



EMPLOYMENT TRIBUNALS

Claimant: Mr I Vally

Respondent: Spring Petroleum Co Ltd

Heard at: Manchester **On:** 7 & 8 December 2017

Before: Employment Judge Holmes

Representation

Claimant: In Person

Respondent: Mr Warnes, Consultant

RESERVED JUDGMENT

It is the judgment of the tribunal that:

1. The claimant was constructively and unfairly dismissed.
2. The claimant is entitled to a remedy. The parties are to seek to agree remedy, and in default are to notify the tribunal by **29 January 2018** as to whether a remedy hearing is required, and , if so, shall specify that issues are to be determined by the tribunal, and provide an estimated length of hearing, and dates to avoid for such a hearing.

REASONS

1. The claimant was employed as a sales assistant at its Furthergate Petrol Station , Accrington Road, Blackburn by the respondent (and its predecessors) from 1 July 2000 until his resignation on 16 May 2017. He complains that his resignation was a constructive dismissal , was unfair.

2. The claimant appeared in person , and the respondent was represented by Mr Warnes, consultant. The claimant gave evidence first, and called no witnesses. The respondent called Mohammad Hanif Master, his line manager, Arif Patel, Jonathan Marshall, and Scott MacKenzie. There was an agreed Bundle. The parties made oral submissions on the final day of the hearing, and the tribunal reserved its decision.

3. Having heard the evidence, read the documents in the Bundle, considered the submissions of the parties, the tribunal finds the following relevant facts:

- 2.1 The respondent carries on a petrol station business. The claimant was originally employed by Master Zums Limited, but in or about 2008 His employment was transferred to another company Mercury Forecourts

Limited. In or about August 2015 Mercury merged with Spring Petroleum, to become Spring Petroleum Company Limited. The claimant's employment transferred on each such change and he was employed by Spring Petroleum Company Limited from August 2015. In , 2016, however, the ownership of that company changed, with MRH (GB) Limited acquiring a major shareholding in it. A new senior management became responsible for running the business. In December 2016 Scott MacKenzie of MRH became the General Manager, and Jonathan Marshall was the Area Manager covering Blackburn. There was, however, no further transfer of the claimant's contract of employment.

- 2.2 Upon the acquisition by MRH new documentation was issued for staff. A new Statement of Main Terms of Employment was prepared for the claimant in or about December 2016, but he refused to sign it.
- 2.3 The claimant worked at the Furthergate site, in Blackburn. He worked night shifts. His manager was Hanif Master, who had been his manager since 2008. Because the claimant worked nights, he and Hanif Master did not see much of each other, and communicated by notes , texts or mobile phone.
- 2.4 The claimant had , during the course of his employment , taken holidays of more than three weeks duration. He had planned to this in 2016, but had been asked not to by Hanif Master, due to lack of cover.
- 2.5 On 6 September 2016, however, the claimant asked Hanif Master if he could take four weeks holiday between 26 May and 29 June 2017. He did so by completing a holiday request form, with those dates filled in, and leaving it for Hanif Master after a shift. A copy of this document is at page 46 of the Bundle.
- 2.6 Hanif Master told the claimant at that time that it was too early for him to approve that holiday, but he did not, the tribunal finds refuse it, nor did he make any reference to the policy of not permitting more than three weeks holiday to be taken at any one time.
- 2.7 In January 2017 the heating at the site was not in good working order, and the claimant complained about this, and paid for a portable heater with money from the till. The claimant and Hanif Master exchanged texts about this (page 47 of the Bundle).
- 2.8 On 3 February 2017 the claimant booked a holiday to Tel Aviv for the dates of 26 May to 29 June 2017 (pages 54 to 56 of the Bundle). On 7 February 2017 he sent a text or similar message to Hanif Master's mobile phone, showing again a photograph of his holiday request form from September 2016 that he had sent on 6 September 2016. This message is at page 56A of the Bundle.
- 2.9 Hanif Master did not speak to the claimant at that point, but sent him a message in which he forwarded an e-mail he, along with other site managers, had received from Scott MacKenzie on 13 February 2017 (-age 57 of the Bundle) which set out various actions required of the site managers, and stipulated that no more than three weeks holiday could be

taken at a time. The claimant told Hanif Master that he was not subject to that handbook, and no more was said by Hanif Master.

- 2.10 Around this time, from February 2017 the management of the respondent wished to rationalise and harmonise holiday arrangements across the business, and to that end Scott MacKenzie wanted to ascertain what holidays had already been booked by staff with their managers, and to ensure that they were taken before the start of the new holiday year. This was the purpose of his e-mail of 13 February 2017. Attached to that e-mail was a form, which he required all staff to sign, in relation to holiday entitlement from April 2016 to March 2017. In this document, it was stated that the respondent would allow holiday to be carried over from the previous year, but this would cease for the ensuing holiday year. This document does not mention the prohibition on more than 21 days or three weeks holiday being taken at any one time.
- 2.11 This policy was contained in the Staff handbook, at section A, para. 7 (page 41 of the Bundle). Following the change of ownership and management in 2016, the respondent had issued new statements of terms of employment to staff, which referred to the Handbook, also issued at that time. The claimant had refused to sign any new statement of terms of employment, or for the handbook.
- 2.12 By e-mail of 15 February 2017 the claimant asked Hanif Master to book 12 days holiday, three four day blocks, between 6 March and 1 May 2017. Hanif Master could not authorise all those dates, and in an e-mail exchange the claimant asked to vary those dates to two weeks in April and one in May 2017.
- 2.13 E-mail communication continued between Hanif Master and Scott MacKenzie during March 2017, in which the holidays authorised for his staff to the end of the current year were confirmed.
- 2.14 Around this time, on or about 21 March 2017, Scott MacKenzie sent the claimant another set of documents relating to his employment, including a Statement of Main Terms of Employment and the Employee Handbook (page 61 of the Bundle). The claimant replied to him by e-mail of 5 April 2017 (page 70 of the Bundle) saying that he would not sign them, as he believed that MRH were trying to revise his contract, and he wanted to stay of the terms of his original contract upon which his employment transferred to Mercury – Spring Petroleum
- 2.15 By e-mail of 25 April 2017 (pages 74 to 75 of the Bundle) Hanif Master asked the claimant what holidays he wanted to book, saying *"Also as stated in the employee handbook a maximum of 3 weeks only can be taken at any time including weekends."*
- 2.16 The claimant replied by e-mail of 26 April 2017 (page 74 of the Bundle) to which he attached a further copy of the holiday request form from September 2016, saying *"Above is the holiday I booked back in 06/09/2016"*.

2.17 Scott MacKenzie sent an e-mail (probably a further, corrected version of an earlier e-mail) on 2 May 2017 (pages 77 and 78 of the Bundle) to Hanif Master, along with other site managers. In it he referred to the rule that Spring employees were not permitted to take more than 3 weeks consecutive holiday, saying this was not a new policy, and asking managers to tell him by 5 p.m. on 3 May 2017 if there were any staff for whom any manager had authorised more than three weeks holiday, adding :

“to be clear Site Managers & Area Managers do not have the authority to do this.”

He went on to ask, if there was any employee who had booked more than 3 weeks consecutive holiday, to be provided with the details.

2.18 In reply , by e-mail to Scott MacKenzie of 3 May 2017 (page 77 of the Bundle), entitled “Re: Holiday Requests”, Hanif Master said this:

“Iqbal Vally Night staff he requested his holiday’s for five weeks from 20/05/2017 till 02/06/2017. I have not authorize his holiday’s regarding this Jonathan call him to have a meeting on Tuesday 6th May.”

2.19 The matter was left to be dealt with by Jonathan Marshall speaking to the claimant. In the meantime, Scott MacKenzie had been informed of the issue, and on 5 May 2017 he sent an e-mail to all site managers (page 84 of the Bundle) in which he referred to the policy of not allowing more than three weeks consecutive holiday , saying this had been the poklicy for some time, but noting that it was clear that it was not always being followed. He on to say how he had received a list of (longer) holidays which had already been booked, which would be honoured. He went on to say that a line would have to be drawn under the practices of the past, and that no one, including himself could in future authorise holidays of more then three consecutive weeks.

2.20 By another e-mail the same day (page 85 of the Bundle) Scott MacKenzie wrote to the managers (and possibly others) informing them of the holidays of more than 21 days (referring to them as a “list”) that would be permitted , saying “No more ..” His e-mail contains what appears to be a cut and pasted extract from Hanif Master’s e-mail to him of 3 May 2017. After this extract Scott MacKenzie has added the words “*Await outcome of Jonathan’s meeting*”.

2.21 On or about 9 May 2017 the claimant spoke with Jonathan Marshall. They were meant to have met that day, but the claimant did not attend work for the meeting. They therefore spoke on the phone later in the day. In this conversation the claimant was told that more than 3 weeks holiday could not be authorised. There was some discussion about the claimant not working under the terms of Spring Petroleum, but under his original contract with Master Zums. The upshot of this conversation was that the claimant’s holiday was not authorised by Jonathan Marshall, who considered that it had not been authorised previously by Hanif Master.

2.22 The claimant was due to start his holiday on 29 May 2017. It was , by early May 2017, too late to seek to cancel it without financial penalty.

2.23 The claimant raised a written grievance on 11 May 2017 (page 92 of the Bundle) which was received by Jonathan Marshall. In the grievance the claimant complained , firstly, about what he saw as the attempts to change his contract, and the absence of his original contract with Furthgate. He went on to refer to his holidays, which he claimed had been booked with Hanif Master in September 2016. He said that as he had not been given sufficient notice , the company would be liable for his loss. He would cancel and work his shifts if the company fully compensated him in the sum of around £1800, otherwise he would be taking his holidays.

2.24 Having received the claimant's grievance, Jonathan Marchall replied by letter of 11 May 2017 (page 93 of the Bundle), sent by e-mail. Attached to that letter was an undated statement of terms of Employment, to which the claimant's signature had apparently been appended (pages 96 and 97 of the Bundle). The claimant had signed no such document.

2.25 A meeting was arranged with Jonathan Marshall on 16 May 2017. Prior to the meeting, Jonathan Marshall interviewed Hanif Master. The notes of his interview are at pages 98 and 99of the Bundle. In this interview Hanif Master said this in answer to questions by Jonathan Marshall about when the claimant had booked his holiday and what was said, and what had happened subsequently:

“JM : When did he ask for the holidays ?

HM: September 2016.

JM: At that point what was said ?

HM: It was too early to get him them holidays and I did not agree to them.”

JM : What happen since?

HM : He ask one time in March 2017.

JM : Did he ask if you had authorised them ?

HM : I never authorise the holiday. The Scott sent emails about having no more than 3 weeks.”

2.26 In the meeting with the claimant, (the notes of which are at pages 100 to 109 of the Bundle) Jonathan Marshall went through his grievance letter. Badre Dalal was present as an observer. Four points of grievance were identified, the first of which related to the claimant's issue about his contract of employment upon transfer, and the three remaining points were all related to the holiday issue. The first part of the meeting discussed the first issue, and there was discussion about the terms that the claimant objected to.

2.27 The meeting then turned to the holiday issue. The claimant explained how a holiday request was put in, and how if nothing was heard, it was assumed that the holiday had been granted. He was referred to the Employee Handbook, and the policy of no more than three weeks holiday being permitted. He said he was not “going with the handbook”. He did not agree those terms. It was put to him that Hanif Master had not authorised the holiday, to which the claimant retorted that it had taken him 7 months to tell him. Jonathan Marshall asked if there could be any compromise, but the claimant said that he had already booked. In discussing the specific complain of insufficient notice, the claimant was asked if he could provide proof of the booking, and he said he could not do so at that time.

2.28 Jonathan Marshall summed up the meeting. In relation to the holiday issue, he said that Hanif Master had said that he had not authorised the holiday, but the claimant had said that he had. When Asked if there was anything he would like to add the claimant said this was not going to resolve anything, and he was resigning.

2.29 The claimant had prepared a letter of resignation, dated 16 May 2017 (pages 110 to 112 of the Bundle) which he handed to Jonathan Marshall at the end of meeting. In it he firstly referred to the attempts to change his terms of employment since 2010 and 2015. he then went on to refer to his annual leave saying this:

“Secondly, I feel I have been scrutinised with my annual leave. I had booked my holidays back in 06/09/2016 for 20 days starting 29th may 2017. The usual procedure was that if we did not receive a response with regards to the leave then it was assumed that the holidays were booked.”

2.30 He went on to explain how after a period of 7 months, Hanif Master had told him that he could had to use his annual leave in another period, and not the initial period he had requested. He said he refused to cancel his annual leave then as his holiday had been paid for in full, and he would be out of pocket. He went on to describe the telephone call on 9 May 2017, arranging a meeting with Jonathan Marshall, and how he was informed on the phone that his holidays would not be authorised as it was now company policy not to grant more than three weeks’ annual leave.

2.31 The claimant went on to say what he had been told about the Spring Petroleum contract and handbook, where these terms are set out. The claimant then went on to refer to discussions about his contract, and how he had received an e-mail from Jonathan Marshall on 10 May 2017 (though more probably on 11 May 2017) which confirmed that he had signed a Spring Petroleum contract. He said the signature was not his, and added:

“I am significantly concerned about this fraudulent activity that has taken place and I am willing to take this to court should the issue not be resolved Additionally, the document is not dated which further adds to my concern.”

- 2.32 The claimant went on to describe further messages between himself and Hanif Master , and how he had then instigated the grievance.
- 2.33 The claimant then went on to make mention of a problem with the heaters at the premises, which were not working, and which he had raised in January 2017. He complained that this had not been rectified, and was affecting his osteoarthritis.
- 2.34 He ended by saying that he did not believe that an appeal would get him any justice, and he had tried his utmost to resolve the matter through the grievance procedure but the respondent had shown no compassion. He said he had spoken to ACAS, and would be taking matters further with a constructive dismissal claim as “Spring MRH has constituted a breach of my original terms of employment”.
- 2.35 By letter of 17 May 2017 (page 113 of the Bundle) from Robyn Duckworth, Area manager, the respondent expressed surprise at the claimant’s resignation letter , and offered him a further grievance hearing heard by Robyn Duckworth. He was invited also to reconsider his decision to resign. A further letter, in the same terms , was sent dated 19 May 2017 (page 115 of the Bundle).
- 2.36 The claimant replied by e-mail of 22 May 2017 (page 116 of the Bundle), to the effect that as he had not heard from the company by 2.0 p.m. on 19 May 2017, he had decided to take the matter further though ACAS, and would not be attending any further meetings, as he believed that no positive outcome would come out in any further grievance meetings.
- 2.37 Arif Patel wrote to the claimant on 23 May 2017 (page 119 of the Bundle) , apparently treating the claimant’s resignation letter as an appeal. He sought to encourage the claimant to attend an appeal meeting on 26 May 2017. The claimant did not attend any such meeting, and by e-mail of 24 May 2017 (pages 123 to 124 of the Bundle) he explained his reasons for not doing so.
- 2.38 On or about 30 May 2017 Jonathan Marshall sent the claimant an undated letter (pages 120 to 121 of the Bundle) which was an outcome of the grievance he had held on 16 May 2017. He dealt with the contractual issue first, saying that without sight of the Master Zums contract it was hard to resolve that issue.
- 2.39 Turning to the holiday issue, he recited his understanding of the position , and the way in which the claimant had said that his holiday had been authorised. Whilst items 1 and 2 of the grievance were not substantiated, items 3 and 4 were, and the respondent allowed the claimant’s holiday on this occasion, making the point that all future requests would have to be limited to three weeks, and would be signed off in writing. The claimant was told of his right of appeal.
- 2.40 The claimant, however, was already on holiday at that point. He did, however, receive the outcome letter, and by e-mail of 1 June 2017 he raised various issues about the outcome letter, the first of which was

complain about the serious fraud of his signature being falsified on contractual documents.

2.41 Scott Mackenzie replied to this e-mail by letter of 22 June 2017 (page 125 of the Bundle) offering to hear the claimant's appeal on 5 July 2017. He set out what he understood to be the claimant's grounds of appeal from his e-mail of 1 June 2017.

2.42 On 2 July 2017 the claimant wrote to the respondent (page 126 of the Bundle) stating that he would not be attending any appeal, and making some proposals which the tribunal considers were probably intended to be without prejudice, and which have therefore been ignored.

2.43 On 5 July 2017 Scott MacKenzie wrote to the claimant (page 127 of the Bundle) setting out the history of the grievance, the resignation and the grievance appeal. He accepted the claimant's resignation.

4. Those then, are the relevant facts as found by the tribunal. The tribunal found that there unsatisfactory aspects to the claimant's evidence, and did not accept that he did not send the text message of 7 February 2017 to Hanif Master. His accuracy on the date he received the signed Statement , and when he returned to the UK having gone on holiday, was poor, and his evidence was not totally credible. On the other hand, Hanif Master , for reasons further discussed below, was less than convincing upon the crucial issue of just what he did or did not say to the claimant when he first made his request for holiday on 6 September 2016. In particular, the tribunal does not accept that he ever expressly referred the claimant to the "3 week" rule until he sent the claimant the e-mail he had received from Scott Mackenzie on 13 February 2017.

The Submissions.

5. The parties made submissions. The respondent's submissions were first. Mr Warnes started by identifying two or three issues, the heating, the holiday request and the forgery of the claimant's signature. There could be more – the claimant seemed to rely upon Jonathan Marshall's conduct in the meeting, but as he had pre – written his resignation letter , this could not have played a part. It was for the claimant to advance what the reasons for his resignation were, it did not seem that this was a "final straw" case. The claimant appeared to say all the issues were major ones, but then was not sure. Credibility was an issue, particularly between the claimant and Hanif Master as to the holiday request and how it was dealt with. He invited the tribunal to make allowances for Hanif Master having English as a second language, and perhaps not being familiar with the nuances of "not authorising" as opposed to "refusing". The claimant had oddly refused to accept that he had sent the text of 7 February 2017, when he clearly had done. Similarly there had been a major issue as to the date of the claimant's return to the UK, as shown by a fit note . The claimant had not been truthful, and was unclear about when he was sent the signed Statement of terms. To the extent that the claimant was relying upon a term from custom and practice as to how holidays were booked, he could not succeed, as he agreed his contractual position was different.

6. The heating issue was a minor one, and could not be made into a serious breach of the implied term of trust and confidence. The respondent was trying to

deal with it, although the claimant may not have been aware of its efforts. The forged signature was serious, he agreed, but the claimant was hasty in assuming that the respondent would have acted upon it, and would not have accepted his words that he had not signed the document. In any event the claimant did not resign the minute he received that document. He did not afford the respondent any chance to deal with it, he had written his letter, regardless of what was going to be said. It was disputed that Jonathan Marshall said that his holiday was “not going to happen”, and the claimant had not put that to him in cross – examination.

7. Reference was made to **London Borough of Waltham Forest v Omilaju [2005] IRLR 35**, on the last straw principle, and it was argued that the claimant had acted prematurely. The claimant could only resign in response to an anticipatory breach. He hardly knew Jonathan Marshall and Scott MacKenzie, so how could he know how they would treat him? They were reasonable people, and would have, as they had shown by their subsequent actions, treated him reasonably. He could and should have waited. The real reason the claimant resigned was, as he put it in evidence, that he was “pee’d off”, and was not going to give Jonathan Marshall a chance to put things right.

8. The claimant, not being a lawyer understandably was rather brief. He resigned, he said, on the basis of the fraudulent contract that was produced, the holiday issue, and what Jonathan Marshall had said in the meeting. He appreciated that even if he got this holiday, in due course, the respondent would be able to make changes to his contract later. He was being told that he had signed a contract, and if he had said he had not, the respondent would not have believed him. He had been treated badly after 17 years in the job. He had issues with the heating, and had raised them, why had it taken 8 months to deal with the issue, and why had it taken so long to deal with his holiday request?

The Law.

9. The relevant statutory provisions are set out in Annexe A hereto.

10. The law of constructive dismissal is well established. The caselaw on constructive dismissal is well established. It has its origins in the classic statement of Lord Denning in the case of **Western Excavating (ECC) Limited v Sharp 1978 ICR 221** in which he held that in order for an employer’s conduct to give rise to a claim of constructive dismissal it must involve a repudiatory breach of contract. As Lord Denning MR said “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employers conduct. He is constructively dismissed”. Thus in order to succeed the claimant must establish that there was a fundamental breach of contract on the part of the employer, that that breach caused him to resign, and that he did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

11. It is clear that in order to establish that there has been a fundamental breach of contract it is not necessary to show one fundamental act or omission. There does not need to be one event, there can be a series of events which

cumulatively amount to a breach of an implied term. In such circumstances, where there is not one individual act or omission relied upon, but a series of actions that are alleged to amount to that breach, where they culminate in one particular act that is known as the “last straw”, and in order to establish that a claimant has been constructively dismissed there has to be a last straw. Indeed in the leading case which the Tribunal has considered on this issue, **London Borough of Waltham Forest v Omilaju [2005] IRLR 35**, a decision of the Court of Appeal and the judgment of Lord Justice Dyson, it is clear from the discussion in that case of the nature of constructive dismissal, that in order for there to be a constructive dismissal where there is a series of acts, the final straw must be there, and although the final straw may be relatively insignificant, it must not be utterly trivial. There must be a final straw, otherwise there can be no constructive dismissal. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. The judgment goes on to say:

“A claimant cannot subsequently rely on those acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.”

Moreover, and this is an important part of the judgment:

“An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee’s trust and confidence have been undermined is objective.”

So to the extent that the claimant might have perceived that as being the case, the Tribunal cannot rely solely on that, it must look objectively on the act complained of.

12. In terms of the fundamental breach of contract alleged, the claimant does not rely upon any express term, he is relying upon the manner in which the respondents dealt with him, when they acted in a way which constituted a fundamental breach of what is known as the “implied term of trust and confidence”. That term is one which is well-known to the Tribunals, and which is frequently relied upon by claimants in these circumstances. Properly understood the formulation of that term was best put in the judgment of Mr Justice Browne-Wilkinson in **Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347** which effectively is that “the employer will not, without reasonable and proper cause, conduct himself in a manner which is calculated or likely to seriously destroy or damage the relationship of trust and confidence between the parties”. That is known as the implied term, in shorthand, of trust and confidence, but that is the full legal definition.

Discussion and Findings.

13. The starting point has to be the issue of whether the respondent so conducted itself that it breached the claimant’s contract of employment so seriously that it entitled him to resign and claim constructive dismissal. The

claimant not being a lawyer, or legally represented, has not expressly put the basis upon which he says the respondent so breached his contract. It appeared he may be contending that he had contractual right to take more than three weeks holiday, relying upon "custom and practice". If that is so, the tribunal cannot so find. The establishment of such a term depends upon cogent evidence that such a term was "reasonably notorious" and the evidence that the claimant had done this in the past falls well short of the necessary evidence for such a claim to be established. Further, as submitted, the claimant's case is that he was on different, and preserved, contractual terms, from his colleagues.

14. Rather, the tribunal considers that the claimant's case is better put on the basis of the implied term of trust and confidence, which is set out above.

15. There are, the tribunal considers two aspects of the respondent's conduct which potentially could amount to a fundamental breach of this term. The heating issue is not one that the tribunal considers is capable of amounting to, or significantly contributing to, any fundamental breach of the implied term of trust and confidence. The first is the treatment of his holiday booking, and the second the presentation of a document with his signature purportedly upon it, when it is accepted now that he had not signed it.

16. In relation to the former, the tribunal accepts the claimant's evidence as to what occurred in September 2016. The tribunal is satisfied that Hanif Master did not refuse the request then, and did not refer the claimant to the three week policy. That is a finding of fact, made because nothing Hanif Master said or did is consistent with such an assertion. If that was the case, one would have expected, when the claimant raised such a request again in February 2017, he would have referred him back to his refusal in September 2016. Further, when telling Scott Mackenzie about the booking in his e-mail of 3 May 2017, one would have expected him to go further than say "I did not authorise it", but to say he had positively refused it. Similarly, when interviewed for the grievance, he made no mention of having given the claimant such a clear refusal, again simply saying he had not authorised it. It is also of note that Hanif Master in that interview mentions Scott MacKenzie "then" sending the e-mail about having no more than 3 weeks. This again appears consistent with this being something new, not a reminder of a previously established policy. It is similarly significant, the tribunal considers, that it was never put to the claimant by Jonathan Marshall in the grievance meeting that the claimant had been told by Hanif Master, back in September 2016, that a request for more than three weeks would not be granted.

17. Mr Warnes urged the tribunal to ignore any such discrepancies as being nuances of language that may be attributable to Hanif Master having English as his second language. The tribunal has taken that into account, but he has been a manager since 2008, and was quite able to write and speak English clearly. The omission to mention the fact that he told the claimant as long ago as September 2016 that any such holiday request was, in reality, a non-starter, arises from the simple fact, the tribunal finds, that he did not.

18. Therein, the tribunal finds, lies the issue about the holiday. Hanif Master had not, in September 2016, told the claimant he could not take so long a holiday. He, at the very least, left that open as a possibility. When, then in February 2017 the claimant reminded him of this request, he did not then

respond in terms that such holiday had already been refused. He then got Scott MacKenzie's e-mail on 13 February 2017, a rather inconvenient time to receive it. This was at a time when managers were clearly coming under pressure about holiday authorisation, and requests for more than three weeks were to be refused. All Hanif Master did then was to forward this e-mail to the claimant, whose response was that he was not subject to the Handbook. Hanif Master did not then take this up with either the claimant or Scott MacKenzie, but rather let things rumble on, with no further action on his part.

19. The tribunal finds that the most likely explanation for all this is that, having failed adequately to deal with the claimant's requests in September 2016 and February 2017, leading him to believe that his holiday had been or would be authorised, as he had in the past been permitted to take such a long holiday, when there arose an issue about this in late April 2017, Hanif Master was then in a difficult position with his senior management. He rather backtracked, and avoided responsibility for what had occurred. He had not actually told the claimant he could not take the three weeks holiday he had been seeking since September 2016, and was now faced with him saying that this had been authorised. Whether Hanif Master had expressly authorised the holiday or not, by late April 2017 he had not expressly told the claimant he could not take it, and the claimant had booked it on 3 February 2017, relying somewhat on Hanif Master's passivity. That may have been a little unwise on the part of the claimant, but once he had not heard back from Hanif Master after his message on 7 February 2017, he was entitled to assume that his holiday was authorised. Even after the e-mail exchange at the end of April 2017, Hanif Master did not respond to the claimant that his holiday was not authorised, but rather then informed Scott MacKenzie that he had not authorised this holiday. Jonathan Marshall's telephone conversation on 9 May 2017 did nothing to help the situation, largely because he was getting conflicting accounts of what Hanif Master had or had not done. The claimant, at that time, was thus in the position that his, by then, imminent holiday was at risk, or his employment may be if he took it.

20. That would of itself be a serious, and potentially fatal breach of the relationship of trust and confidence. It may, however, have been capable of repair even at that stage, but there then occurred another, far more serious matter. The respondent, in the email of 11 May 2017 from Jonathan Marshall sent the claimant a document which appeared to have his signature upon it, which it is now accepted, it does not. The effect of such an action, however, must be considered in context, and at the time. The claimant, who had a history of not signing company documents, and was known to be deeply wary of any change to his terms and conditions of employment, was then sent a document whereby it was to appear, in the context of his grievance, that he had, after all, signed a new Statement of terms and conditions of employment, which would include acceptance of a handbook with provisions about holiday arrangements which would undermine his grievance. Whilst sympathetic to Scott Mackenzie, and Jonathan Marshall, who merely provided this document to the claimant in all innocence that it was a forgery, the respondent, as an employer, must be judged by the likely effect of such an action upon the relationship of trust and confidence. Whilst Mr Warnes suggested that this was not a final straw case, it is perhaps a "two straw" case. It may be, for instance, that to have provided this forged document in the course of the claimant's employment, when there was no grievance in progress, would have been less serious. Providing it in these circumstances, however, can only, when objectively viewed, have given rise to

the reasonable apprehension on the part of the claimant that this would be used to his detriment in the forthcoming meeting, and determination of his grievance.

21. The tribunal is accordingly satisfied that the respondent did indeed, in these two aspects, conduct itself in such a manner that as was likely to destroy or seriously damage the relationship of trust and confidence. The tribunal has considerable sympathy for Scott Mackenzie and Jonathan Marshall, both of whom impressed the tribunal as fair men, trying to deal fairly with difficult issues. The damage, however, was done, in part by Hanif Master in September 2016, and February 2017, and in bigger part, by whichever unknown employee appended the claimant's forged signature to a Statement of Main Terms of Employment.

22. It is unfortunate that the fact that the claimant would actually be allowed to take the disputed holiday as the likely outcome of the grievance was not conveyed to him before he resigned, or even very shortly after he did. His decision, however, had already been made, clearly, as the letter had been written before the grievance meeting. Understandable as it was for Jonathan Marshall to want to take advice before making, or conveying his decision, the fact is that the damage done by the forged Statement was such that even if the holiday issue could have been resolved in that meeting, the tribunal doubts the relationship could have been repaired at that stage. Whilst the issue as to the taking of the holiday could be argued to have been an anticipatory breach, there was nothing anticipatory about the production of the forged document.

23. The claimant clearly, the tribunal is satisfied, resigned in response to the breach, and therefore succeeds in his claim that he was constructively dismissed. As no alternative plea that his dismissal was nonetheless fair has been raised (nor, frankly, could it be) it follows that his dismissal was unfair. Further, as he gave no notice, and was constructively dismissed, his dismissal would also be wrongful, although he has not claimed in respect of breach of contract for notice pay, but would be entitled to do so.

Conclusion and remedy.

24. The claimant is entitled to a remedy, but it was agreed that this would be considered at a further hearing if necessary. The tribunal's comments hereafter, therefore, are not findings, but are preliminary observations, intended to assist the parties in reaching an agreement as to remedy, or in narrowing the issues that the tribunal will be asked to determine in any remedy hearing. The claimant is clearly entitled to a basic award, which should be capable of agreement, there being no dispute that he was employed in total for 17 years.

25. In relation to the compensatory award, whilst the claimant has not expressly claimed notice pay, as he was constructively dismissed, he would also succeed in a claim for wrongful dismissal, and would be entitled to notice pay. The maximum statutory period of notice to which he was entitled would be 12 weeks, and this would overlap with the initial period of any loss of earnings award that the tribunal would be likely to make as part of the compensatory award. Thus, the claimant is likely on any view to be awarded the equivalent of notice pay for 12 weeks, less any appropriate deductions, whether by way of an award for notice pay, or the initial period of loss of earnings as part of the compensatory award.

26. Thereafter, however, the tribunal would be likely to require some persuasion that any losses after that period should be awarded. As the claimant himself acknowledged, the respondent would, after due period of notice, be entitled to enforce its holiday policy of no more than three weeks being taken at a time, and the claimant's evidence was that he would not have stayed in the job in those circumstances. Whilst there must be an element of speculation in that, the tribunal can see good arguments that it would not be just and equitable to award the claimant in respect of losses which extend for longer than the notice period.

27. Further, if the tribunal takes the view that the claimant's employment would have ended in any event because he would not have remained, an award for loss of statutory rights may not be appropriate. Should the claimant seek to recover loss of earnings for a longer period, he will have to bear in mind that whilst he alleges that his subsequent illness and incapacity for work is attributable to the respondent's constructive dismissal, he would need cogent medical evidence to show this, especially as the condition which prevented him seeking work for part of this period, sciatica, is a physical condition which would not, on the face of it, in the absence of medical evidence, appear at first blush to arise from his constructive dismissal. This is particularly so when the claimant was apparently suffering from this condition whilst on holiday in Israel, and consulted his GP about it on his return to the UK on 23 June 2017.

28. It is also noted that the claimant has sought an uplift for the alleged failure of the respondent to follow the ACAS code of practice. From his Schedule of Loss, however, he appears, with respect to him as an unrepresented party, to have misunderstood the basis upon which the tribunal would consider making such an award. He refers to the failure of the respondent to engage with the ACAS conciliator, or to respond to offers he made to settle his claims. That is, however, not a basis upon which the tribunal can make any uplift to the compensatory award under s.207A of TULR(C)A . Conversely, it would be the respondent who would be entitled to argue that in failing to allow the respondent to complete the grievance process, but resigning during a grievance hearing, the claimant had failed to comply with a relevant Code of Practice, and there should therefore be a reduction in any compensatory award (or damages for breach of contract, for the provisions apply to both types of claim) by up to 25%.

29. Whilst the tribunal has not yet heard any argument on such a proposition, its provisional view is that it would be inappropriate to make a maximum reduction when the claimant had at least instigated the grievance procedure, and had attended a meeting to pursue it. The tribunal does not propose to comment further at this stage, but the parties will doubtless appreciate the arguments for a reduction of less than 25%, but more than 0%.

30. It is therefore hoped that with these findings, and the above preliminary observations as to remedy, with the claimant perhaps being able to seek legal advice as to the appropriate level of remedy, the parties can resolve remedy without a further hearing. If, of course, they cannot, the tribunal will hold a further hearing. The parties are reminded that ACAS can conciliate in relation to remedy too, when there has been a hearing and a finding on liability, and the parties are encouraged to explore agreement of remedy. If this is not possible, they are to agree what elements they can, and inform the tribunal in accordance with the directions above as to whether a remedy hearing is necessary , and , if so, what

is to be determined.

The potential unlawful deductions from wages claim.

31. Finally, in his Schedule of Loss, but not in the claim form, the claimant sought to argue that he had suffered unlawful deductions from his wages in respect of the last two payments made to him by the respondent, both after his employment ended, on 26 May and 23 June 2017 (page 128 of the Bundle), where the hourly rate of £7.70 is used as the basis of his pay. This arises from the fact that in the preceding month, on 28 April 2017 (page 129 of the Bundle), he was paid at the rate of £8.00 per hour. The claimant alleged that his pay went up, and should have gone up, when the NMW was increased in April 2017. The respondent argued that this was not so, the one payment at the rate of £8.00 per hour was in error, which was corrected in the next two payments, and the claimant has not brought, and should not now be permitted to bring, a deduction from wages claim at this late stage in the proceedings. The respondent has not sought to recover the alleged overpayment made in April 2017.

32. The claimant was asked if he wished to seek to amend his claims to bring this additional claim. He was asked twice in the course of the hearing, and made no such application. The tribunal considers that no such claim is before it. If an application to amend were to be made, of course, it would be out of time, and given how late it was raised, and that no evidence was led, or questions asked of the respondent's witnesses on the issue, on the principles of **Selkent Bus Co. v Moore** any such application would have been unlikely to succeed.

Employment Judge Holmes

Dated : 29 December 2017:

RESERVED JUDGMENT SENT TO THE PARTIES ON

2 January 2018

FOR THE TRIBUNAL OFFICE

ANNEXE A

Employment Rights Act 1996**95 Circumstances in which an employee is dismissed**

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

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

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

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

98 General

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

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

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

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

(a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

(b) *relates to the conduct of the employee,*

(c) *is that the employee was redundant, or*

(d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

(3) *In subsection (2)(a)—*

(a) *'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

(b) 'qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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