Case No: 1600171/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr M Desforges-Grey

Respondent: Glass World (Cardiff) Limited

Heard at: Cardiff **On:** 23 September 2019

Before: Employment Judge S Jenkins

Representation
Claimant: Miss H Randall (Counsel)
Respondent: Mr P Zehetmayr (Director)

RESERVED JUDGMENT

1. The Claimant's claims of unfair dismissal and breach of contract succeed.

2. The amount of compensation to be paid to the Claimant in respect of those claims will need to be assessed at a subsequent hearing, but the amount of the unfair dismissal basic award and compensatory award are to be reduced by 50% by reason of the Claimant's contributory conduct.

REASONS

Background

1. The Claimant had brought claims of unfair dismissal, expressed on alternative bases as explained further below, and breach of contract.

2. I heard evidence from the Claimant on his own behalf and from Mr Peter Zehetmayr on behalf of the Respondent. I also read the witness statements of eight other of the Respondent's employees; Paul Delaney, Carl Jones, Catherine Rees, Clint Riley, Kieron Thomas, David Treharne and William Zehetmayr. None of those witnesses were in attendance and their evidence was therefore not able to be tested, and I indicated at the outset of the hearing that there was therefore limited weight I could attach to them. In any event, much of the content of those statements was of background relevance only.

3. I considered the documents in the bundle to which my attention was drawn, with the bundle being split into two sections; the Claimant's documents spanning pages C1 to C38, and the Respondent's documents spanning pages R1 to R42.

Issues and law

4. The primary factual issue for me to resolve was whether the Respondent had dismissed the Claimant, as that would then lead to the particular way in which the Claimant's claims would be considered. The Claimant contended that he had been expressly dismissed by the Respondent or, in the alternative, had been dismissed in circumstances encompassed by the case of Hogg v Dover College [1990] ICR 39, i.e. in circumstances where his contract had been so fundamentally changed as to amount to dismissal. In the further alternative, the Claimant contended that if it was considered that he had resigned, then he had done so in circumstances which amounted to a constructive unfair dismissal. The Respondent contended that the Claimant had resigned and had not been dismissed, and that the circumstances were not such as to amount to a constructive unfair dismissal.

5. In terms of the legal issues for me to assess, if I considered that the Claimant had been dismissed, I needed to consider what was the reason for dismissal and whether the reason was one which fell within sections 98(1) or (2) of the Employment Rights Act 1996 ("ERA"). From the documents it seemed likely that if, notwithstanding the Respondent's contention that there had been no dismissal, I concluded that there had been a dismissal, then the reason for the dismissal would have been the Claimant's conduct, a reason falling within section 98(2)(b) ERA, although I was conscious that it was for the Respondent to prove the reason for dismissal.

6. If that proved to be the case then I had to consider whether the dismissal for that reason was fair or unfair in all the circumstances, applying section 98(4) ERA. In that regard, if the reason was established to be the Claimant's conduct, then I had to apply the test set out in British Home Stores v Burchell [1978] IRLR 39, which required me to consider; whether the Respondent had a genuine belief in the Claimant's guilt, whether that belief was based on reasonable grounds, and whether those grounds were formed from a sufficient investigation. I also needed to consider whether any dismissal was procedurally unfair, taking into account the terms of the ACAS Code of Practice.

7. If the Burchell test was satisfied, I had to consider whether the sanction of dismissal was fair in the circumstances and, applying the case of Iceland Frozen Foods v Jones [1983] ICR 17, was within the range of reasonable responses open to an employer acting reasonably. I was conscious in this regard, and also in relation to the sufficiency of the investigation, that the Respondent's actions had to be judged against the standards of a reasonable employer and that I should take care not to substitute my own view for that of the Respondent.

8. If I was satisfied that there had not been a dismissal, and that the Claimant had resigned, I then had to consider whether that resignation amounted to a constructive unfair dismissal, applying the test set out in the case of Western Excavating (E.C.C.) Ltd v Sharp [1978] ICR 221. That involved consideration

of whether the Respondent had fundamentally breached the Claimant's contract; if so, whether the Claimant had resigned in response to that breach; and whether the Claimant had resigned sufficiently swiftly so as to avoid being considered to have affirmed the breach. In that regard, the Claimant contended that the Respondent's actions in carrying out a deficient investigation, and in looking to move the Claimant from his role as part of the disciplinary sanction, amounted to breaches of the implied duty of trust and confidence.

9. If I was satisfied that there had been an unfair dismissal, whether express or constructive, I would then have to consider what remedy to award and, in particular, consider whether any reduction should be made to reflect the principle set down in Polkey v AE Dayton Services Ltd [1988] ICR 142, i.e. if there had been procedural deficiencies, whether had such deficiencies not arisen, the dismissal would nevertheless have been likely to have ensued fairly. I would also have to consider whether the amounts of the basic award or compensatory award should be reduced to reflect any contributory conduct on the part of the Claimant.

10. With regard to the breach of contract claim, the question of whether the Claimant had resigned or had been dismissed would again be central. If there had been a dismissal then, as it did not appear that the Claimant had been dismissed for gross misconduct, he would have been entitled to notice. If there had been a resignation then, unless that arose in circumstances where there was a constructive wrongful dismissal, i.e. where it arose from a repudiatory breach of contract by the Respondent, there would have been no entitlement to notice.

Findings

11. I made the following findings of fact, and where there was any dispute I did so on the balance of probabilities.

12. The Respondent is a glazing company with a factory based in Tonyrefail, from which it also undertakes glazing work at customers' premises, although the bulk of its business takes place at its factory.

13. The Claimant was employed as a glazier, up until the termination of his employment in October 2018. His work involved him travelling to customers' premises to undertake glazing work, although he would start and finish his working day at the factory and would, on occasions, return to the factory to obtain further instructions or materials. The Claimant did also undertake some duties at the factory, on occasions, but the bulk of his work was that of a glazier attending external premises.

14. The Claimant commenced employment in October 1995 and was issued with a contract of employment in March 1996. That stated that he was employed as a glazier and contained the following sentence, "*The Organisation reserves the right to require you to perform other duties and work in other departments from time to time, and it is a condition of your employment that you are prepared to do this*".

15. During the Claimant's 23-year career, no formal concerns were raised about his performance or conduct, although, as became apparent during the

disciplinary process which led to the termination of the Claimant's employment, some concerns about the Claimant existed on the part of some staff, certainly, in the latter part of his career.

16. The Claimant usually worked with one particular colleague, Brian Wilson, who was dismissed, albeit for not directly connected reasons, just prior to the termination of the Claimant's employment.

17. The number of glaziers employed by the Respondent varied over the years. At times there were as many as eight, but by the time of the termination of the Claimant's employment there were five, and that has reduced further since.

18. Initially the Claimant was issued with his own company van, which he was able to use personally outside of office hours. The Respondent's policy changed, however, to operating a pool of vans which had to remain at the Company's premises outside of work hours. That necessitated the Claimant to obtain his own vehicle, although he was assisted by the Respondent, by way of lifts from other employees from time to time.

19. Prior to 2018, the Respondent operated 24-hour call out system which had been worked by the Claimant. That ceased in 2018, as it seemed that the Claimant's colleagues did not wish to work such a system and therefore the Respondent brought it to an end.

20. One other incident of some relevance prior to the events which led to the termination of the Claimant's employment, was that the Claimant felt had arisen that an issue had arisen between himself and his manager, Mr Peter Zehetmayr, regarding the booking of a holiday. In his written witness statement, the Claimant had stated that that had occurred in early 2018, but he clarified at the start of his evidence that this had occurred in 2016. It related to a clash of bookings which, although the Claimant was allowed to take the holiday, led the Claimant to feel that it had left something of a sour taste on the part of the Respondent. The Respondent confirmed that this event had in fact taken place, but had occurred in 2013, although I did not consider that anything material turned on that.

21. The issues which led to the termination of the Claimant's employment occurred at the end of September 2018 and into October 2018. The Respondent became concerned, on 28 September 2018, that a tower scaffold that was used for glazing work was not at the factory. It transpired that it was at Mr Wilson's home, apparently to enable him to cut his garden hedge. It was also understood that the Claimant had delivered the scaffold to Mr Wilson's home and that no permission had been granted, either to Mr Wilson to use the scaffold, or to the Claimant to deliver it.

22. The Respondent's management became concerned that breaches of discipline had occurred, and Mr William Zehetmayr, the glazing services manager, met separately with the Claimant and Mr Wilson on 4 October 2018 to investigate the situation. These meetings led him to conclude that there had been a breach of discipline and that a disciplinary hearing should be held. He then sent the Claimant a letter, delivered by being placed in his post tray at the factory, requiring his attendance at a disciplinary meeting on 9 October 2018. The letter stated that the question of disciplinary action against the

Claimant, in accordance with the Company's Disciplinary Procedure, would be considered with regard to misconduct and a breakdown in trust as a result of a number of recent events. The letter went on to note that possible consequences arising from this meeting might be a formal warning or dismissal. The letter also notified the Claimant of his entitlement to be accompanied by another work colleague, although this was stated as not to include his colleague, Mr Wilson, who had also been involved in the relevant events.

23. The Claimant was concerned at the lack of detail contained in the letter and the reference to dismissal. He therefore went to see Mr William Zehetmayr. On the way to his office however, he passed Mr David Treharne, one of the Respondent's other directors. Mr Treharne and the Claimant discussed the proposed disciplinary hearing, with the Claimant asking Mr Treharne what the reference to "recent events" included, to which Mr Treharne replied that Mr William Zehetmayr was leading the process. The Claimant indicated that he wished to speak to his union, and Mr Treharne confirmed that he was welcome to do so, but that he would not be allowed to bring a trade union representative to the disciplinary meeting as the Respondent did not recognise a union. In his written witness statement, Mr Treharne recognised that that was an incorrect statement.

24. A short meeting then took place with the Claimant, Mr Treharne and Mr Zehetmayr in attendance, and with the Claimant being accompanied by a colleague, Mr Alex Vaughan. During this meeting, the Claimant asked Mr Zehetmayr to explain what would be dealt with at the disciplinary hearing, and Mr Zehetmayr confirmed that it would cover the taking of the scaffolding, the using of a company vehicle to do so and its use in company time, all of which was considered to have been without permission.

25. The Claimant also questioned whether "other events" were to be discussed, and was told by Mr Zehetmayr that there "may well be" other topics to be covered, such as concerns about the Claimant's attitude and relationships with other staff. Mr Treharne confirmed that, "things could change" between that date and the date of the hearing, and that if issues were raised in relation to which the Claimant needed time to prepare, then the meeting could be adjourned.

26. Within the bundle was an email of 3 October 2018 from Cathy Rees, a manager in the glazing department, to Mr Peter Zehetmayr, in which Ms Rees noted that an issue had arisen that day in relation to the Claimant. She indicated that the Claimant and Mr Wilson had stated that they had two jobs to do in the afternoon, but that she had subsequently clarified that one of the jobs had been completed at midday, leaving only one for the afternoon, and that that job had been completed by 2.00pm, but that the Claimant and Mr Wilson had not returned until 4:30pm to clock out.

27. The disciplinary hearing took place on 9 October 2018 at 3.00pm as scheduled. It was managed by Mr Peter Zehetmayr, accompanied by Paul Delaney, glazing manager. The Claimant was unaccompanied, as Alex Vaughan had left for the day, but confirmed that he was happy to continue.

28. With regard to the scaffolding tower, the Claimant stated that he had no knowledge of Mr Wilson taking the tower home on Thursday, 27 October, but

was aware that Mr Wilson had wanted to borrow it to cut his hedge. The Claimant was also asked about his whereabouts on the afternoon of 3 October but stated that he had no recollection of it.

29. The Claimant was also asked about a number of other issues regarding his relationships with other employees in the glazing department, it being alleged that he was abusive to others, was uncooperative, and could not be contacted. The Claimant responded that he felt that he had no problem with others in the department and that any contact problems were down to others not answering the phone.

30. At the conclusion of the meeting, Mr Zehetmayr considered that he was not in a position to come to a decision, and it was agreed to meet with the Claimant again on Friday 12 October to give the Claimant time to think about his whereabouts on 3 October 2018, and to think about his relationships with others in the glazing department. It was arranged for the meeting to take place at 8.00am at the Claimant's request.

31. At that point, the Claimant asked Mr Zehetmayr to “cut to the chase” and dismiss him. He was already aware by this stage that Mr Wilson had been dismissed, and it appeared that he felt that he was going to be dismissed. Mr Zehetmayr confirmed however that no decision had been made, and that no decision would be made until after the meeting on 12 October at the earliest.

32. In advance of that meeting, Mr Zehetmayr wrote to the Claimant on 10 October 2018, noting the arrangements for the further meeting and that the Claimant had been asked in particular to consider his whereabouts between 2.00pm and 4:30pm on Wednesday, 3 October 2018, and his working relationship with the glazing department team. It was reiterated that a possible consequence of the meeting could be a formal warning or dismissal, and the Claimant was reminded of his right to be accompanied by a work colleague, other than Mr Walters.

33. At the reconvened meeting, Mr Vaughan was present to accompany the Claimant. With regard to the afternoon of 3 October, the Claimant explained that, after completing his final job at 2.00pm, he and Mr Wilson took their lunch break, having not been able to take it prior to that, and had then gone to a local Aldi store to look at tools before returning to the factory at 4:30pm.

34. In relation to disagreements with others, the Claimant stated that he felt that there were no problems other than with one employee, with whom he had had a disagreement approximately a month earlier.

35. At this meeting the Claimant again reiterated that he assumed that he was being dismissed and that he wanted to leave immediately, which what he was allowed to do. I did not find however that the Claimant had been dismissed at that point as the evidence, in the form of the Respondent's notes of the meeting indicated otherwise.

36. Subsequent to the meeting, and unbeknown to Mr Zehetmayr at the time, and unbeknown to him until the start of the following week, the Claimant spoke to several of his colleagues, and shook their hands and indicated to them that he was going to be dismissed.

37. Following the meeting, Mr Zehetmayr and Mr Delaney discussed the issues. It was felt that the case against the Claimant in relation to his absence on the afternoon of 3 October 2018 had been made out, and also that his attitude towards the company and his colleagues had been unacceptable and that a final written warning was merited. It appears that that no further consideration was given to the tower scaffold issue. It was felt that a final written warning was merited, but it was also felt that the Claimant could not be trusted to work on his own, and nor could he be paired with a colleague, as Mr Wilson, with whom he had previously worked, had been dismissed. It was therefore considered appropriate to move the Claimant from his role as a glazier to work in the factory where he could be supervised.

38. Mr Zehetmayr prepared a letter to go to the Claimant to confirm the outcome of the meeting, and then telephoned him on the afternoon of 12 October to inform him of the outcome. The Claimant did not take the decision, in particular the move to the factory, well. He stated that he felt that the Respondent had been looking to dismiss him for some time, and that the decision taken was the cheapest way of doing so.

39. There was a conflict between the evidence of the Claimant and Mr Zehetmayr in relation to the content of this conversation. Mr Zehetmayr, stated that the Claimant had indicated that the Respondent had "done him a favour", as this was the "push" he needed to go out and work for himself, but the Claimant refuted that. I noted the contemporary evidence in the form of the Respondent's note of the conversation, and the content of Mr Zehetmayr's subsequent letter of 16 October 2018, and preferred the Respondent's evidence. I did not consider however that this amounted to any form of resignation on the part of the Claimant due to the subsequent part of the discussion between the two.

40. There was a further contradiction in the evidence over the next part of this conversation. The Claimant's s evidence was that he had asserted that he wanted to take the weekend to consider the situation, whereas Mr Zehetmayr asserted that he had suggested that the Claimant should take the time to consider things. Again, the contemporary evidence, in the form of Mr Zehetmayr's note and also the content of a subsequent letter dated 16 October 2018, to which further reference is made below, led me to prefer the Respondent's evidence on this point. Regardless of who suggested taking the weekend to consider matters, I found that there was an agreement that that should happen.

41. As a consequence, I did not consider that there was any express dismissal by the Respondent at that point, nor was there any express resignation by the Claimant. It was anticipated, regardless of who had suggested taking the weekend to consider matters, that the Claimant would take the weekend and would contact Mr Zehetmayr on the following Monday. I observe that there did not appear to have been any discussion as to what would happen if the Claimant ultimately indicated that he did not agree with the move to the factory.

42. Mr Zehetmayr then sent his already prepared letter to the Claimant which confirmed the final written warning and the requirement that he move to work in the factory. The letter also noted the Claimant's right to appeal.

43. Th Claimant indicated that he was then unfit to work the following week due to a shoulder injury. He had indicated in his witness statement that that had occurred a couple of weeks previously, but, under cross-examination, stated that it happened in the week commencing 8 October 2018. The injury, however, had not been reported to the Respondent at any time and the Claimant had been at work throughout the week in question.

44. In his claim form, the Claimant stated that he had visited his GP and been signed off as unfit for work. In fact, however, the Claimant confirmed in his oral evidence, and by reference to the documents, that he had not seen his GP but had submitted an employee statement of sickness for SSP purposes. He did not however submit this promptly to the Respondent, but rather his wife delivered it to the factory on her way home from work on the evening of Monday 15 October 2018. That meant that it was not seen by Mr Zehetmayr until Tuesday 16 October 2018.

45. I also found that the Claimant had made no attempt to contact the Respondent on Monday 15 October, although he stated that that was because he had tried to telephone and it was not answered. I considered that the Claimant had been disingenuous about his shoulder complaint at this point, as he had been at work the previous week and there was no evidence of him having visited his GP. I also noted that no attempt had been made to deliver the note until the evening of the day in question. It was not possible to verify whether the Claimant had attempted to make telephone contact, but I considered it unlikely that he did so, bearing in mind that the sickness statement was not delivered until the evening. I did not consider however, that there was any indication that the Claimant had resigned. At this point, whatever the rights and wrongs of the lack of contact by the Claimant until the evening of 15 October 2018, he had not given any indication that he was not going to return to work. Furthermore, the provision of the sickness certificate indicated that the Claimant, in his own mind, was unfit for work at that point and not that he was looking to resign.

46. On Tuesday 16 October 2018, and following receipt of the sickness certificate, Mr Zehetmayr considered that the Claimant was wasting the Respondent's time to make mischief and, through his lack of communication on the Monday had left the Respondent's employment without notice. He therefore sent a letter to the Claimant dated 16 October 2018, confirming that. There was no other contact between the Claimant and Respondent other than the issue by the Respondent of the Claimant's P45, in which the leaving date was noted as 19 October 2018.

The parties' cases

47. The Respondent's position was that it felt that the Claimant had been building a case for unfair dismissal and that he had accused the Respondent of untrue matters in order to misrepresent the state of affairs; for example, that there had been no prior notice of the disciplinary meetings when, in fact, there had been, and also in relation to the shoulder injury.

48. The Respondent also noted that the Claimant had shaken the hands of several colleagues on the Friday when leaving the company's premises, which it felt was indicative of him intending to leave.

49. The Respondent felt that it had tried to follow appropriate processes, but that allegations had kept coming into them which meant that they had to make changes to the allegations being put to the Claimant, but that he was always given time to respond.

50. The Respondent contended that the move to the factory was not in any sense a demotion, the Claimant was going to retain his pay and his working hours and the particular clause in the contract catered for such a move. The Respondent also noted that four employees out of six in the glazing department had complained about the Claimant and that one of the other two, Mr Wilson, no longer worked there.

51. The Claimant's representations were that the 16 October 2018 letter amounted to a letter of dismissal. There was no indication that the Claimant had resigned at that stage, and the shaking of the hands of the Claimant's colleagues on the previous Friday had simply arisen from his belief that he was to be dismissed. The Claimant contended that there had been no verbal resignation, and that the reason for his lack of contact on Monday 15 October had been the fact that employees had not answered the telephone. He had then submitted the sickness certificate.

52. The Claimant contended that the letter of 16 October did not provide any fair reason for the Respondent's dismissal of the Claimant and also that it was clear that the Claimant had failed to follow any form of proper process.

53. In the alternative, and applying the Hogg v Dover College case, the Claimant contended that the proposed move to the factory amounted to a substantial departure from, and therefore to a termination of, his contract. He submitted that the reference in the contract to being required to move related only to short-term matters and not to a permanent change.

54. The Claimant also contended that there was an inadequate investigation into the allegations against him, that he was never provided details in advance of the meetings, and that the details of the supposed differences between the Claimant and his colleagues were insufficiently described. He further contended that the sanction of dismissal, or of a final written warning with a move to the factory, was not within the range of reasonable responses.

55. With regard to the constructive unfair dismissal claim, the Claimant again noted that there had been a failure to follow appropriate processes, which was contended to amount to a repudiatory breach of contract. The Claimant also contended that the variation of the Claimant's contract to require him to work in the factory on a permanent basis also amounted to a repudiatory breach, or that, taken together, the second breach would be the “final straw” in a course of conduct amounting to a repudiatory breach.

56. With regard to the breach of contract claim, the Claimant contended that the Claimant’s case stood or fell with regard to the decision on dismissal. If it was contended that the Claimant had been dismissed, whether actually or constructively, then he should have been dismissed on notice, whereas if it was considered that the Claimant had resigned in circumstances which did not amount to constructive unfair dismissal then his claim for breach of contract would fail.

Conclusions

57. I noted that the principal factual question for me to resolve was whether there had been a dismissal or a resignation. If there had been a dismissal, I had to consider whether it had been fair, whilst if there had been a resignation I had to consider whether it amounted to a constructive unfair dismissal.

58. My conclusion was that there had been a dismissal by the Respondent in the form of its letter of 16 October 2018. I considered that there had been no resignation by the Claimant prior to that, in that it had been left, following the meeting on 12 October 2018, that the Claimant would consider his position over the weekend and the Claimant had not provided any indication as to his position following that. Instead, he had sent in a sickness statement which was indicative of his desire to maintain an ongoing employment relationship.

59. Whilst, as I have noted above, I felt that the Claimant was disingenuous by his actions in providing a sickness statement, there was no clear resignation, and no facts from which a resignation could have been inferred. Subject to the analysis of the Hogg v Dover College issue, to which I return below, there had been no dismissal prior to that point and therefore I considered that the Respondent's letter of 16th October 2018 did amount to a dismissal.

60. Moving to the question of the reason for dismissal, I noted that the Claimant argued that the letter did not allow the Respondent to make out any reason. I was however satisfied that the content of the particular letter meant that, having concluded that there had been a dismissal, the reason for that dismissal was the Claimant's conduct. The Respondent was clearly concerned by the recent events and by the lack of contact on the part of the Claimant on Monday, 15 October, and I was not convinced that there had been any ulterior motive; referable to any or all of the holiday incident, the withdrawal of the van, or the change to 24-hour callouts; as alleged by the Claimant.

61. Turning to the question of whether dismissal for that reason was fair, and applying the Burchell test, I was satisfied that the Respondent had a genuine belief of the Claimant's guilt of the disciplinary offences. However, I was not satisfied that the Claimant had reasonable grounds for forming that belief. The Respondent itself decided not to dismiss the Claimant in response to the misconduct that it had found had taken place, and it was only the lack of further contact on the part of the Claimant that ultimately led to the decision to dismiss.

62. However, I noted that the Respondent had been in possession of the sickness statement before taking that decision to dismiss and therefore it did not have reasonable grounds to form the basis of a belief that the Claimant should be dismissed without further investigation and consideration, however spurious it may have felt the Claimant's actions to have been.

63. I also noted that the Claimant's relationship with his colleagues formed part of the basis of the decision to issue the final written warning and I considered that it would be very unusual for any employer to reasonably form a view that an employment relationship, particularly one of 23 years duration, should end due to relationship issues with colleagues which were not particularised, without any form of warning and without any opportunity for the Claimant to

improve.

64. Furthermore, with regard to the investigation, there was very little substantive investigation into the allegations against the Claimant. There was a meeting with the Claimant and Mr Wilson over the tower scaffold, but that did not appear to have formed part of the decision to impose a disciplinary sanction on the Claimant. There was very little investigation of the allegations of the unsatisfactory relationship between the Claimant and his colleagues, and there was no investigation of whether the Claimant's actions in being off sick on Monday 15 October 2018 and in submitting the sickness certificate on the evening of that day had amounted to misconduct.

65. With regard to the sanction of dismissal, I concluded, notwithstanding my conclusions on the Burchell test, that the sanction of dismissal was, in any event, not fair. The Respondent itself did not dismiss the Claimant in relation to the events up to 12 October, and, as far as the events of 15 and 16 of October were concerned, i.e. the initial lack of contact and the sickness certificate, I did not consider that they would have led a reasonable employer to dismiss the employee without further investigation.

66. I also considered in the alternative that the Claimant had effectively been dismissed on the Hogg v Dover College basis. I noted the content of the Claimant's contract, but noted that the particular clause referred to the Claimant being required to work in other departments from time to time. There was no indication to the Claimant that his move to the factory would be temporary in nature or that that there would be any form of review. I also noted that no indication had been given as to what might happen to the Claimant if he refused to move to work in the factory and that it was very clear that the Claimant did not wish to do so. I therefore considered that the imposition of the move amounted to a termination of the Claimant's contract and would also have led to an unfair dismissal.

67. With regard to the constructive unfair dismissal element, although not necessary for me to form conclusions, I briefly do so for completeness. My conclusions were that, if I had concluded the Claimant had resigned, whether on 12 or 15 October 2018, in light of the final written warning and the request that he move to work in the factory, then those actions would have amounted to a repudiatory breach of trust and confidence by the Respondent, bearing in mind my comments above in relation to the Hogg v Dover College issue, and that the Claimant would have been considered to have resigned in response to that and would have done so sufficiently swiftly.

68. Turning to the question of remedy, the detail of which remains to be assessed at a separate hearing, I did not consider that any account should be made of the Polkey principle. I noted that the Claimant had submitted a sickness certificate, and that there were grounds to consider that that was done in a disingenuous manner, but I did not consider that any investigation into that matter would have been likely to have led to the Claimant's dismissal as it would have been impossible to gainsay the Claimant's assertion about his health.

69. However, with regard to contributory conduct, I noted that the events of 3 October 2018, whilst they ultimately did not appear to have been used as part of the disciplinary sanction, were considered by the Respondent to have been

made out, and that those would have led to the imposition of a disciplinary action against the Claimant. I also considered that the Claimant had been guilty of some misconduct in not contacting the Respondent appropriately on the day of 15 October and in relation to the sickness issue. In my view, these were material instances of misconduct and I therefore considered that it would be appropriate to reduce both the basic award and compensatory awards for unfair dismissal by 50%.

70. Finally, with regard to breach of contract, as indicated by the Claimant's representative, this largely stood or fell with the unfair dismissal claim. Having concluded that there had been a dismissal of the Claimant by the Respondent, that was not a dismissal which could have been made on a summary basis, i.e., without notice, and therefore the Claimant's claim of breach of contract also succeeded.

71. The precise amount of compensation will need to be assessed at a future remedy hearing unless agreed between the parties.

Employment Judge S Jenkins

17 October 2019

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....20 October 2019.....

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FOR EMPLOYMENT TRIBUNALS