else had been allowed to.

    44.7 The claimant's back condition was not bad enough for him to have reported it to his doctor.

45. In deciding the appropriate penalty, Pam Wright says that she also took into account the respondent's code of business standards which states that all employees are expected to "*provide a timely, reliable and secure performance of services nationwide*" and "*use sound judgement and take personal accountability for workplace actions*".

46. Finally, Pam Wright decided against imposing a compulsory transfer because she wanted to give the claimant an opportunity to restore the respondent's faith in his ability to do his role. As a consequence, she identified a number of future expectations including the claimant obtaining from his doctor a diagnosis, and advice on treatment and managing his condition.

47. The claimant immediately appealed Pam Wright's decision on the basis that he did not believe that his version of events had been interpreted fairly, her decision had been a foregone conclusion, aspects of her decision were not accurate and "*my integrity is clearly being questioned*" (page 170). The claimant's appeal was referred to an independent casework manager, Julie Fisher, who met with the claimant and Andrew Tarpy on 26 October 2017 (pages 174 to 179). Both parties had before them a bundle of 55 pages of documents, and the meeting was characterised as a rehearing of the claimant's case.

48. In explaining the grounds of his appeal, the claimant maintained that Pam Wright had misrepresented what took place or was said. Most importantly:

    48.1 He thought that the phrase "*tit for tat*" suggested that he was devious, and the fact that his medical condition had not been raised did not mean that it did not exist.

    48.2 He did not say that he has unwilling to cover the collection, but that he was unwilling to aggravate his back condition.

    48.3 He had not flatly refused to do a collection that week, but only in the same circumstances as those on the day in question.

    48.4 His position had not shifted, but had been consistent from his first email.

    48.5 He did not try to discuss the matter with Roberto Petrillo before emailing his response because he believed that his email contained "*all the information that was required*". He also considered that his email was "*self-explanatory*" in respect of his individual circumstances. He further refused to be criticised "*about dialogue*" because Roberto Petrillo had not tried to speak to him in the first instance.

    48.6 Pam Wright criticised the claimant for taking and hour and a half to respond to Roberto Petrillo's first email, but he began his shift at 11:15am and did not have access to a shared computer until 12:15pm.

    48.7 Pam Wright was "*totally dismissive of anything [he] had said or documented … The point of principle i.e. precedent repeatedly referred to by Pam Wright has in no way been addressed and has been repeatedly used as an excuse to bully or brow beat me into being treated differently and less favourable than other … employees*."

    48.8 He was not willing to accept the penalty as he could now be dismissed "*at the apparent whim of management at any time*".

    48.9 Andrew Tarpy also suggested that there may be "*new evidence*" because the claimant was going to see his doctor the following week "*for a further diagnosis*".

49. Julie Fisher upheld Pam Wright's conduct decision by letter dated 30 November 2017 and a report dated 29 November 2017 (pages 186 to 193). Prior to her decision, the claimant did not provide any further evidence or

confirmation of a diagnosis from his doctor. Julie Fisher's material findings were:

49.1 The "*tit for tat approach*" was a reasonable conclusion. The claimant's initial response to his manager was bluntly to say that he would not cover the collection and to refer to another colleague's medical issue as justification. The driver's medical restrictions had clearly impacted on the claimant because he had been prevented from taking a day's leave as a result.

49.2 If the claimant's position in terms of covering the collection duty had been about any medical condition or discomfort he was experiencing on the day in question, she would have expected the claimant to have telephoned his manager to explain his difficulties and discuss the matter further rather than blankly refusing to cover the duty.

49.3 The claimant's second email response clearly stated that he was not willing to cover the driver's duty, rather than exacerbate his condition, which he repeated to Roberto Petrillo the following day.

49.4 The claimant's position had shifted in that he had made no attempt on the day in question or the following day to discuss his personal circumstances, but simply referred back to the precedent. His first email was not "*self-explanatory*" in this respect.

49.5 The timing of when the claimant sent his first response to Roberto Petrillo was not material. The issue was the content of the email and the claimant's responses thereafter.

49.6 Pam Wright had taken into account what the claimant had said during his interview. In the circumstances, Julie Fisher agreed that his approach to the matter had been unacceptable. In particular, the claimant's attitude towards his duty commitments were not what was expected.

49.7 Suspended dismissal was an agreed penalty within the conduct code and further sanction could not be imposed without any further breach of conduct, investigation and formal procedure.

<u>The sick pay issue</u>

50. The claimant was on annual leave for two weeks from the end of October 2017. He was due to return to work on 13 November 2017, but on that day was signed off as unfit for work for 4 weeks with "*work related stress/anxiety*" (page 182). Throughout his absence, the claimant was in contact with Roberto Petrillo and later Paul Wright (pages 267 to 271).

51. On the first day of his absence, the claimant told Roberto Petrillo that the underlying reason was the conduct penalty and that he been "*dealt a bum deal*" (page 267). Mr Petrillo invited the clamant to a meeting to discuss his condition and any support he may require by way of a stress risk assessment (page 183). The claimant did not attend that meeting, as a result of which Mr Petrillo spoke to the claimant and wrote again to remind him of the conditions for receiving company sick pay. Put simply, Mr Petrillo needed to satisfy himself (among other things) that the claimant's absence was necessary and due to a genuine illness (pages 184 to 185).

52. The claimant and Andrew Tarpy met with Roberto Petrillo on 21 November 2017. Mr Petrillo recorded after that meeting that he had "*identified a refusal and reluctance to accept the outcome of the recent Conduct proceedings I*

initiated at the reason for [the claimant's] absence" (page 268). He also recorded the claimant as stating that he had been harshly treated and if his appeal were unsuccessful, he would "*explore other options including constructive dismissal*".

53. Roberto Petrillo drew up a plan following on from the stress risk assessment, which was sent to the claimant by letter on 4 December 2017 (pages 194 to 196). The plan identified a number of "*perceived stressors*" including the conduct penalty and unequal treatment within the hub. Mr Petrillo had suggested that he and the claimant should draw a line under the conduct issue and work well together, and the claimant should discuss what he thought were any incidents of favouritism. The covering letter also identified "*anxiety around waiting for the appeal outcome*" as a barrier to returning to work, which had since been determined. Finally, the plan stated that the claimant had been offered a referral to ATOS "*as a supportive measure … if felt required, though not at this time as he is under the guidance of his doctor*".

54. On 6 December 2017, the claimant was signed off for a further month with "*work related stress*" (page 197). The claimant and Andrew Tarpy also met with Roberto Petrillo the next day to discuss his plan for the claimant's return to work (page 198). Among other things, the claimant said that he believed that the conduct issue had not been resolved even though he had exhausted the procedure. Essentially, he thought that he was being called a "*liar*". Mr Petrillo therefore asked the claimant what would enable him to return to work, to which he replied: "*An apology form Pam Wright and a written apology from the Appeals Manager.*" Mr Petrillo explained that that was not going to happen, and he was generally concerned that the claimant was now staying away from work in protest "*against a perceived injustice*". He therefore stated that he would seek HR advice as to whether the claimant absence was "*necessary and due to genuine illness*" as he "*now doubted*" that this was the case.

55. At the end of the meeting, the claimant confirmed that he was reluctant to take any medication but intended to contact a support group recommended by his GP. Andrew Tarpy also that he would investigate whether "*some form of mediation*" was available, but he explained to the Tribunal that he "*couldn't remember anything happening*" in this respect.

56. By letter dated 12 December 2017, Roberto Petrillo set out how he intended to resolve the issues that the claimant raised, and confirmed that he would not be receiving any apology as requested because the conduct penalty had been upheld following a proper process (pages 199 to 201). Mr Petrillo also invited the claimant to a further meeting and referred him to the respondent's counselling service, Feeling First Class.

57. Roberto Petrillo met with the claimant and Andrew Tarpy on 14 December 2017 (page 202). Having taken HR advice, Mr Petrillo explained that he had concluded that the claimant's absence did not meet one of the conditions for receiving company sick pay (namely, that it was necessary and due to a genuine illness) because he doubted that the claimant had any intention of returning to work. He had devised a plan for the claimant's assisted return, and the claimant knew that an apology would not be forthcoming, but he had failed to engage with the process. There followed an angry exchange, during which the claimant described Mr Petrillo's letter as "*full of holes*" and accused him of "*bullying and harassment*". At the end of the meeting, Roberto Petrillo

advised the claimant that if he did not return to work his company sick pay would be withdrawn.

58. The claimant did not return to work, and so by letter dated 18 December 2017 Roberto Petrillo set out the history of the claimant's absence and their previous meetings, and confirmed that company sick pay had been withdrawn effective from 15 December 2017 (pages 203 to 204). The next day, the claimant raised a grievance on the basis that he wanted reinstatement of his sick pay and "*management to desist from bullying*" (pages 205 to 210). In the accompanying narrative, the claimant set out the entire history of the conduct issue as well as his sickness absence. Essentially, the claimant thought that Roberto Petrillo was calling him "*a liar*" and his GP "*incompetent*".

59. In the meantime, Pam Wright took over management of the claimant's sickness absence and invited the claimant to a meeting on 4 January 2018 for "*none-cooperation*", among other things on the basis that the respondent was not satisfied that the claimant intended to return to work in the foreseeable future (pages 216 to 217 and 219 to 221). From this time the claimant was accompanied by another CWU representative, Michael Roberts. At the beginning of the meeting, Pam Wright explained that the claimant's grievance would be reallocated to another manager as the original assigned manager worked within her team. She stated that the purpose of this meeting was "*to understand what issues were preventing a return to work so that action could be taken to support [the claimant] in returning*".

60. During the meeting the claimant identified three issues which were preventing him returning to work: the conduct case, stomach problems and sleep deprivation. Among other things, Pam Wright asked the claimant what he required in order to return to work, including a transfer to a different unit or function. The claimant replied that he continued to feel a sense of injustice and could not say when he might return. He had not followed up the counselling suggestion made by his GP and continued to resist taking medication because he already took several different drugs each day for other health conditions. There was some discussion about why an ATOS referral had not been made, but Pam Wright advised that the quickest way to counselling was via Feeling First Class rather than an OH referral.

61. Following a short break, Michael Roberts said that the claimant would refer himself to Feeling First Class, attend a review meeting in 4 to 6 weeks, and accept an OH referral. Pam Wright was unable to accept that a reasonable plan of action. In her view, if the claimant's conduct case had concluded and the respondent was prepared to release the claimant from duty to attend counselling, there was no reason why he could not return to work with the appropriate support. She also explained that the claimant's medical certificates entitled him to statutory but not company sick pay if the latter's conditions were not met.

62. Following a further break in the meeting, the claimant confirmed that he would not be returning to work. The notes of the meeting set out the following agreed way forward:

    62.1 To help the claimant devise coping mechanisms regarding his sense of injustice, he would self-refer to Feeling First Class as the quickest route to counselling.

62.2 The pay position would remain unchanged until the claimant's grievance had been determined because Pam Wright did not believe that his absence was "*necessary*".

62.3 The grievance would be reallocated and heard, following which the claimant would be invited to a further interview if he remained off work to consider his continuing employment with the respondent. If he felt able to return in the meantime, he would be released from duty to attend counselling sessions.

63. On 8 January 2018, the claimant was signed off for a further 6 weeks with "*anxiety and depression*" (page 277). At that time, Roberto Petrillo and Pam Wright were unaware of any change in diagnosis. Paul Wright telephoned the claimant the following day and told the claimant that he "*had*" his fit note, which the claimant had hand-delivered to Keighley (page 269). Paul Wright explained during his evidence that he meant that it had been received at Bradford. He did not physically see the fit note because it was forwarded by the Keighley office directly to his admin support who, in turn, inputted the absence on to PSP and placed the note on the claimant's file. The claimant did not mention "*depression*" during his conversation with Paul Wright. He simply stated that there was "*no change*" in his health, and Mr Wright thought that Feeling First Class could help him to address any financial worries.

64. The claimant and Michael Roberts met with by Colin Riley, a delivery office manager, on 22 January 2018 to discuss his sick pay grievance (pages 225 to 227). Mr Roberts told Mr Riley that the claimant had since been diagnosed with depression. The claimant also stated that he believed that the conduct penalty had caused his illness, but this was now being used as a reason for stopping his pay. Reading between the lines, he still thought that he was being called a liar. In his view, neither Roberto Petrillo nor Pam Wright were sufficiently medically qualified to determine whether the claimant's illness was genuine, and had given insufficient reasons for their decisions.

65. By letter dated 5 February 2018, Colin Riley rejected the claimant's grievance (pages 229 and 230). In summary, Mr Riley concluded that the claimant was effectively trying to use his sickness absence as a lever to reopen his conduct case. As a result, Mr Riley did not consider it appropriate for the claimant to receive company sick pay when he sought to blame his absence on an incident for which he had been responsible. In his view, the claimant had also refused to engage with any of the options presented to him to enable a return to work, other than very recently taking up the offer of counselling, and the respondent's attempts to manage his absence did not amount to bullying. Colin Riley also suggested that an OH referral was inappropriate in the claimant's case because he was absent because of a work-related issue. Until such time as that issue was resolved, the respondent was prevented from making such a referral.

66. By letter dated 9 February 2018, the claimant appealed Colin Riley's decision (pages 231 to 232). He did so on the basis that Mr Riley was unqualified to make clinical decisions about his illness, the respondent had denied him an OH referral without good cause, and the options put forward by the respondent to facilitate a return to work had all been unacceptable as they would add further stress to his situation. Finally, it was "*clearly an act of management bullying*" being required to return to work when his GP was advising him that this would be "*medically unwise*".

67. On 15 February 2018, the claimant was signed off work for a further month with "*depression/anxiety*" (page 278).

68. The claimant's grievance was allocated to Mark Plumpton, an ADST team leader, on 16 February 2018 (page 235). By email on 21 February 2018, he received guidance on the respondent's sick pay policy from an HR advice and support case manager (pages 236 to 237). In summary, in view of the stated reason for the withdrawal of the claimant's sick pay, Mr Plumpton was advised to establish the manager's rationale behind the decision, check whether the claimant had been offered a stress risk assessment, and establish why the claimant felt that he could not attend work. The guidance also stated that OH referrals were not normally made for work-related stress because the report would simply state that the stressors needed to be removed to enable the employee to return to work. Finally, Mr Plumpton was advised to check whether the claimant received notice of the withdrawal of his company sick pay.

69. Mark Plumpton accordingly wrote to the claimant on 22 February 2018 to inform him that there would be a delay because he was about to take annual leave, but he hoped to hold and interview during the week commencing 19 March 2018 (page 240). The claimant was once more referred to Feeling First Class for additional support.

70. Mark Plumpton thereafter met with Colin Riley on 5 March 2018 (pages 241 to 242). Mr Riley explained that he believed that the claimant's sickness absence was not genuine because he went off sick shortly after receiving the conduct penalty and on the basis that he believed that is integrity was being questioned. The claimant had also been given the opportunity to return to work in a different area, but had continued to present fit notes.

71. On 6 March 2018, Mark Plumpton met with Roberto Petrillo (pages 243 to 244). Mr Petrillo confirmed that he had carried out a stress risk assessment, but the claimant had wanted to discuss only the conduct case and "*past experiences*". In his view, if an apology would enable the claimant to return to work, "*this infers that the absence is not genuine*".

72. Also on 6 March 2018, Paul Wright contacted the claimant to obtain an update on his sickness absence (page 271). Among other things, the claimant told him that there was "*no relevant change*" in his health and he was unsure whether the counselling sessions were helping. He also stated that it was highly likely that he would obtain another fit note from his GP when the current note expired.

73. By letter dated 13 March 2018, the claimant tendered his resignation effective from 19 March 2018 (pages 245 to 246). Most importantly, the claimant wrote:

    "*I believe this course of action has been forced on me through a situation engineered by [the respondent's] management to make my position untenable by amongst other things; refusing to pay full sick pay and refusing to accept qualified medical advice in the form of doctors certificates stating that I should refrain from work for the stated periods*."

74. The claimant also telephoned Paul Wright on 13 March 2018 to let him know that he intended to resign because "*he could not live on £60 a week*" (page 271). Mr Wright wished the claimant all the best for the future.

75. Mark Plumpton nevertheless continued to investigate the claimant's grievance and interviewed Pam Wright on 19 March 2018 (pages 247 to 248). Among

other things, Miss Wright confirmed that since their meeting in January 2018 the claimant had attended 6 counselling sessions paid for by the respondent. She was also in no doubt that the reason that the claimant had not returned to work was his sense of injustice over the conduct case, as a result of which he had rejected all other options as unacceptable.

76. Mark Plumpton met with the claimant and Michael Webster to discuss his grievance appeal on 10 April 2018 (pages 251 to 260). In summary, the claimant stated that he did not agree with all of the various meeting notes even though he had signed them, and that without the conduct case he would not have been on sick leave. He also stated that he resigned because he had "*given up getting any reasonable hearing from … management*".

77. By letter dated 16 April 2018, Mark Plumpton rejected the claimant's appeal (pages 261 to 263). Most importantly:

    77.1 At the time company sick pay was stopped, the claimant was signed off with work-related stress. The proper way to deal with that stress is to remove the barriers causing it. A plan was therefore formulated by way of a stress risk assessment.

    77.2 The claimant had confirmed that he could return to work if he received an apology in respect of the conduct case. He also believed that the sole reason for his sickness absence was the conduct penalty.

    77.3 The other options offered to him for a return to work were unacceptable because the conduct issue would follow him wherever he worked within the respondent.

    77.4 Although there had been some confusion about whether the claimant had been offered an OH referral, the agreed way forward as at January 2018 was counselling via Feeling First Class on the basis that this was the quickest route to addressing the claimant's sense of injustice.

78. Mark Plumpton concluded that the claimant's sense of injustice remained, as well as his belief that his integrity had been called into question. The claimant had made it clear that unless and until he received an apology in respect of the conduct case he would remain off work. Mr Plumpton ultimately decided that this was not a reason which made the claimant's sickness absence necessary.

The relevant law

79. Section 95 of the Employment Rights Act 1996 (the ERA) states:

    "(1) For the purposes of this part an employee is dismissed by his employer if … —

    (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances which he is entitled to terminate it without notice by reason of the employer's conduct."

80. This is known as constructive dismissal. The case of **Western Excavating (ECC) v Sharp [1978] ICR 221** states that it is for the employee to prove on the balance of probabilities that the employer committed a repudiatory (or fundamental) breach of contract. A repudiatory breach means:

    "*a significant breach of contract going to the root of the contract which shows that the employer no longer intends to be bound by the essential terms of the contract*".

81. The employee must then prove the employer's breach at least in part caused them to resign as a result and that they did not affirm the contract by delaying too long before resigning.

82. The case of **Malik & Another v BCCI [1997] ICR 606** confirms that there is an implied term in every contract of employment that an employer will 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. A breach of this implied term is "*inevitably*" fundamental (**Morrow v Safeway Stores PLC [2002] IRLR 9 EAT**; **Amnesty International v Ahmed [2009] IRLR 884 EAT**).].

83. In **Woods v W M Car Services (Peterborough) Limited [1981] IRLR 347**, the Court of Appeal explained:

"*To constitute a breach of this implied term it is not necessary to show the employer intended any repudiation of the contract. The employment tribunal's function is to look at the employer's conduct as a whole and to determine whether it is such that its cumulative effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it."*

84. A number of acts by an employer (in other words, a course of conduct) can, when considered as a whole, amount to a fundamental breach of contract. In this situation, an employee may resign following a "last straw" incident (**Lewis v Motorworld Garages Limited [1986] ICR 157**). Guidance on such cases, provided by the Court of Appeal in the case of **London Borough of Waltham Forest v Omilaju [2005] IRLR 35**, can be summarised as follows:

    84.1 The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with earlier acts, contribute something to that breach and be more than utterly trivial.

    84.2 Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.

    84.3 An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the employer's act as hurtful and destructive of their trust and confidence in the employer.

    84.4 The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It may not itself amount to a breach of contract. However, if the "final straw" consists of conduct which, when viewed objectively, is found to be reasonable and justifiable, it would unusual for an employment tribunal to find that it contributed to the undermining of the employee's trust and confidence in their employer.

85. In **Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978** the Court of Appeal recently clarified that when considering whether an employee has been constructively dismissed as a result of cumulative or successive acts or omissions, it is sufficient for a Tribunal to ask itself the following questions (paragraph 55):

    85.1 What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered her or his resignation?

85.2 Has s/he affirmed the contract since the last act?

85.3 If not, was that act (or omission) by itself a repudiatory breach of contract?

85.4 If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? If it was, there is no need for any separate consideration of a possible previous affirmation. This is because if the tribunal considers the employer's conduct as a whole to have been sufficiently serious and the final act to have been part of that conduct, it should not normally matter whether it amounted to a repudiatory breach at some earlier stage: even if it had and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive her or his right to do so.

85.5 Did the employee resign in response (or partly in response) to that breach?

86. In addition, there is no need for there to be any "*proximity in time or in nature*" between the last straw and any previous acts or omissions by the employer (**Logan v Commissioners of Customs and Excise [2004] ICR 1 CA**).

87. If the Tribunal finds that an employee has been constructively dismissed, it must then consider whether that dismissal was unfair. Section 98 of the ERA states:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held".

88. The reason for a constructive dismissal, as confirmed by the Court of Appeal in **Berriman v Delabole Slate Limited [1985] ICR 546**, is the reason for the employer's conduct which entitled the employee to terminate the contract in accordance with section 95(1)(c) of the Act.

89. Section 98(4) of the ERA states:

"…where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case".

90. In constructive dismissal cases, in general terms the Tribunal should consider whether the employer's reason for committing a fundamental breach of contract was, in the circumstances, sufficient to justify that breach.

Conclusion

91. The claimant and respondent's representative made a number of oral submissions following the evidence. The Tribunal had considered those submissions with care, but do not set them out in full. Accordingly, the Tribunal summarises the parties' contentions below where appropriate. The parties will otherwise recognise how the Tribunal has dealt with their submissions in its findings of fact relevant to the issues to be determined, and in its application of the law to those facts.

92. The first issue is whether there was a fundamental breach of the claimant's contract by the respondent. If there was a breach, the Tribunal must decide on an objective basis whether it was fundamental by considering its impact on the contractual relationship of the parties.

93. It is not disputed that there was an express term in the claimant's contract relating to company sick pay. The claimant argues that the respondent breached that term by withdrawing company sick pay even though his sickness absence had been certified by his GP. Most importantly, Michael Roberts contended in his written statement that the claimant's medical certificates were effectively "*cast aside*" by the respondent. The claimant also maintained throughout that because none of the respondent's managers were medically qualified, they were in no place to determine whether he was able to return to work.

94. The Tribunal is satisfied, however, that the respondent did have the express contractual the right to withdraw company sick pay if certain defined conditions were not met (quoted at paragraph 13 above). Providing medical certificates was one of those conditions, but there were also others. By 14 December 2017, Roberto Petrillo was certainly not satisfied that the claimant's absence was necessary, based on what the claimant had told him. By implication, and based on the claimant stating that he would be able to return to work if he received an apology in respect of the disciplinary issue, Mr Petrillo, Pam Wright and Colin Riley also queried whether the claimant's absence was due to a genuine illness.

95. From the outset the claimant maintained that he had been signed off work because, in his opinion, he had been harshly treated in terms of the disciplinary issue. He thereafter suggested to Roberto Petrillo and Pam Wright in meetings first that he would need to consider his options if his appeal was successful and secondly that he would be able to return to work if he received specific apologies.

96. In the circumstances, the Tribunal is satisfied that although the respondent did not doubt that the claimant was presenting to his GP with certain symptoms, as he himself maintained the conduct penalty was the only reason that he was refusing to return to work. In the circumstances, according to the conditions attached to company sick pay, the Tribunal concludes on balance that there was a written contractual provision which entitled the respondent to withhold company sick pay if the claimant failed to meet the eligibility criteria. The respondent accordingly concluded that the claimant's absence was effectively a protest against the disciplinary issue and therefore not "*necessary*".

97. The next issue is whether, in the alternative, the respondent was in breach of the implied term that it would not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage

the relationship of trust and confidence between the parties. As already explained, such a breach if found is inevitably fundamental.

98. In terms of the career break issue (allegations 6.1.1 to 6.1.3 above), in the absence of Tim Wilson giving evidence the Tribunal is bound to accept the claimant and Andrew Tarpy's evidence that he agreed with the claimant that he could return to his hub support role on his return. Mr Wilson subsequently tried to renege on that agreement because (according to Pam Wright's evidence) by that point he wanted to keep someone else in the role.

99. David Haigh also found in upholding the claimant's subsequent complaint of unfair displacement (and the Tribunal accepts) that the claimant's role did in fact remain substantively vacant at around the time he was due to return, but he was told the opposite. Tim Wilson then gave further contradictory information to the claimant, including advising him that he would be returning to Halifax but in quick succession stating that such a role had not in fact been identified. To compound matters, Mr Wilson also tried to blame Pam Wright for his actions, whereas David Haigh was satisfied (and the Tribunal accepts) that she had been asked for and had provided advice as his line manager. That advice was properly based on what Tim Wilson had told her, and the stated requirements of the respondent's career break policy.

100. Turning to the overtime issue and, first, allegations 6.1.4 and 6.1.5 above, on balance the Tribunal is not persuaded that the respondent permitted a longstanding private arrangement whereby one collection driver was offered double time for overtime shifts. The Tribunal is satisfied that Paul Wright occasionally offered an extra-hour incentive to all OPGs at Keighley (including the claimant). Phil Jackson also agreed to and did pay double time on two occasions to two drivers on 24 and 31 December 2016, and instructed the claimant to offer one of those drivers double time if he agreed to cover a shift on 7 January 2017.

101. Secondly, in terms of allegation 6.1.6 above, Pam Wright was indeed allocated the claimant's complaint about the double-time issue. She accordingly upheld it and brought an end the practice of paying ghost overtime at Keighley generally, including the extra-hour incentive. The claimant suggested in evidence that it was inappropriate for Pam Wright to investigate the overtime issue because his complaint was against her. The Tribunal finds that this was not the case, in that the grievance named Paul Wright and Phil Jackson only.

102. The claimant nevertheless maintains that Pam Wright's investigation was insufficiently thorough, but has produced no supporting evidence in this respect beyond his suspicions. He simply believes that because the managers in question were, in turn, managed by her, she must have been aware of the situation.

103. In her grievance report, Pam Wright accepted that her method of investigation had been "*unconventional*". However, she explained to the Tribunal that this was because she wanted to prevent collusion. Normally, individuals receive 48-hours' notice of an investigatory interview. In this case she arrived at Bradford unannounced. She also reviewed PSP payments made to Keighley collection drivers in the previous year. In the Tribunal's judgment, there was no apparent bias or lack of investigation. The claimant also could have taken his complaint further if he was truly unhappy, but he chose not to do so. In the circumstances, the Tribunal is satisfied that the respondent adequately and properly investigated the claimant's complaint

about the overtime issue and accordingly brought to an end the practice of ghost overtime being offered either selectively or at all.

104. Turning to the disciplinary issue (allegations 6.1.7 to 6.1.9 above), the claimant essentially maintains that he was suspended without reasonable cause, and was given an unjust and unmerited conduct penalty which was later upheld on appeal. His contention appears to be that on the day in question the primary reason for his refusal to cover the collection duty was in order to safeguard his health. He believes that the respondent dismissed his concerns because he had not mentioned his lumbago before. The claimant considers that the disciplinary issue was also a further example of preferential treatment within the hub, because the absent collection driver had previously refused to cover the claimant's duty owing to health concerns and had not been disciplined as a result.

105. On balance, the Tribunal is satisfied that the respondent had reasonable and proper cause for suspending the claimant, imposing a disciplinary sanction and upholding the conduct penalty on appeal. Most importantly, following an objective assessment of the facts relating to the disciplinary issue, the Tribunal is satisfied that the respondent had reasonable and proper cause for concluding that the claimant's prime motive for refusing to carry out the collection had been to take a stand about perceived preferential treatment rather than to safeguard his health. The Tribunal concludes this for the following reasons:

105.1 The claimant initially said that the wet conditions and sitting in a damp van would aggravate his condition. Significantly, he also found and forwarded evidence of the collection driver's previous refusal to justify his own position. Citing the email as a precedent effectively shut down any discussion about the matter. The claimant thereafter plainly refused to cover the collection (rather than aggravate his condition), even though the weather had by that point changed. In cross-examination he accepted that, for him, it was a point of principle in that he was "*demanding fair and equal treatment*".

105.2 Refusing to follow a reasonable instruction is deemed to be serious according to the respondent's conduct code; USO failure, similarly so. The conduct code anticipates precautionary suspension where there has been such a refusal, and the claimant was warned and given time and three opportunities to modify his stance, but he chose not to do so. In cross-examination, the claimant accepted that the respondent's employees had an important part to play in maintaining the expected standards of its public service. The suspension was kept under review by Roberto Petrillo in accordance with the conduct code.

105.3 The Tribunal is satisfied that the claimant twice said that he would not cover a collection at all that week, prior to his suspension, again in reliance upon the so-called precedent. He later tried to blame Roberto Petrillo for misunderstanding his position, and in evidence claimed that he had two meaningful face-to-face discussions about his health concerns, however the contemporaneous documents do not support his version of events. Most importantly, during his fact-finding interview the claimant suggested that he had not been clear about the reasons for and terms of his refusal. Nevertheless, he then stated that the damp weather was by that time not a relevant circumstance: it was now dependent upon whether

his "*condition [was] playing up*" (quoted in emphasis at paragraph 38.9 above).

105.4 The claimant believed that he was entitled to refuse to perform the collection, but accepted in cross-examination that he did not know the full circumstances surrounding the driver's condition. Pam Wright explained to the Tribunal that she established as part of her deliberations that the collection driver's circumstances were not comparable. He had a diagnosed condition and an agreed "*intervention plan*" had been put in place in order to manage it. During the conduct proceedings the claimant said that he would (and was later told to) obtain a diagnosis from his GP, but did not do so.

105.5 Julie Fisher explained to the Tribunal that context was all. She would have expected someone with the claimant's responsibilities and raising a health issue for first time not to have closed off any conversation in reliance on a precedent. It was the manner of the claimant's response, behaviour and lack of insight that tipped the scales for her.

105.6 The claimant complained throughout the process that his integrity was being called into question. Following an objective assessment, the Tribunal does not accept that this was the case. The respondent reasonably and properly concluded that the claimant's behaviour had been unacceptable, and rejected as mitigation his attempts to justify his actions after the event.

105.7 During the respondent's evidence, the claimant suggested to each of the relevant witnesses that they did not believe he had a back condition because he had not previously raised it with his managers. However, the Tribunal is satisfied that the respondent did not in fact disbelieve the claimant in this respect. Most importantly, as part of the conduct outcome Pam Wright was prepared to put in place an intervention plan which depended on the claimant first obtaining a correct diagnosis and advice from his doctor.

106. Turning to the sick pay issue (allegations 6.1.10 to 6.1.12 above), the Tribunal has already found that, in all the circumstances, the respondent was contractually entitled to withdraw the claimant's company sick pay on the basis that it had properly concluded that all of its eligibility criteria had not been met. In the alternative, the question is whether, in doing so, the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy its relationship of trust and confidence with the claimant.

107. The Tribunal accepts that this may have been the case if, for example, the respondent had unreasonably maintained a mistaken interpretation of the claimant's contract. In the claimant's case, the respondent's managers had reasonable and proper cause for acting in the way that they did, based on what the claimant was telling them at the time. The claimant was also given notice of Roberto Petrillo's doubts about the necessity for his absence, and a number of opportunities to engage with the respondent in order to find a way forward to address his sense of injustice. The claimant essentially dismissed Roberto Petrillo's suggestions at the time as "*full of holes*". In cross-examination he stated that Mr Petrillo's plan following the stress risk assessment contained "*nothing genuine that would assist*". The Tribunal is further satisfied that Pam Wright reconsidered the position during their meeting on 4 January 2018, and endorsed Roberto Petrillo's original decision.

108. The claimant also suggests that the respondent was effectively making "*clinical decisions*" about his ability to return to work and that the change in diagnosis in January 2018 was material. The Tribunal does not accept that this was the case. An objective assessment of the factual background to this issue shows that the claimant's stated reason for his absence did not change throughout the remainder of his employment and during the determination of his final grievance appeal. The conduct decision was identified as the barrier to his return to work. As the Tribunal has found, the respondent properly took decisions about the claimant's company sick pay based on what the claimant was telling it. In cross-examination, the claimant further accepted that his continuing absence was "*an attempt to redo the appeal which had been rejected*".

109. Finally, although there was some confusion about whether an OH referral had been offered or whether it was appropriate, the Tribunal is satisfied that that is not material. Most importantly, by January 2018 it had been properly established with the claimant that his sense of injustice was preventing a return to work, and a self-referral to Feeling First Class would provide the quickest route to counselling to help him in this respect.

110. The Tribunal now assesses the breach of trust and confidence issue against the above findings. In accordance with the guidance in **Kaur**, the first step is to identify the most recent act or omission which the claimant says caused or triggered his resignation.

111. According to his resignation letter, the claimant clearly terminated his employment because of the sick pay issue. During his evidence, the claimant confirmed that no specific act or omission took place in March 2018, and in particular his telephone conversation with Paul Wright on 6 March 2018 had no bearing on his decision to resign. He also confirmed in cross-examination that his decision was not prompted by the time Mark Plumpton was taking to determine his second stage grievance. The Tribunal therefore finds that the last alleged act or omission appears to be the failure of the claimant's first stage grievance on 5 February 2018. The claimant explained to the Tribunal that while he waited for his second stage grievance to progress, he was attending counselling sessions. His counsellor led him to believe that he had to make his own decisions. In March 2018 he realised that his grievance appeal was unlikely to succeed and therefore chose to terminate his employment at this time.

112. The Tribunal is further satisfied that the claimant did not affirm his contract in respect of the sick pay issue. Although he continued in employment for just over a month following the determination of his first stage grievance, the matter remained clearly in dispute by way of his second stage complaint. However for the reasons stated above, the Tribunal is satisfied that the respondent's decision to reject the first stage grievance did not by itself amount to a fundamental breach of contract.

113. The claimant also mistakenly interpreted the respondent's handling of the sick pay issue as hurtful and destructive of his trust and confidence in his employer. He thought that the respondent was effectively overruling his doctor's opinion. On that basis, the Tribunal finds that the respondent's handling of the sick pay issue overall did not form part of several acts or omissions which cumulatively amounted to a breach of the implied term of trust and confidence.

114. For the reasons stated above, the Tribunal further finds that the respondent's handling of the disciplinary issue was similarly reasonable and justifiable. The Tribunal accepts that the career break issue would have undermined the claimant's trust and confidence in the respondent because he was misled about the availability of his substantive role, even though his subsequent complaint of unfair displacement was upheld. The Tribunal further accepts that the limited instances of agreements by Phil Jackson to pay certain OPGs double time for overtime would have similarly undermined the claimant's trust and confidence, even though the respondent brought that practice to an end when the claimant again complained. However, as those matters occurred in 2014, and the end of 2016 and beginning of 2017 respectively, the Tribunal accepts that the claimant affirmed his contract by continuing in work, and the subsequent disciplinary and sick pay issues were insufficient to revive any right to resign on that basis.

115. In the circumstances, the Tribunal is not satisfied that there was a fundamental breach of contract by the respondent. As a result, in the Tribunal's judgment there was no dismissal in accordance with section 95(1)(c) of the ERA, in which case the claimant's claim for unfair dismissal must fail. In the circumstances, the Tribunal has not determined the remaining issues as identified in paragraphs 6.4 and 6.5 above in relation to the claimant's claim for unfair dismissal.

Employment Judge Licorish

Date. 20 December 2018