EMPLOYMENT TRIBUNALS

Claimant: **Mr. P Heggs**

Respondent: **Direct Care Works Limited**

Heard at: **Leicester**

On: **4th, 5th and 6th June 2018**

Before: **Employment Judge Heap**

Members: **Mrs. C Hatcliff**
Mr. A Wood

Representatives

Claimant: **Mr. Bidnell-Edwards - Counsel**
Respondent: **Mr. C Johnson - Consultant**

RESERVED JUDGMENT

1. The claim of constructive unfair dismissal fails and is dismissed.

2. The complaint of indirect disability discrimination is dismissed on withdrawal by the Claimant.

3. The Tribunal has no jurisdiction to entertain the complaint of a failure to inform and consult contrary to Regulations 13 and 14 Transfer of Undertakings (Protection of Employment) Regulations 2006 on the basis that it has been presented outside the appropriate statutory time limits and it was reasonably practicable for the complaint to have been presented in time.

4. The claim of a failure to make reasonable adjustments fails and is dismissed.

5. The complaint of unauthorised deductions from wages fails and is dismissed.

6. The complaint of unpaid holiday pay fails and is dismissed.

REASONS

BACKGROUND AND THE ISSUES

1. This is a claim brought by Mr. Phillip Heggs (hereinafter referred to as "The Claimant") against his now former employer, Direct Care Works Limited (hereinafter referred to as "The Respondent").

2. The Claimant presented his claim by way of an ET1 Claim Form which was received by the Employment Tribunal Service on 14th July 2017. That presentation followed the Claimant having entered into ACAS Early Conciliation on 19th May 2017. The complaints pursued by the Claimant at the stage of presentation of that Claim Form were of constructive unfair dismissal; discrimination relying on the protected characteristic of disability in respect of both indirect discrimination and a failure to make reasonable adjustments; a complaint of a failure to inform and consult contrary to Regulations 13 and 14 of the Transfer of Undertakings (Protection of Employment) Regulations 2006; a complaint in relation to unauthorised deductions from wages and for unpaid holiday pay. The Claimant also complained of a failure to provide an updated statement of main terms and conditions of employment and Mr. Bidnell-Edwards confirmed that that complaint was essentially parasitic on one or more of the other complaints succeeding on the basis that the Claimant sought an adjustment to any compensation Ordered to be paid under the provisions of Section 38 Employment Act 2002.

3. It should be noted that insofar as the constructive unfair dismissal was concerned, the Claimant contended that that dismissal was automatically unfair on account of it being said that it was in connection with a transfer of undertakings pursuant to the Transfer of Undertakings (Protection of Employment Regulations) 2006 ("TUPE") or, in the alternative, that it was unfair contrary to Sections 94 and 95 Employment Rights Act 1996.

4. The Claimant's claims were, and indeed still are, resisted in their entirety by the Respondent by way of an ET3 Response submitted and received by the Employment Tribunal on 15th August 2017.

5. Following submission of that ET3 Response. the claim came before Employment Judge Clark at a Preliminary hearing for the purposes of case management. That hearing took place on 12th September 2017. At that hearing Employment Judge Clark set out the complaints raised by the Claimant as they were understood to be at that time (see page 36 to 41 of the hearing bundle). At that hearing the Claimant was ordered to provide further information in respect of both the TUPE transfer that he alleged had taken place and also in respect of the monetary claims regarding unauthorised deductions from wages and unpaid holiday pay.

6. The Claimant provided that further information on 3rd October 2017 (see pages 24 to 26 of the hearing bundle). The parties agreed at the outset of the hearing that the issues to be determined in the claim were those set out in Employment Judge Clark's previous Case Management Order. However, there were two issues of note which arose during the course of the hearing in respect of which we had to make observations or determinations. The first of those matters related to the fact that it was clear that the claim for a failure to inform and consult had been presented outside the relevant statutory time limit

contained in Regulation 15(12) TUPE. The effect of that was that we observed to Mr. Bidnell-Edwards at the outset of the hearing that the Claimant would therefore need to persuade the Tribunal that it was not reasonably practicable for that claim to have been presented in time and that it was presented within a reasonable period after the expiration of that time limit. We raised that issue given that the Claimant's witness evidence in relation to that matter was entirely silent.

7. Having discussed with the parties that the burden would be upon the Claimant to establish that the Tribunal had jurisdiction to entertain that complaint, the matter was dealt with by way of agreement with the parties for Mr. Bidnell-Edwards to ask supplemental questions of the Claimant. Mr. Johnson did not object to that course.

8. The second issue that arose was that during the course of the second day of the hearing, and following the close of the Claimant's evidence, Mr. Bidnell-Edwards made an application to amend the claim to alter the landscape of the indirect discrimination complaint. Mr. Johnson objected to the application on behalf of the Respondent.

9. We refused that application with reasons given orally at the time. Neither party has asked us to embody those reasons within this Judgment and therefore we say no more about that matter save as to observe that following our refusal of the application Mr. Bidnell-Edwards, acting on the Claimant's instructions, withdrew the complaint of indirect discrimination which had previously been advanced. That complaint did not therefore remain a live claim before us and it is not something which we have had to deal with in the context of these proceedings.

10. It should be noted here that although the Respondent had previously disputed that the Claimant was a disabled person within the meaning of Section 6 Equality Act 2010 ("EQA 2010"), by the time that the claim came before us for hearing that matter was conceded both in respect of depression and cancer; those being the conditions relied upon by the Claimant for the purpose of the discrimination complaints. We also observe that whilst the Respondent had previously taken a point as to knowledge of disability, given the content of the witness evidence produced by Ms. Korotko on behalf of the Respondent, Mr. Johnson sensibly conceded the knowledge point and it was not taken further.

THE HEARING

11. During the course of the hearing, we heard evidence from the Claimant himself and from Fiona McLeod on his behalf. Ms McLeod was the former owner of the Respondent business and had, for the majority of the Claimant's employment, been engaged in a management capacity and had been his direct line manager. That included for a period of time after she had sold her stake in the Respondent business.

12. On behalf of the Respondent we heard evidence from Vena Mhaka, the owner and Managing Director of the Respondent; from Gary McCarthy the Respondent's former Business Development Manager and from Anna Korotko, the Respondent's Office Manager.

13. We make our observations in relation to matters of credibility in relation to the

witnesses from whom we have heard below.

14. In addition to the witness evidence that we have heard we have also paid careful reference to the documentation to which we have been taken to during the course of the proceedings and which includes a hearing bundle running to just over 130 pages. We have similarly paid careful reference to the helpful oral submissions made by both Mr. Bidnell-Edwards on behalf of the Claimant and Mr. Johnson on behalf of the Respondent.

15. It should be noted that there was an unfortunate delay in this Reserved Judgment being promulgated following the hearing. The parties will be aware from correspondence sent after the hearing so as to keep them informed, that whilst the Judgment was dictated within a short time after the Tribunal concluded our deliberations, there was an unfortunate delay in the typing of the same with the result that this Judgment was not returned to be considered by the Judge until 12th October 2018. Thereafter, there was a delay in fairing up the Judgment as a result of judicial and other commitments and a period of leave taken. The patience of the parties in respect of the delay has been much appreciated and they can be assured that the Judge has paid careful regard when fairing up the Judgment to her notes of evidence, notes of deliberations on 6th June 2018; the witness statements and the documents adduced by the parties. Whilst the delay is both unfortunate and regrettable, that has not affected the findings or conclusions reached within this Reserved Judgment.

CREDIBILITY

16. One issue that has invariably informed our findings of fact in respect of the complaints before us is the matter of credibility and we therefore will say a word about that matter now. We begin with the Claimant. On the whole we were not impressed with the Claimant as a witness. We considered him to be somewhat evasive, vague on key events such as when he had instructed solicitors and for his evidence on occasions to bear the hallmarks of exaggeration. We therefore viewed the evidence that he gave to us against that backdrop.

17. We considered the evidence of Ms. McLeod to be helpful and of assistance in understanding the various arrangements surrounding payments made for travel and expenses. Although she had had a parting of the ways with the Respondent and clearly had a close professional relationship with the Claimant, we considered the majority of her evidence to be objective and factual we did not take the view that this was given with any axe to grind. We therefore considered her a credible and helpful witness.

18. We also found the Respondents witnesses to be largely consistent and credible. Mr. McCarthy, for example, was prepared to make concessions where appropriate that certain matters could perhaps have been dealt with somewhat better.

19. Similarly, Mrs. Mhaka despite a considerable amount of somewhat repetitive and forceful questioning remained consistent in her evidence and we were satisfied that she directly answered the questions which were put to her, contrary to the suggestion made on behalf of the Claimant. We were equally impressed with Ms. Korotko. She was consistent in her evidence before the Tribunal with both the content of her witness statement and the information which appeared in the contemporaneous documents before us. We were

satisfied that her approach, both at the hearing and also during the course of the Claimant's employment, was one which was indicative of a desire to assist and resolve the issues. We did not have cause to doubt the account that she gave to us.

THE LAW

20. Before turning to our findings of fact we remind ourselves of the law which we are required to apply to each of those facts as we have found them to be.

Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE" or "TUPE 2006")

21. The question of whether there has been a relevant transfer under TUPE is provided for by Regulation 3 TUPE 2006, the pertinent parts of which provide as follows:

> ***"A relevant transfer***
>
> *These Regulations apply to—*
>
> *(a)a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;*
>
> *(b)a service provision change, that is a situation in which—*
>
> *(i)activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");*
>
> *(ii)activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or*
>
> *(iii)activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,*
>
> *and in which the conditions set out in paragraph (3) are satisfied.*
>
> *(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*

22. Regulation 7 TUPE 2006 deals with the question of dismissals (including constructive dismissals) which are in connection with a transfer and provides as follows:

> ***"Dismissal of employee because of relevant transfer***
>
> *Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—*
>
> *(a)the transfer itself; or*

(b)a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce."

23. The duty to inform and consult in respect of a TUPE transfer is contained within Regulations 13 and 14 TUPE 2006. Regulation 15(12) deals with the period in which such complaints must be presented to an Employment Tribunal and provides as follows:

"An employment tribunal shall not consider a complaint under paragraph (1) or (10) unless it is presented to the tribunal before the end of the period of three months beginning with—

(a)in respect of a complaint under paragraph (1), the date on which the relevant transfer is completed; or

(b)in respect of a complaint under paragraph (10), the date of the tribunal's order under paragraph (7) or (8),

or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months."

24. If a complaint is presented outside the time limit provided for by Regulation 15(12) TUPE 2006, the Tribunal will have no jurisdiction to entertain it unless it is satisfied that it was "not reasonably" practicable – or to put it another way not reasonably feasible - for a complaint to be presented in time. The burden is upon a Claimant to satisfy the Tribunal on that question and it is a high hurdle to meet. An extension of time will always be the exception and not the rule. If a Claimant can satisfy the Tribunal that there was something either physically or mentally impeding the complaint being presented in time – and thus it was not reasonably practicable to present it within the appropriate statutory time limit – that is still not the end of the matter and that Claimant must also go on to persuade the Tribunal that the claim was thereafter presented within a reasonable period after the normal time limit expired.

Constructive unfair dismissal

25. The right not to be unfairly dismissed in contained within Section 94 Employment Rights Act 1996 ("ERA 1996"). A dismissal in this context includes a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer's conduct – namely a constructive dismissal situation (see Section 95 ERA 1996).

26. An employee will be rendered constructively dismissed in circumstances where there has been a fundamental breach of their contract of employment by the employer to which they resign in response.

27. A breach need not be an express breach of the employment contract; it may be an implied breach, such as a breach of the implied term of mutual trust and confidence. If a Tribunal finds such a breach of trust and confidence to have occurred, then this will almost always constitute a fundamental breach of contract.

28. Tribunals take guidance in relation to issues of constructive dismissal from the leading case of **Western Excavating – v – Sharp [1978] IRLR 27 CA** and we note in this regard as follows:-

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

29. There is an implied term 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 trust and confidence between the employer and the employee. Breach of that implied term, if established, will inevitably be repudiatory by its very nature.

30. The conduct that is relied on as a breach of the term may consist of a series of acts, some of which may be trivial and which can be looked at as a whole. In cases where a Claimant relies on a "final straw", that act itself does not have to be a fundamental breach or even a breach of contract but it must be a more than minor or trivial occurrence.

31. The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the Respondent employer's conduct on a Claimant employee are only relevant in so far as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.

32. If there is a fundamental breach of contract, an employee must, however, resign in response to it. That requirement includes there being no extraneous reasons for the resignation, such as them having left to take up another position elsewhere or any other such reason if that is unrelated to the breach relied upon.

33. However, if the repudiatory breach was part of the cause of the resignation, then that suffices. There is no requirement of sole causation or predominant effect; **Nottinghamshire County Council v Meikle [2004] IRLR 703**.

34. It is possible for an employee to waive (or acquiesce to) an employer's breach of contract by their actions, including by delay in tendering their resignation and leaving employment. In those circumstances, an employee will affirm the contract and will be unable to rely upon any breach which may have been perpetrated by the employer in seeking to argue that they have been constructively dismissed.

35. The onus is upon the employee to establish the essential elements of a complaint of constructive dismissal.

Failure to make reasonable adjustments

36. The duty to make reasonable adjustments arises in the circumstances set out in Section 20 Equality Act 2010 ("EqA 2010"), the relevant parts of which provide that:

> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2)The duty comprises the following three requirements.*
>
> *(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(4)The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*

37. Section 21 EQA 2010 provides that:

> *(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
>
> *(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*
>
> *(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2);*
>
> *(4)A failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."*

38. It will therefore amount to discrimination for an employer to fail to comply with a duty to make reasonable adjustments imposed upon them in relation to that disabled person (paragraph 6.4 of The EHRC Code).

39. However, the duty to make reasonable adjustments will only arise where a

disabled person is placed at a substantial disadvantage by:

- An employer's provision, criterion or practice ("PCP").
- A physical feature of the employer's premises.
- An employer's failure to provide an auxiliary aid.

40. Where the claim relates to a PCP, this "should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions" imposed by the employer (paragraph 6.10 of The EHRC Code as referred to below).

41. Matters resulting from ineptitude or oversight on the part of the employer will not, however, amount to a PCP (see ***Newcastle Upon Tyne Hospitals NHS Foundation Trust v Bagley UK EAT 0417/11***).

42. The duty to make reasonable adjustments only arises insofar as an employer is required to take such steps as it is reasonable to take in order to avoid the substantial disadvantage to the disabled person. A Tribunal is required to take into account matters such as whether the adjustment would have ameliorated the disabled person's disadvantage, the cost of the adjustment in the light of the employer's financial resources, and the disruption that the adjustment would have had on the employer's activities.

The EHRC Code

43. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The EHRC Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

Unauthorised deductions from wages – Section 13 ERA 1996

44. Section 13 ERA 1996 provides for protection of the wages of a worker as follows:

> ***"Right not to suffer unauthorised deductions.***
>
> *(1)An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
>
> *(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
>
> *(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined*

effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

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

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

FINDINGS OF FACT

45. We should observe that we have confined our findings of fact to those matters which are relevant in order to make a proper determination of the remaining complaints before us. We have not therefore dealt with each and every point in dispute between the parties if those matters are not necessary for that proper determination.

Commencement of employment and the business of the Respondent

46. The Claimant commenced employment with the Respondent in December 2012 as a Support Worker.

47. The nature of the business of the Respondent is the provision of social inclusion services to vulnerable members of the community. The nature of those activities is to visit, spend time with and support service users in their own homes or to take them out and include them in activity or trips outside their home environment. On those occasions where the activities or trips are outside the house, service users would be transported by support workers such as the Claimant in their own vehicles.

48. The Claimant was provided with a contract of employment setting out the main terms and conditions of his employment on 1st August 2013 (see pages 43 to 455 of the hearing bundle). At that time, the Respondent Company was owned and managed by Fiona McLeod, who was at all material times with which we are concerned the Claimant's direct line manager. There is no question that the Claimant and Ms. McLeod had a very good working

relationship and it is clear that she was, and continues to be, very supportive of him.

49. The main provisions of the Claimant's contract of employment with which we are concerned read as follows:

> *"**Contracted hours***
>
> *Your contracted hours will be for 18 hours per week. This means that we will guarantee to pay you for 18 hours. We recognise there may be some weeks when your hours fall below this; we will still pay a minimum of 18 hours unless we have offered you hours that you have declined without reasonable cause.*
>
> *There will be occasions when you will work in excess of 18 per week. You will of course be paid the going rate for all hours worked.*
>
> ***Pay***
>
> *Your pay will be £7.50 per hour[1].*
>
> *You will be paid on the last Friday of each month by BACS.*
>
> *In addition you will be paid any expenses incurred as a result of approved work or travel undertaken for Direct Care Works. Details, including receipts, should be submitted in writing.*
>
> ***Hours of Work***
>
> *Your working hours will be arranged on a weekly basis.*
>
> *We provide a service that covers seven days per week, including bank holidays. The working day is from 7.00 AM until 10.00 PM. There is an expectation that you will be available to cover a variety of shifts over this period. You are also expected to cover alternate weekends.*
>
> ***Holidays***
>
> *Your annual leave entitlement will be calculated at a rate of 12.07% of the number of hours you have worked. This will be calculated after you have worked 12 weeks and backdated to your start date. You will be unable to take paid leave before this time[2].*
>
> ***Training and Development***
>
> *Direct Care Works maintains a positive policy of training and development for their staff. You will be encouraged to discuss your appropriate training needs with your immediate supervisor or at your appraisal.*

[1] This was a reference to the Claimant's rate of pay at the time that his contract of employment was issued. It is common ground that his rate of pay later increased and at the time that his employment terminated he was remunerated in the sum of £8.50 per hour.

[2] We would observe that the requirement to have worked 12 weeks before being entitled to holiday pay is not now reflective of the Working Time Regulations 1998 and has not been for some considerable time – and well before the contract of employment was issued – but that is an observation only and it is not a matter that concerns us in the context of this claim.

On occasions you will be expected to participate in courses appropriate to and approved by Direct Care Works."

50. The Claimant signed his acceptance of those terms on 22nd August 2013 (see page 45 of the hearing bundle).

51. The Claimant's contract of employment did not make reference to a grievance policy or procedure or provide any other indication of how work related concerns were to be addressed by the Respondent. Whilst there is a Complaints Policy operated the Respondent, a copy of which appears in the hearing bundle before us at pages 46 to 47, it appears to us, as we observed to the parties at the outset, that that is applicable to complaints from service users and does not assist with resolution of grievances or concerns from employees. Neither Mr Johnson who appeared on behalf of the Respondent nor any of the witnesses from whom we heard on their behalf were able to assist us as to whether there was any other policy or grievance procedure applicable to complaints made by members of staff. We must therefore conclude that there is no applicable policy in place. That is a matter which we find somewhat surprising given the duty on an employer to provide a form or course of redress in respect of grievances in the workplace.

Allocation of shifts

52. As we understand matters, shifts are allocated to support workers based upon availability that they themselves provide to the Respondent. They are asked in this regard, as we understand it on a monthly basis, for availability to undertake shifts. That availability was generally provided by e-mail and the Claimant on a number of occasions specified that he did not wish to work weekends. He also specified dates when, quite understandably, he was unable to attend for shifts because he had appointments with his oncologist or for other medical treatment.

53. It appears to us from the evidence before us that those requests were always accommodated by the Respondent, as indeed they should have been, and the Claimant does not suggest to the contrary. Indeed, his evidence was that Anna Korotko, who was at all material times the Respondent's Planner, accommodated the patterns that the Claimant wanted to work and he was never asked, for example, to work on a weekend despite the indication in his contract of employment that that would be expected.

54. In 2014 Ms. McLeod sold her shares in the Respondent Company to David and Carin Davies. However, Ms McLeod was retained in a senior management capacity as part of the share sale agreement and continued to line manage the Claimant.

55. On 30th November 2015, the Claimant wrote to Carin Davies by e-mail indicating that his financial circumstances meant that he needed to undertake more hours of work and he asked in this regard for at least 20 hours of work per week to be allocated to him. Carin Davies indicated that she would review the situation accordingly. It appears that following that review there was an increase in the Claimant's hours (although we do not have all of his time sheets to assist us on this point) but there is nothing before us to suggest that that was a formal agreement to amend the Claimant's terms and conditions of employment.

56. On 11th December 2015 David Davies sent out an All Staff Memo which read as follows:

> *"Re hourly employment contracts.*
>
> *I would just like to clarify your contracts of employment as there has been some confusion for a few of you.*
>
> *Contracts that specify guaranteed hours "hourly contract"*
>
> *Anyone who has a contract for a specified amount of hours must make themselves available for work, for 5 days a week and alternate weekends, unless we have a prior agreement with you.*
>
> *Where you request "unavailability" including annual leave these are "requests" and must be approved by the Planner who will then confirm your requests. However, if we cannot, you are obliged to work in order to meet your contractual obligation. If you refuse then you are in breach of your contract and it becomes void.*
>
> *Most of the time with some careful planning we have been able to accommodate your requests.*
>
> *If your availability changes we are happy to re-negotiate your contract in order to accommodate the change. This may mean a reduction in your hourly contract.*
>
> *Covering calls due to sickness or absence*
>
> *Recently on two or three occasions we have requested cover when people have been absent due to sickness and the requests have been refused. Your contract does stipulate that you are expected to cover for sickness or absence.*
>
> *I would also like to clarify some practises of asking another member of staff to cover your shifts, any change of staff or times of calls etc must be requested with the Planner prior to the change. If you ask another member of staff to cover your weekend and the Planner has approved this, then that person must be available to cover any additional calls that arise from other staff absence, it will also mean that you will work two weekends in a row, so please bear this in mind when agreeing to the request.*
>
> *Direct Care Works supplies support to vulnerable adults for 15 hours each day, 7 days a week so we do have to ensure that we meet our clients' needs and of course this will mean that we have to cover additional calls unexpectedly. Your continued support is important to us and without this we could not deliver a quality service."*

57. The Claimant did not object to the terms or tone of the email but replied to say that with the exception of weekends and for medical appointments he would always be available to help and provide stand in cover.

58. In addition to the references already set out above, there are also a number of other occasions where the Claimant referred to an agreement that he

would not have to work weekends or that he was not providing availability for weekends (see for example pages 55, 67 and 70 of the hearing bundle).

59. On 29th February 2016 Carin Davies noted to the support workers at the Respondent Company, including the Claimant, that there may be a need to ask them to pick up additional shifts as a result of staff shortages. The Claimant replied that he was more than happy with the 25 hours that he now worked and that, apart from weekends, he was more than willing to help out with any emergencies or shortfalls that may occur in the short term.

60. It is evident that, at that stage at least, the Claimant was satisfied with the arrangements for the allocation of shifts and the hours that he was working.

61. However, again we have not seen anything that suggests that there had been any formal variation to the Claimant's terms and conditions of employment to increase his hours to a minimum of 25 hours per week. It was clear from the Claimant's contract of employment that 18 hours per week were guaranteed (subject to the caveat that hours were not unreasonably refused) and it was logical that support workers may therefore work more hours than that depending on the availability of work and their own availability. There was therefore no need at this or indeed at any other time to update the Claimant's contract of employment.

Share sale to Vena Mhaka

62. On 1st September 2016, Mrs. Vena Mhaka acquired the whole of the shares in the Respondent Company by way of a share sale from David and Carin Davies.

63. Whilst there was no formal consultation with the staff in relation to that acquisition (on the basis that the advice that had been received by Mrs. Mhaka at that time was that TUPE did not apply to a share sale and therefore there was no duty to inform and consult) we are satisfied that there were staff meetings, which included the Claimant, at which the change of ownership of the Respondent business was discussed and the Claimant and others were therefore informed that Mrs. Mhaka had now purchased the entire share capital of the Respondent.

64. We are satisfied from the evidence before us that neither the Claimant nor the workforce generally were kept in the dark about the situation. Particularly, we are satisfied from the evidence of the Respondent that there was a staff meeting on 16th November 2016 where the staff were advised about the change in ownership of the Respondent and a further meeting on 30th November 2016. There was, on the Claimant's own account, a further staff meeting in December 2016 at which such issues were also discussed (see paragraph 28 of the ET1 Claim Form and paragraph 5 of the Claimant's witness statement).

65. Like the position with Ms. McLeod following the 2014 share sale, David and Carin Davies remained in post at the Respondent Company as part of the Share Sale Agreement in a senior management capacity until approximately January 2017. That was in order to facilitate a smooth transition following the share sale.

66. During that time Ms. McLeod also remained an employee of the

Respondents, again in a relatively senior management capacity, and she continued at that stage to be the Claimant's line manager. She continued in employment in a management capacity until approximately 4th January 2017 when she resigned.

First Choice Care Agency Limited

67. In addition to her ownership of the share capital of the Respondent, Mrs. Mhaka is also the owner and Managing Director of First Choice Care Agency Limited ("First Choice"). Although that Company also specialises in the field of care, we are satisfied that that is a distinct entity from the Respondent in terms of the type of services that it provides and the service users that it assists.

68. In this regard, First Choice provides domiciliary care for the service users that it supports. Whilst that care is provided within their own homes, the nature of the support provided relates to assistance with personal care or household tasks. The service is therefore distinct and of a different type to the activity or companion social inclusion activities which the Respondent specialises in. The two services therefore perhaps complement each other, but the service user base is markedly different as is the way in which services for service users is performed. We should also observe in this regard that the Respondent provides services both to private service users and also those whose service provision is funded by the Local Authority but the same is not so for First Choice. Given that the services provided by the Respondent and First Choice differed in the manner described above, there was not any cross over with regard to the workforce of each entity and, for example, First Choice workers did not work for or provide cover for the Respondent nor vice versa.

69. Equally, unlike the support workers employed by the Respondent, we accept that First Choice employees were engaged on zero hours contracts and that they did not have any expenses claiming system for mileage and travel as they instead utilised company vehicles to travel to and from the service users that they assisted.

70. However, after Mrs. Mhaka purchased her shareholding in the Respondent she did determine that the offices of both First Choice and the Respondent should be one and the same. We accept her evidence that she took that decision for financial reasons because at that stage First Choice and the Respondent were both renting separate costly office spaces with the associated overheads such as heating, electricity and the like. Mrs. Mhaka took the view that if both the Respondent and First Choice were housed in the same office accommodation, that would decrease the running costs to both companies of both rent and the associated overheads. In a sector such as the care industry, we can see why the saving of costs was an important issue and why Mrs. Mhaka took the decision in that regard.

71. Following the decision to house First Choice and the Respondent in the same office premises, both companies moved into a single new office building which had housed neither of them previously. That decision was not one that would have had a marked effect on the majority of the workforce of either First Choice or the Respondent as there was no requirement for regular office visits by staff given the nature of their work. In this regard, the Claimant and the other support workers employed by the Respondent and by

First Choice worked remotely and rarely needed to visit the offices.

72. Despite the housing of both First Choice and the Respondent under one roof, we accept that they continued to operate as separate entities undertaking the different types of care work to which we have already referred. There was no cross over in relation to staff or duties, save as for the fact that Ms. Korotko, who worked as the Office Planner and Office Manager, and Mr. McCarthy who was employed as the Business Development Manager, had a role in both organisations and, of course, Mrs. Mhaka was the Managing Director and owner of both companies. Again, the cross over for Ms. Korotko and Mr. McCarthy was one of convenience and cost. Ms. Korotko had worked solely for the Respondent as Planner previously and had been responsible for assisting with the allocation of shifts to support workers, including the Claimant.

73. On 6th December 2016, the Claimant and other support workers from the Respondent were invited to an open office Christmas meet and greet at which employees from First Choice would also be present. That arrangement was said to be so that the support workers from the Respondent could meet and catch up with the team from First Choice. However, that was, it appears to us, a social occasion only and the work of the two entities continued to remain distinct both in terms of having separate teams of support workers and those workers undertaking very different types of care for different service users.

<u>December 2016 appraisal</u>

74. On 6th December 2016 the Claimant had an appraisal with Ms. McLeod in her capacity as his line manager. During the appraisal the Claimant and Ms. McLeod discussed a number of the service users that the Claimant was supporting at that time and it is clear from the appraisal documentation which we have seen during the course of the hearing that at that time the Claimant was supporting service users in Loughborough, Countesthorpe, Birstall and Market Harborough (see pages 72, 73 and 74 of the hearing bundle). He was therefore travelling not inconsiderable distances from his home in Wigston, Leicestershire. No reference was made by the Claimant at that time about any difficulties in respect of such travel, despite, as set out below, one other topic of conversation also being the Claimant's health and the question of any required adjustments. We are satisfied that those sorts of distances of travel were typical of the locations that the Claimant would travel to throughout his employment in order to assist service users. He expressed no difficulty at that time, or indeed as we can see it at any other, about not being able to travel such distances because it caused him fatigue.

75. In addition to discussion about specific service users, the Claimant's wellbeing was also discussed with the Claimant being asked to keep the Respondent informed in relation to his health and any adjustments needed to support him in work.

76. General employment issues were also discussed at the appraisal. The only matter raised by the Claimant at that time was in relation to his annual leave and whether there might be a payment in lieu if all annual leave could not be taken prior to the end of the leave year.

Financial review

77. In or around December 2016, Mrs. Mhaka began to have concerns about the financial viability of the Respondent. Those concerns came to pass after she had spent some time after the share sale reviewing the way in which the Respondent operated. Whilst we would observe that it might be somewhat unusual that such matters had not already been considered via the due diligence process before the share sale, we nevertheless accepted her evidence that it was only around December 2016 that she began to have concerns about the Respondent's financial viability.

78. In addition to having taken the step of housing both the Respondent and First Choice under one roof so as to cut costs, Mrs. Mhaka also took steps to look at the position in relation to expenses which were being claimed by support workers within the Respondent Company. We accepted her evidence that she had concerns that considerable sums were being claimed in respect of expenses by some of the support workers, which appeared to her to be disproportionate to their rates of remuneration.

The "Expectations" Memorandum

79. At a similar time, Mr. McCarthy in his then capacity as Business Development Manager sent out a memorandum to all staff within the Respondent. That memorandum appears at page 76 to 79 of the hearing bundle. Although written in Mr. McCarthy's name, it was sent on the instruction of Mrs. Mhaka and was derived, with the exception of matters relating to travel expenses, from similar documentation that she had previously sent to employees of First Choice. We do not find that that was done from anything other than the convenience of using an existing template and it was not an attempt to seek to harmonise the terms and conditions of the Respondent and First Choice or to bring them in line with each other in some other way. It was simply the use of an existing template or precedent document.

80. This document sought to set out the expectations of the Respondent in respect of its employees. Given that this document is a serious bone of contention in respect of these proceedings, it is necessary to set out the content in full. The memorandum said this:

"Direct Care Works Ltd. Expectations.

Direct Care Works Ltd. is a provider of domiciliary and supported living services for people that have chosen to stay in their own homes and be cared for in familiar surroundings. Our service users have chosen us to enable them to do this safely. You as a member of the care team will be able to make a difference in their lives by ensuring that we continue to provide a quality service whilst ensuring that safe standards are met and maintained always.

It is my responsibility to continue improving the service we provide, ensuring that the needs of our service users are met safely and efficiently. We do this by ensuring that all the staff are well trained and supported during their working day. Bad practice within the organisation will not be tolerated as our duty is to protect the rights of our service users that have chosen us to come into their homes.

Now that we have settled in our new offices, I would like to take this opportunity of setting out our expectations from you and to ensure that the work we do is transparent and clear. I think it is important that we make clear what our expectations of you are. These expectations are important to enable us to continue to have a good working relationship. Failure to adhere to these expectations will lead to disciplinary action and which may result in a termination of our working relationship. In other words, if our expectations of you are below a satisfactory standard and you have not taken on board any support to enable you to work safely, you may be liable to a disciplinary which ultimately lead to you losing your job.

Our expectations of you:

1. *To arrive to your call within the call times. If you are going to be 10 minutes late (outside the call time), you will need to ring the office so that we can inform the service user that you will be late.* ***Under no circumstances*** *are you to contact the service user direct unless you have been instructed to do so by the office or on call.*

2. *To spend the whole of the allocated time with the service user. Remember to write time of arrival and time of departure clearly in the daily log. If the service user asks you to leave early, please ring (not text) the office before you leave the service users home. If you must leave early by choice, then ensure that you log the exact time you leave in the daily log. You will only be paid for the actual time worked rather than the allocated time.*

3. *To make sure you complete fully all the records before you leave. Always ensure that you complete the ongoing service users records accurately, with all the information of tasks carried out, tasks not carried out and the reason why they were not carried out.*

4. *Emergency cancellation of calls should be made by you (i.e. telephone) and not via text or email.*

5. *To communicate with the office at all times on 0116 2629332 if you have any issues, questions or advice.*

6. *To work across the day, 7 days a week to enable the needs of our service users to be met safely with a full complement of staffing levels. Unreasonable expectations from you not to work weekends or evenings will no longer be tolerated. Your working hours per week will be honoured and the rota produced to reflect theses* [sic] *hours, considering the needs of our service users.*

7. *Out of pocket expenses will need to be approved by the senior management before payment is authorised, all expenses will need to be proved by a receipt that needs to be attached to the "out of pocket expenses form", (copy attached) and sent into the office. The amount of out of pocket expenses are as follows:*

   Coffee out with client £5.00
   Lunch/Dinner with client £10
   All other expenses need to be authorised by the senior

management first. ***No receipt no payment****.*

8. *All travel expenses will need to be submitted on the correct form which can be collected from the office (copy attached to this document). Travel expenses will be paid as set out below:*

   First hour travel will be paid up until the end of the contract with the client whose budget we manage. Following this, we will no longer be able to claim this money from the client.

   Using own vehicle to take client out will be paid at 0.45p per mile. Travel between calls/clients will be paid at 0.25p per mile.

9. *Unacceptable levels of absence will be investigated, and the consequence of which may result in disciplinary action. After any period of sickness, a return to work interview will be held in the office before you can commence working with clients. You will be expected to make yourself available for your return to work interview before you return to work following a period of absentism [sic] due to sickness.*

10. *Your standard of work should be satisfactory, and if it is not and this is caused by your carelessness or neglect of duty, you will be subject to disciplinary warning and may likely result in you loosing* [sic] *your job.*

11. *Your standard of dress and appearance should be clean and practical for the job in hand.*

12. *Objectionable or insulting behaviour, bad language and bullying towards service users or other staff cannot and will not be tolerated. This will be viewed as gross misconduct and result in you loosing* [sic] *you job.*

13. *Health and Safety breaches will lead to disciplinary action being taken. Remember it is your responsibility to take reasonable care of your own Health and Safety and to report any concerns to the office immediately.*

14. *All reasonable instructions from managers or seniors should be obeyed and taken on board, Failure to do this will be insubordination and will likely lead to disciplinary.*

15. *Never accept "cash in hand" for any activities carried out for the service user and do not accept gifts or give gifts to service users. If in doubt, contact the office.*

This list is not exhaustive. Remember the success of Direct Care Works Ltd depends largely on you and therefore we look to you to play your part in allowing this to happen. If you meet these expectations, it means we are working together to safely meet the needs of those individuals that choose us to come into their homes. If you require further clarification on any point in this document, please contact me at the office Monday – Friday 9 am – 4 pm.

Regards Gary McCarthy

Thank you for your continued support."

81. That communication was perhaps not phrased in the most sensitive and positive way, a matter which Mr. McCarthy accepted in cross examination. However, in many ways it simply set out relatively common sense principles such as in relation to objectionable behaviour or health and safety breaches. It does not appear to us to be any more severe in tone or content to the communication sent by Mr. Davies of 11th December 2015 to which we have already referred. We certainly do not perceive the memorandum as being threatening, bullying or harassing as the Claimant suggests. An employer is entitled to set out their expectations of employees, including in reasonably strident terms, so that there can be no suggestion that employees are unaware of the standards of conduct that are required. The tone of the memorandum could perhaps have been better but there was nothing unreasonable about the content or any different to that which would be expected in a code of conduct or disciplinary policy. The memorandum was sent to all members of staff of the Respondent; the Claimant was not in any way singled out.

82. One issue that may on the face of it have potentially concerned the Claimant was the reference to weekend working at paragraph 6 of the memorandum. However, in reality we are satisfied that that was no different to the reference in Mr. Davies' email of 11th December 2015 on the same subject and the Claimant's evidence before us was that he knew, even after the Expectations Memorandum, that he would not have to work weekends because Ms. Korotko would continue arranging his shifts as she had always done, including after the email from Mr. Davies. That part of the Expectations Memorandum was therefore a matter that would not have affected the Claimant any more than the 11th December email had and we are satisfied from his evidence that the Claimant was aware of that position. Indeed, he never worked, nor was he asked to work, a weekend shift.

Travel payments

83. However, one effect of the Memorandum was to be changes to the way in which payments in respect of travel were to be made. The position in respect of such payments was rather convoluted but, as best as we understand it from the evidence before us, the position at the time was that the Claimant and his colleagues within the Respondent were entitled to claim travel expenses at 45 pence per mile to the first call of the day but only to a maximum of 6 miles, irrespective of the distance to that call. They would therefore receive expenses of £2.70 travel to the first call of the day. That particular limitation on the travel expenses to be claimed for the first call of the day (or as it has often been described in these proceedings, the first hour of travel) was one that was brought in by Mr. & Mrs. Davies when they owned the shareholding in the Respondent company.

84. The notification from the Respondent by way of Mr. McCarthy's Expectations Memorandum, and from later communications to which we have referred below, was to be to remove the expenses payment for travel to the first call of the day. However, that would only be the case for service users whose costs were funded by the Local Authority. It would not be the case for service users who funded their care provision privately (which encompassed around

25% of service users) and those expenses would continue to be charged by the Respondent and paid to the support workers who assisted them. The reason for that change was that the Local Authority was to cease to pay expenses for the first call of the day and therefore the Respondent could no longer charge the £2.70 to them to pass onto the support workers.

85. There would therefore be a change to the Claimant's ability to charge the £2.70 of expenses to attend the first call of the day. Oddly, we have no schedule or other documentation to assist with the actual impact that would have on the Claimant on a weekly basis. The Claimant's evidence was that that loss might occur on average four or five times per week although given his vague and somewhat changeable evidence on a number of issues, we have no way of knowing how accurate that assessment is and we treat it accordingly with some degree of caution. However, clearly it would have some financial impact on the Claimant.

86. The intention at the time of the Memorandum was for the change in respect of the first hour of travel to come into effect from the new tax year in April 2017 (see page 132 of the hearing bundle) and so the Claimant and other support workers were given approximately three months' notice of the changes to the expenses system for the first call of the day.

87. The second change was for travel expenses between calls to be paid at a rate of 25 pence per mile rather than at 45 pence per mile as had previously been the case. This, it appears to us, arose from the concerns of Mrs. Mhaka regarding the considerable amount that was being claimed in travel expenses. All travel which was transporting service users to and from activities remained at 45 pence per mile.

88. We have no schedule or reliable evidence as to what financial impact that change in the rate of travel expenses would have had upon the Claimant but we note, for example, that it would appear that two service users in particular who were supported by the Claimant did not reside more than a maximum of 15 minutes from each other according to his time sheets at page 110 of the hearing bundle. It would appear that travel between clients might in that regard be relatively limited and certainly we are satisfied that this would have been a planning issue that Ms. Korotko would have been able to consider with the support workers, including the Claimant.

89. We would observe that nothing within the Expectations Memorandum was such that it represented a change to the main terms and conditions of employment set out in the Claimant's contract of employment such that it was not necessary for any revisions or updating to be made to that document.

<u>Communications following the Expectations Memorandum</u>

90. On 7th February 2017 the Claimant emailed Anna Korotko, the Office Planner, indicating that he had been in contact with ACAS and with his own trade union who had informed him that as the Respondent now had a new owner all employees were subject to TUPE. The Claimant asked Ms. Korotko why that had not happened. We do not have a reply from Ms Korotko to that particular communication and we conclude that there was no response to it. That may well have been a simple oversight on her part given the diligence with which she otherwise sought to assist the Claimant.

91. The Claimant was already aware of TUPE from a situation in a previous employment and also trade union advice that he had received as we shall refer to further below.

92. On 23rd February 2017 there was a communication sent from Ms. Korotko on behalf of Mr. McCarthy regarding the first hour of travel issue which read as follows:

> *"Good afternoon*
>
> *This is to inform you that the first hour travel to the client will cease from Monday 27th February 2017. This is not a company decision but has come from local authority. The clients budgets can no longer sustain this. We are sorry for any inconvenience caused."*

93. We are satisfied from the evidence before us that the Local Authority had brought forward the changes in respect of the position on expenses for the first call of the day and had only notified the Respondent of that position shortly before Ms. Kototko's email to the Claimant and others. That was a departure from the notice of that change that had previously been given but it was something outside the control of the Respondent.

94. That communication was followed up by a further email from Ms. Korotko on 25th February 2017 regarding the first hour of travel which read as follows (see page 125 of the hearing bundle):

> *"Dear All*
>
> *I understand you very anxious about cut of 1st hour travel – we all are. Just to remind this decision has been passed to DCW[3] by social services, this is not DCW decision.* ***Also 1st hour cut has not being*** [sic] ***made for private clients****. You can still claim it for 1st hour travel if the client is private. This will be discussed with those clients in the future.*
>
> *This is unfortunate time of this decision as you just got your rotas for March therefore I will do my best to help you as much as I can to make it better for you.* ***Please let me know as soon as possible which visits you would like change*** *or any changes you would like to be made in your rotas. I can promise I will go through all your concerns and try to sort these out but I need your support as well in terms of covering unwanted calls which could suit your rota better. Also there might be some visits which I will not be able to change for this month but will be addressed in April.*
>
> *This situation is not beneficial to anyone therefore I will start planning for April earlier to have more time to make more changer* [sic] *to your rota in order to organise your work better. To make it happen I would like to ask what are you prepare* [sic] *to do. Obviously travelling under 5 miles will not be discussed but how far you willing to drive and how long for? (for example "I would drive 7 miles for at least 2 hours, 10 miles for at least 4 hours etc….)*
>
> *If we work together on this problem we will find acceptable solutions hopefully. I look forward to hear* [sic] *from you".*

[3] DCW is an abbreviation for Direct Care Works Ltd.

95. We are entirely satisfied that the intention of Ms. Kototko to seek to assist in reaching a solution, including by way of re-arranging shifts, was a genuine one and that she wanted to try to accommodate all support workers, including the Claimant, as best she could. Indeed, we accept that she had always done so for the Claimant and there was not any occasion when requests made of her in respect of planning had not been actioned in an acceptable way.
96. The Claimant replied to Ms. Korotko on 26th February 2017 indicating that he intended to work with two service users which would provide him with 8 hours of work and that he would also undertake "any other reasonable clients with travel in the call" and "any clients as per my contract if DCW cover my expenses". In short, we understand that to mean that the Claimant would cover any calls if he was paid for the first six miles of travel to the first call of the day and any calls where he was to be paid 45 pence per mile for travel. The Claimant did not otherwise engage with Ms. Korotko (other than to the limited extent referred to below) in relation to seeking to discuss and find shifts and service users that may provide an acceptable solution to the removal of the travel expenses for the first call of the day.

97. The Claimant also set out in his reply to Ms. Korotko that he was not able to work on the following Wednesday morning because he was meeting his friend who was a trade union representative (see page 89 of the hearing bundle). In this regard, at some time between December and February 2017 the Claimant had joined a trade union and was obtaining general advice from them about the circumstances relating to his employment. We understand from his evidence that this was not specific advice about matters prior to his joining the union as is not uncommon.

98. Ms. Korotko replied the following day (see page 90a of the hearing bundle), to attach a copy of the Claimant's rota. She also referred to a new client in Blaby and asked the Claimant if he was interested and willing to meet the client. The Claimant relied and asked for details to be forwarded. However, the introduction never came to fruition as the Claimant resigned on 24th March 2017 and so it was determined, in our view not unreasonably, that it would not be appropriate to introduce the Claimant to a new client given the short duration of his notice period as that would prove disruptive for the service user.

99. The Claimant thereafter wrote what might best be termed as a somewhat ill-advised email. We accept the evidence of the Respondent that that email was copied not only to individuals to whom it needed to be sent - such as Ms. Korotko - but also to Service Users who were the clients of the Respondent. That was both highly inappropriate and unprofessional given that the Claimant should not have involved Service Users in what were essentially internal grievances that he had with the Respondent. The content of the Claimant's email said this:

    "Hi Anna

    In reply to you [sic] *email it was stated in a different email (About two weeks ago) that 1st hour travel would be cancelled as renewal time came due which would make scence* [sic] *as the contracts would have been set up through the year! Then two weeks later it was stated in a email that all 1st hour travel would finish on Monday!!*

Will you please answer the following questions:

- *What changed in the two weeks? If the Leicestershire social sevices* [sic] *suddenly changed this why did they not do it after the end of the financial year April 5th 2017?*

- *If DCW knew changes were due why did DCW say in the email of two weeks ago that they might change at renewal?*

- *Why did DCW not pass any information onto employees from Leicestershire social Services.*

- *If you feel that this might be a breach of the data protection act I can make a [sic] application under the Freedom of Information Act 2000 to Leicester Social Services to support your claims as I am sure all DCW employees would be interested to see how many future changes might affect their Pay, expenses and employment! Please let me know if you wish me to sort this out to avoid any confusion!*

I see the normal tactics of fear:

"We are seeing providers closing offices or even stop trading and I don't want that to happen to us at Direct Care Works Ltd".

Someone else fault:

The care sector is changing. We are all working in a sector which has seen budgets being cut and providers being given more challenges with very little increase from local authority"

Sweetener:

"So for this reason, I am looking to form a staff consultative group (non paid meetings) to look at ways that we can build the business and take it forward, and we can only do this with you, If you would like to be part of this or nominate someone then please email me at directcareworks@hotmail.com. It would be a great opportunity for you to gain more experience."

Followed by the bad news on how DCW can maximise THEIR PROFITS at your TIME (Both free and paid) and EXPENCE [sic] *(Take Home Pay)*

I see that a more understand [sic] *attitude has been adopted by DCW and in my opinion might be for the following reason:*

You may know that the other care company is co owned and has only been around for several years, you can go as I have to the companies house website were [sic] *all limited companies have to register their details such as director, company secretary etc to see how long they have been around, and this with the fact that care companies in Leicestershire have to be a certain size now to handle each week a minimum amount care hours and in my opinion that why DCW was purchased to get the required capacity and you may ask what has this got to do with the new gentle*

understanding attude [sic] *now used by DCW (I might be wrong, But no one from DCW as ever bothered to tell me anything when DCW changed owner???)*

Most if not all of the line management team have resigned and four or five employees have handed thier [sic] *notice in and god knows how many more are thinking about it!*

I can not [sic] *go to my district calls such as Loughborough which is a round trip of 40 miles and I can not* [sic] *afford the fuel as my take home pay is just above National Minimum Pay! No doubt there are many more employees thinking the same as me*

So due to the Greed of DCM[4] who wish to turn the company into a cash cow and have finally pushed too far it now leaves the company with a very big problem as upto [sic] *a third of employees gone and even more thing* [sic] *about it or are unwilling to pay out of their pockets to go to calls.*

DCW are in a very big and real danger of not being able to cover all calls, if one or two people left then it could have been covered by the line management or as extra calls from other emplyee's [sic] *but as all these people have left this is not an option.*

Most care companies that maximise profits and don.t care about employee's don't care if unhappy employees leave as there are 100s more fools out there as replacements, but it take time to employ new replacements!

So in my opinion what does this mean? DCW have to keep us sweet and cover all their calls till they recruite [sic] *replacements or risk defaulting on the contracts to the Leicesteshire* [sic] *social sevices* [sic], *But be warned this will only last till the staff level is back up to normal when the drive to maximise profits will start again!*

Of course all this is my own opinion and if I have been mistaken I am sorry!

This is not the place to raise my concerns, but as I have no line manager and the DCW refuse to have any staff meeting this is the only option open to me! If DCW disagree with my comments and would like to arrange a staff meeting, I am sure all employee's, who are left would be happy to attend!

As to which calls I can afford to travel to? only the calls were [sic] *I take the client out and transport them in my car at 45p a mile."*

100. The Claimant then named at the end of his email two service users who appeared to fit into that category, H and L.

[4] We understand that to be a typographical error which should read "DCW".

101. As a result of his email, the Claimant was asked to attend a meeting with Mr. McCarthy. That was understandable given the content and the fact that we accept that the Claimant had copied that email to a number of service users. The Claimant refused to attend the meeting indicating that Mr. McCarthy "had not bothered to communicate with anyone for the past six months" and that if he wished to see the Claimant then that would have to be with an independent witness present and a transcript of the meeting provided and at a date and time convenient to the Claimant. The Claimant noted in fairly strident terms that he was also still awaiting a reply to his emails (see page 84 of the hearing bundle).

102. Mr. McCarthy replied as follows:

> *"Good afternoon Mr Heggs.*
>
> *We acknowledge your emails.*
>
> *We have noted that you are unable to attend the meeting set for Tuesday 28th February 2017.*
>
> *I would be very grateful if you could let us know when you will be able to attend the said meeting.*
>
> *As stated in your email regarding working we have taken you off the rota for these clients. As you are aware you are on a contracted hours and as you are refusing to work with the clients you are in breech* [sic] *of your contract.*
>
> *You are aware of the nature of the work we do and therefore your demand cannot be meet* [sic] *at this time to have clients closer to your home as they don't exist.*
>
> *Can I please draw your attention that your emails are in breach of confidentiality, if you have any issues please direct them to the office only."*

103. That latter position was a reference to the Claimant having disseminated his emails to service users and their families as set out above. Whilst the Claimant denies having done so, we accept the evidence of the Respondent that he did copy in service users and their families. That is supported by the comment made in Mr. McCarthy's email and we have not seen any reply from the Claimant to query what was being suggested in that regard.

104. Given the content, tone and audience to which the Claimant's email was sent, we do not consider the reply from Mr. McCarthy to have been unreasonable.

<u>The Claimant's hours of work</u>

105. We have been provided with copies of the Claimant's time sheets for various periods, albeit not for a significant portion of his employment with the Respondent and also with some significant gaps – for example in respect of much of February 2017. The time sheets demonstrate that during the following periods the Claimant worked the following hours:

9-13 January 2017 -	26.5 hours
16-20 January 2017 -	23.5 hours
23-27 January 2017 -	25.5 hours
27 February – 3 March 2017 -	23.5 hours
6-10 March 2017 -	23.5 hours
13-17 March 2017 -	23.5 hours
20-24 March 2017 -	23.5 hours

106. It is therefore not entirely clear that there was any reduction in the Claimant's hours of work but to any degree that there was over a period of time that we have not seen timesheets for, we are satisfied that that was as a result of the Claimant placing limitations on the shifts that he was prepared to undertake and not because the Respondent failed to provide work for him. Again, there had been no change to the Claimant's hours of work by the Respondent in this regard which required any updating to his Contract of Employment. The position remained as it always had.

The Claimant's Grievance

107. On 6th March 2017 the Claimant raised a grievance. We do not set out the content of that grievance in full as it runs to several pages but the pertinent points or complaints made by the Claimant and which are relevant to our considerations in the context of this claim are as follows:

- That there had been a lack of transparency or notification in relation to the change of ownership of the Respondent which the Claimant said had created unnecessary fear and worry regarding the continuation of employment, wages, expenses, future intentions and business plans;

- Following the change of ownership all communications had been carried out by short phone calls and aggressive emails;

- That there had been no team meetings since September 2016 and that the Claimant had been advised that this was because Mr. McCarthy had not approved the cost;

- That there was little if any clear management system in place with no regular system of the cascading of information down the management chain and that the Claimant no longer had a line manager;

- That an email of 23rd February 2017 had set out that there would no longer be assigned managers and that instead it was said that all managers would be able to deal with questions and that supervisions would only be held in the office and only by HR[5];

- The result was that the Claimant had for the first time in 46 years of employment not had a named line manager;

- That he had been informed that line managers had not been included in any staff meetings;

[5] Oddly although this email is a central issue in these proceedings we have not seen a copy of it as it is not contained in the hearing bundle neither could either party provide a copy. There does not, however, appear to be any dispute that the particular information as set out in the Claimant's grievance was contained within such an email.

- That the management team would have less time to deal with line management problems;

- That it would be harder to build good working relationships;

- That there was no team building or team spirit;

- That employees were less likely to express problems or concerns to HR and the senior management team and there was a lack of transparency for management;

- That Mr. McCarthy had sent an email dated 31st January 2017 setting out that travel between calls and clients would be paid at 25p per mile and that there was no future date when this was to come into effect and was thereafter changed without reasonable notice;

- That custom and practice dictated payment for travel expenses at a higher rate of 45p and that this would cause financial hardship for workers undertaking longer distance calls;

- That in a staff meeting in December 2016 Mr. McCarthy had stated that employees of First Choice had complained that those employed by the Respondent were paid 45 pence per mile and that he would have to look into that[6];

- That incorrect information had been given by Mr. McCarthy that any reduced mileage expenses could be reclaimed from the Inland Revenue as a tax rebate but that was not accurate for part time workers;

- That Mr McCarthy has accordingly misled the Claimant and others over that issue;

- That there were questions surrounding the changes in relation to first hour travel and why that was not beginning with effect from the new financial year;

- That there had been a further loss of trust because the Respondent was in close contact with social services and therefore should have known about the changes to first hour travel in good time to pass the information on;

- There had been no reasonable notice given in relation to the email from Mr. McCarthy dated 23rd February 2017 as to payments ceasing with effect from 27th February 2017[7];

- That the Claimant would suffer a financial loss by the expenses changes given that most of his calls were up to a 40-mile round trip;

- That there had been no reasonable chance to change calls to ones which would not have resulted in a financial detriment;

[6] We do not accept that as the employees of First Choice did not receive payment for travel expenses as they used Company vehicles.
[7] This is the email sent by Ms. Korotko on behalf of Mr. McCarthy, the content of which we have set out above.

- That historically the first hour travel expenses had been paid;

- That there was no proof that the changes had come from social services and it was not the Respondent, as the Claimant, put it "profiteering";

- That there was objection to Mr McCarthy's email of 24th February 2017 suggesting that the Claimant was in breach of his contract on the basis that it would be reasonable to decline hours where he would end up financially "out of pocket";

- That the Respondent was in breach of his contract of employment and that they had failed to provide him with 18 hours of what the Claimant termed "reasonable" work; and

- That the Respondent had failed to make up the difference in pay between the hours worked by the Claimant and the hours that he was contracted to and that they had had failed to provide him with 25 hours agreed work[8];

108. The Claimant also complained in his grievance regarding an email from Mr McCarthy dated 23rd February 2017 (which again we have not seen and which does feature in the bundle before us) which the Claimant quoted as said this:

> *"All staff are given 5 hours paid work a year to cover things like training, meetings and supervisions. Remember that once the 5 hours have been used all of the training, meetings and supervisions* ***will not be paid for*** *but you will still need to attend".*

109. The Claimant referred to his contract of employment as setting out that he would be paid for all hours worked and that it was not reasonable to expect him to attend and travel to supervisions, meetings and trainings where he would not be paid for all of his time for doing so. He questioned whether such a policy was a "cost cutting" exercise. We have already made our observations on the amount of time spent per annum in respect of training and supervisions below.

110. The Claimant also referred in his grievance to bullying and harassment; setting out an extract from the ACAS Guide to Bullying and Harassment at Work. Thereafter he set out in full the "Expectations" Memorandum from Mr. McCarthy to which we have already referred above. In relation to that memorandum, the Claimant contended it to be bullying, intimidating, offensive, abusive, undermining, humiliating and an excess of management power. The Claimant contended that it threatened him with dismissal "at every turn".

111. The Claimant then ended his grievance with a general section in which he said this:

> *"With stage 4 terminal kidney cancer and Clinical depression caused by my military service in Northern Ireland, the events that have occurred since the takeover have caused a lot of stress, due to lack of transparency*

[8] The Claimant's grievance refers to an email supporting that he was to be provided with 25 hours per week agreed work but we have not seen a copy of that during the course of these proceedings nor does it feature in the bundle before us.

and what can only be described as sometimes bullying tactics, stress that could have easily been avoided. There is now a lack of trust within the company as staff will be left wondering what will happen next. The priority for the company should be the end users, for example I am no longer able to afford to carry out the long distance calls due to the financial impact, this has undone all of the hard work and time spent building up trust with specific clients, and a change of carer may impact on those who already struggle with a break in routine. If staff remain feeling unsettled, this is not a good basis for any business. I am aware that several colleagues have felt no choice but to resign and it is sad and unfair that individuals are made to feel this way. I have spent the last 4 years making a difference in peoples lives, felt valued as a member of staff, was proud to work for the company and there was a strong trust between all. I can appreciate that change is necessary sometimes for a company to move forward, but what I cannot appreciate is the way that we have been treated. The aggressive manner displayed in correspondence, concerns dismissed and a lack of transparency has caused ill feeling and staff to feel unsettled."

112. By that stage it should be noted that Ms. McLeod had resigned from employment with the Respondent with effect from 4th January 2017. We are entirely satisfied that that was something of a blow to the Claimant, who valued Ms. McLeod and her line management of him very highly as we have already observed above.

113. We should observe that the Claimant of course referred in his grievance to incorrect information from Mr. McCarthy about the ability to reclaim tax in respect of travel expenses. The Claimant avers before us that Mr. McCarthy deliberately misrepresented that position. We accept the evidence of Mr. McCarthy that he did not and that this was his genuine understanding of the position at the time and that that information was given in an attempt to assist.

Training and supervisions

114. As part of his work as a support worker, it was necessary for the Claimant and his colleagues to undertake supervisions of the type which took place with Ms. McLeod in December 2016 and also training. We accept the evidence of the Respondent, and Ms. Korotko particularly, that those training and supervision sessions had never previously exceeded five hours in any one year, a fact that the Claimant would of course have been aware of, and that in fact the time spent was considerably less than that. Supervisions took place once per year with approximately one to one and a half hours spent dealing with that according to the unchallenged evidence of Ms. Korotko.

115. In terms of training, we understand that most training would be completed online without the need to travel to undertake it and we accept the further evidence of Ms. Korotko that on average that would comprise approximately 20 minutes training per annum. Moreover, part of the training regime for support workers was in respect of manual handling but the Claimant did not undertake that training given that he was exempted from it by way of a reasonable adjustment for his disability. He therefore in fact undertook less by way of training than the other support workers.

116. We accept that there was therefore no realistic possibility of the Claimant being required to undertake training and supervisions for which he would not be paid given that the provision of five hours payment in that regard would be more than sufficient and that that had been taken into account when the memorandum regarding those matters was sent. We have not been taken to anything to anything which suggests that the Claimant would not be paid for travel to attend the training or supervisions as his Claim Form suggests.

117. We therefore accept that the five hour "cap" set by the Respondent would never have affected the Claimant in practice; a matter that he would have been aware of from the time that he had spent on training and supervisions in previous years.

118. We are also conscious of the fact that the "cap" was also to include meetings. Whilst there is a criticism by the Claimant of a lack of staff meetings after Ms. Mhaka acquired the shares in the Respondent, we have no evidence of their being any regular staff meetings prior to that point and, certainly, no evidence of a diminution in such meetings. However, we cannot see whatever the position that any such meetings that may have been arranged would have taken the Claimant over the five hour cap.

Grievance meeting

119. In response to his grievance, the Claimant was invited to a grievance meeting on 8th March 2017 with Anna Korotko. The Claimant contends before us that Ms. Korotko was not an appropriate person to deal with his grievance given that she was the Office Planner and was without any managerial responsibility. We accept, however, that by that time it had been agreed that Ms. Korotko was to take up the position of Office Manager - although that was not a matter that the Claimant would necessarily have been aware of at that time. Nevertheless, we accept that Ms. Korotko was the best person to deal with the grievance given that the Claimant clearly had strong negative feelings in relation to both Mr. McCarthy and Mrs. Mhaka but appeared to be on consistently good terms with Ms. Korotko and he accepted before us that she had always been helpful and endeavoured to assist him in the past. Given that background and her new role as Office Manager, we accept that Ms. Korotko was the person best placed to seek to assist the Claimant in resolving the issues in his grievance in the first instance.

120. However, Ms. Korotko had the rather unenviable job of trying to deal with the grievance without any actual guidance from the Respondent as to what she was supposed to be doing given that, as we have set out above, they did not have a grievance procedure or other applicable policy which she could follow in these circumstances. We are satisfied however that she did the best she could to try to deal with a resolution to the concerns and issues which the Claimant had raised.

121. In that regard, a grievance meeting took place between the Claimant and Ms. Korotko on 15th March 2017. We accept that during the course of that meeting, the Claimant was provided with documentation confirming that Social Services had changed the parameters of a previous agreement with the Respondent and had withdrawn payment in respect of the first hour of travel issue with effect from 27th February 2017. The Claimant had of

course requested sight of such documentation within his grievance.

122. We are satisfied that Ms. Korotko did her best to allow the Claimant to air his grievances and thereafter to consider the issues carefully that the Claimant had raised, including his concerns in relation to Mr. McCarthy's "Expectations" memorandum and she fed back that she would speak to Mr. McCarthy about the fact that he should be more careful with his wording in the future. We do not accept the criticisms made by Mr. Bidnell-Edwards that she sought at the grievance meeting to argue against the points that the Claimant was making and there is nothing within the notes of the meeting which we have seen which tend to suggest such an issue.

123. There was a delay between the meeting with Ms. Korotko and her being in a position to provide an outcome letter to the Claimant in respect of his grievance. In that regard, we accept that that was down to a delay in Ms. Korotko being provided with a copy of the notes of the meeting; something which did not happen until 23rd March 2017 (see page 132 and 133 of the hearing bundle). We accept her evidence that she had chased up the note taker to provide the notes at an earlier juncture but did not receive them until 23rd March and that she thereafter set about using those notes to assist her in drafting her outcome letter to the Claimant.

124. However, that letter was never sent to the Claimant as before it could be finalised her resigned from employment.

The Claimant's resignation

125. In this regard, on 24th March 2017 the Claimant resigned from employment. His resignation letter, which was sent to Ms. Korotko, said this:

> *"I am writing to inform you that I am resigning from my position as support worker with immediate effect.*
>
> *Please accept this letter as my formal notice and termination of my employment contract with Direct Care Works.*
>
> *I feel I have been left with no option but to leave because of:*
>
> *Expectations that I will travel distances over 6 miles to clients and will not be reimbursed for my travel costs.*
>
> *Attend training/meetings/supervision in my own time and unpaid and not reimbursed for travel costs*
> *Breach of my contract of employment to provide eighteen hours and by agreement twenty five hours of work*
>
> *Use of existing management systems and general lack of communications*
>
> *Please acknowledge receipt of this letter as soon as possible and I will ensure a smooth transition period until my leaving date."*

126. It is clear that by that time, at the very latest, the Claimant had already been in receipt of legal advice given that a draft of that resignation letter was sent to his solicitor, Ms. Thakerar of Lawson West solicitors, shortly before it was submitted to Ms. Korotko (see page 102 of the hearing bundle). It is

somewhat unclear from the Claimant's evidence what date he sought advice from Lawson West but it appears that this came about as a result of him attending one of the regular advice clinics that they held in the village where he lives.

127. Following receipt of the resignation letter, Ms. Korotko wrote to the Claimant acknowledging his resignation and asking for details of his last working day. She also, quite sensibly in our view, cancelled an appointment which had been arranged for him to see the new client in Blaby on account of the fact that he would be leaving in approximately one week's time after working his notice. We accept that it was not practicable therefore to introduce the Claimant to a new client, only to disrupt that client's care by the Claimant leaving just one week later.

128. After the termination of the Claimant's employment he tells us that he suffered a nervous breakdown and that the effects of that lasted for approximately four to six weeks, although his evidence on the point was rather vague. At some stage thereafter, as far as we can ascertain in April 2017, he again made contact with Lawson West who initiated ACAS Early Conciliation on 19th May 2017 and thereafter commenced the proceedings which now come before us for determination.

CONCLUSIONS

129. Insofar as we have not already done so, we turn now to our conclusions in relation to the remaining claims which are before us.

Transfer of Undertakings

130. We deal firstly with the question of whether there was a transfer under the Transfer of Undertakings (Protection of Employment) Regulations and, if so, when that transfer took place.

131. It is not in dispute that the change of ownership of the Respondent came about by way of a share sale from Mr. & Mrs. Davies to Mrs. Mhaka. However, the Claimant submits that there was a transfer between the Respondent and First Choice in that First Choice gained control of the Respondent's activities and harmonised the terms and condition of employment of the Respondent to align them with that of First Choice (see page 24 of the hearing bundle).

132. The Claimant relies on the decision of the Court of Appeal in **Millam v Print Factory (London) 1991 Ltd [2007] EWCA Civ 322** and that First Choice was controlling and had integrated the Respondent into its own operations.

133. Whilst we have carefully considered the decision in **Millam**, we are satisfied that it is not akin to the reality of the situation with regard to First Choice and the Respondent. First Choice had no control over the Respondent whatsoever and there was no integration between the two businesses. Whilst they shared a common ownership, that is clearly insufficient to suggest that First Choice had gained control over the Respondent and more than the Respondent had gained control over First Choice. Whilst they also shared two common members of staff in the form of Ms. Korotko and Mr. McCarthy, that was as a result of financial efficiency and the work that both did for each individual company was distinct. Indeed, Ms. Korotko

continued her duties for the Respondent as she had always carried them out prior to the share sale to Ms. Mhaka.

134. Whilst both companies came to operate out of the same premises, again that was for reasons relating to costs and both the Respondent and First Choice had to move from their own separate premises into one single new building. It was not a matter of the Respondent being relocated – or integrated – into the premises of First Choice and, in reality, the support workers of both companies rarely attended the office. After that point, the companies continued to operate independently of each other. They had different service users and, indeed, a different client base. There was no cross over between the companies either in the way that they performed work nor who performed that work and, for example, no First Choice employees took on work for the Respondent or vice versa.

135. The employees of both companies were, and continued to be, engaged on different terms. For example, First Choice employees were engaged on zero hours contracts whilst the Respondent's support workers continued to have guaranteed minimum hours. There was no drive, as has been suggested, to harmonise terms and conditions as to travel expenses as between First Choice and the Respondent as First Choice did not claim travel expenses because their support workers used company vehicles.

136. Insofar as the "Expectations Memorandum" was concerned, whilst that was taken from a template used for a previous communication to First Choice we are satisfied that that is all that that was. It was not a harmonisation of terms and conditions but merely a use of a previous common sense precedent. No aspect of that Memorandum sought to, or had the effect of, harmonising terms and conditions.

137. In reality, First Choice had no control whatsoever over the Respondent which continued to be operated independently and as a separate legal entity after the share sale to Mrs. Mhaka. We are therefore satisfied for those reasons that there was no transfer under TUPE as a result of the share sale.

<u>Failure to inform and consult</u>

138. Despite our conclusion that there was no relevant transfer – and thus the duty to inform and consult was not triggered – we have nevertheless gone on to consider this element of the claim in the event that we had found there to have been a transfer.

139. It is the Claimant's case that the "transfer" took place on 1st September 2016 on the sale of shares to Mrs. Mhaka.

140. The provisions of Regulation 15(12)(a) TUPE required the Claimant to have entered into Early Conciliation via ACAS within 3 months of the date of the transfer – i.e. in these circumstances by no later than 30th November 2016. The Claimant did not enter into Early Conciliation until 19th May 2017. It is clear, therefore, that this complaint was presented out of the time limit provided for by Regulation 15(12) TUPE. The Claimant therefore has to persuade us that it was not reasonably practicable – or to put it another way not reasonably feasible – to present the claim in time and that he acted within a reasonable period thereafter.

141. The Claimant relies upon a number of things – although it is perhaps noteworthy that none were referenced at all in his witness statement – as to why it is said that it was not reasonably practicable to present the claim in time.

142. The first of those is that the Claimant told us that he was not aware of his ability to bring a complaint of a failure to inform and consult. His evidence was unclear as to when he says that he was aware of his ability to bring such a complaint but this appears, as best as we can establish, to have been some time in April 2017 when he further consulted Lawson West.

143. The question that we need to consider is whether it was reasonable for the Claimant to have been ignorant of his rights in that regard and thus whether that rendered it not reasonably practicable to bring the complaint in time. We are not satisfied that it was reasonable for the Claimant to be ignorant of his rights, if indeed he was, in that regard for the following reasons:

    (i) The Claimant accepted in his evidence that he had access to the internet where there is a wealth of information about complaints arising from TUPE or how to obtain further advice in respect of such matters;

    (ii) The Claimant's evidence was that he had also contacted ACAS for general advice and clearly he had the ability to follow that up at an early stage;

    (iii) The Claimant had access to what he referred to as general advice from his Trade Union at some point between December 2016 and February 2017 (although his evidence was rather vague on this point);

    (iv) By 16th November at the latest he was aware that there had been a change of ownership to Mrs. Mhaka. He already had knowledge of the TUPE Regulations as his email to Ms. Korotko of 7th February 2017 demonstrated and from the content he had clearly been discussing matters and seeking advice about that topic from the Union. He had also spoken to Mr. McCarthy and whilst he told him that there was no TUPE transfer, in the Claimant's words "that didn't ring right" and clearly that representation did not affect the Claimant's ability to obtain further advice. The Claimant could have therefore obtained information and advice regarding a potential claim at that early stage;

    (v) The Claimant had some prior experience of TUPE from a previous period of employment elsewhere and thus he had a degree of familiarity with such issues before Mrs. Mhaka purchased the shares in the Respondent; and

    (vi) The Claimant's evidence was that there were regular free advice sessions held in his village by Lawson West solicitors and, again, when he knew of the change of ownership by 16th November 2016 at the latest, he had ample opportunity to seek advice.

144. The Claimant also relied upon the fact that he had suffered a nervous breakdown in March 2017 which had rendered him unable to function for a period of approximately four to six weeks. Thereafter, but on a date that was somewhat uncertain from the Claimant's evidence but probably in April

2017, the Claimant again contacted Lawson West Solicitors for advice and it is then that he discovered the possibility of bringing a claim.

145. To any degree that the Claimant relies upon that breakdown as rendering it not reasonably practicable to have presented the claim in time, we do not accept that. Firstly, there is no medical evidence to support that position but more importantly than that, by the time of that breakdown the time had already passed for the Claimant to have initiated early conciliation.

146. However, even had we accepted that it was reasonable for the Claimant to have been ignorant of his rights until April 2017, or that he was prevented by virtue of his breakdown from having presented the claim in time, then we would nevertheless have concluded in all events that the Claimant did not present the claim within a reasonable period thereafter. In this regard, he had clearly consulted Lawson West by April 2017 but there were no steps taken to initiate early conciliation until 19th May 2017, at best at least three weeks after the Claimant became aware of his ability to bring that complaint. Given that by that stage the Claimant had the assistance of solicitors, that period was not a reasonable period of time to delay before commencing the early conciliation process.

147. We are therefore satisfied that it was reasonably practicable for the Claimant to have presented the claim in time but, even had we been satisfied on that point, we would nevertheless have concluded that he did not present it within a reasonable period thereafter. The Tribunal therefore has no jurisdiction to entertain this part of the claim and we therefore say no more about it.

Constructive unfair dismissal

148. Having concluded that there was no transfer of undertakings under TUPE, it follows that the Claimant's complaint of automatically unfair dismissal must fail.

149. However, we turn then to the complaint of "ordinary" constructive dismissal contrary to Section 95 ERA 1996. The Claimant relies upon a breach of the implied term of mutual trust and confidence in respect of this complaint. His witness statement at paragraph 15 sets out the reasons for his resignation on which he relies for the purposes of a breach of the implied term of mutual trust and confidence. Those reasons are as follows:

- The expectation to travel distances over six miles to meet clients and not being reimbursed for the travel costs;
- Compulsory attendance for training/supervisions/meetings despite not being paid for that time or reimbursed for travel costs;
- Changes to his hours of work and deductions from his salary if it was considered that he had unreasonably refused work; and
- Use of the existing systems but a general lack of communication by the new management.

150. We deal with each of those matters individually before considering whether, either singularly or cumulatively, they breached the implied term of mutual trust and confidence.

151. The first of those matters is the requirement for what the Claimant has

termed in his witness statement as the requirement to travel over six miles to meet clients but to not be reimbursed for any incurred travel costs. In fact, that is not an accurate representation of the position. The actual position was that the Respondent was to remove what has been referred to as the first hour of travel but what is, in fact, removal of payment for travel to the first call of the day. The evidence before us was clear that payment for such a call was in all events limited to a maximum of £2.70 as only the first six miles were able to be claimed. The loss to the Claimant was therefore limited to a maximum of £2.70 per day. Although we have no documentary evidence to substantiate the position, the Claimant's evidence was that that loss might occur on average four or five times per week. Given the Claimant's vague and somewhat changeable evidence on a number of issues, we have no way of knowing how accurate that assessment is and we treat it accordingly with some degree of caution.

152. Whilst much has been made in these proceedings as to the length of travel to attend service users, the reality is that the Claimant never had received payment for anything more than six miles of travel. Anything under six miles was not paid at all and before the change implemented by the Respondent, the Claimant would have received the same payment for travel to service user seven miles away as he would to one forty miles away. The change did not therefore affect his ability to take on work. All that the change represented was the loss of the maximum payment of £2.70 for the first call of the day. Return travel was not paid for in all events.

153. We do however accept that there would be some loss to the Claimant from the change. However, we are entirely satisfied that Ms. Korotko would, as she indeed always had and her communications to the staff made clear, have sought to assist the Claimant in finding suitable service users to work with in order to minimise the effects of removal of the payment for the first six miles of travel. That did of course only affect clients whose care was funded by the Local Authority and thus it was entirely possible that the Claimant could have been allocated privately paying service users so that the change would have had no effect or marked effect on him in all events. However, the Claimant simply failed to engage.

154. Moreover, the decision taken by the Respondent in this regard was not an arbitrary one. It was something imposed by the Local Authority and was a matter over which the Respondent had no control. The Respondent had sought to give as much notice as was possible of that change, although they had had to bring that removal forward on account of further changes by the Local Authority. We are satisfied that in a sector such as the one in which the Respondent operated, the margins were such that it was not feasible for the Respondent to absorb that cost themselves and that, as above, Ms. Korotko was dedicated to assisting in minimising the effects on the Claimant and other support workers as far as was practicable.

155. Indeed, there is nothing definitive in the evidence before us that assists in understanding what, if any, impact the removal of the payment for the first six miles of travel would have had on the Claimant even absent the offer of Ms. Korotko to assist in terms of planning. We have nothing before us to assist as to whether the calls that the Claimant undertook were to Local Authority clients or those who privately funded their care. That is despite the fact that the Claimant has at all material times been legally represented.

156. Whilst we cannot say therefore that there would have been any marked impact on the Claimant by reason of the removal of the payment for the first six miles of travel, as we have set out above we do accept that there would have been some impact. Even assuming that that had been in the region of £10.00 to £12.00 per week as "guesstimated" by the Claimant in his evidence before us, we are satisfied that that was a matter beyond the Respondent's control and that they tried to mitigate that position as much as possible by giving notice of the change and, thereafter, the offer of Ms. Korotko to alter rotas and assist in terms of planning to best accommodate the individual support workers, including the Claimant.

157. Although not a matter expressly referred to by the Claimant in is statement as a reason for his resignation, insofar as it may be suggested that the variation to the reduction in the rate of expenses payments from 45 pence to 25 pence per mile formed part of the contended breach of the implied term of mutual trust and confidence, we have also considered that position.

158. We would observe in this regard that again we have nothing before us to begin to definitively determine what impact that would have had on the Claimant in relation to his typical service user base. We again find it surprising that no calculation or assessment in that regard appears to have been undertaken given that the Claimant has at all material times been legally represented.

159. We do, however, again accept that there would no doubt have been some impact upon the Claimant – albeit his own evidence was that the effect would be "not a lot" - but we equally accept that the Respondent sought to mitigate that position by giving notice of the changes and, particularly, the offer of assistance of Ms. Korotko to organise service user allocation and shifts to best accommodate the support workers and minimise the impact upon them. We also accept that this was not an arbitrary decision by the Respondent but one borne of concern for the financial viability of the Respondent moving forward.

160. Turning then to the position with regard to payment for training and supervisions, as we have already observed above we accept that there was therefore no realistic possibility of the Claimant being required to undertake training and supervisions for which he would not be paid given that the provision of five hours payment in that regard would be more than sufficient and that that had been taken into account when the memorandum from Mr. McCarthy regarding those matters was sent. The Claimant was aware of that position from previous experience of the amount of training and supervision that he undertook. We have not been taken to anything to anything which suggests that the Claimant would not be paid for travel to attend the training or supervisions and, indeed, we understand that most training would be completed online without the need to travel to undertake it.

161. We turn then to the Claimant's contention that the Respondent had made changes to his hours of work and deductions to his salary if he unreasonably refused work. In fact, that was no different to the position as set out in his contract of employment which made it clear that the payment for a minimum number of hours of work per week was subject to the following caveat:

"…unless we have offered you hours that you have declined without reasonable cause" (see page 43 of the hearing bundle).

162. The position as set out in Mr. McCarthy's memorandum simply re-stated the existing contractual position and there was no change in that regard to the situation as it had always been.

163. Finally, the Claimant contends that there was a lack of communication from the new management. We are satisfied that his main complaint in this regard was what he saw as the removal of his line manager, Ms. McLeod. We have no doubt that this unsettled the Claimant but the position would have been the same in all events at the point that Ms. McLeod resigned from employment with the Respondent. The position was simply that instead of having one line manager, support workers would be able to approach any of the managers to deal with queries. It did not leave the Claimant without any port of call to raise queries or concerns.

164. Whilst it is fair to say that supervisions may not have been as effectively conducted when completed by Mr. McCarthy who had received no formal HR training and did not have the same level of knowledge of the business and operations at support worker level as Ms. McLeod, that was not a situation which was destructive of mutual trust and confidence. It may well have been a bug bear, but it was no more serious than that. Supervisions only took place once per annum for a period of one hour and, as we have observed above, there was a clear route for anyone in the office to deal with concerns or queries from the Claimant and his fellow support workers.

165. The Claimant also takes issue with the content of communications from Mr. McCarthy and a lack of dissemination of information generally. We do not accept those criticisms. There were at least two staff meetings in addition to the staff get together with First Choice to which we have referred above. Moreover, the Claimant was aware that he was able to raise any queries at any time with either Mr. McCarthy or Ms. Korotko and he had their contact details, including email addresses, for that purpose.

166. Whilst Mr. McCarthy's "Expectations" memorandum could perhaps have been more sensitively worded, it was not on the whole unreasonable and it did little more than restate the position as it had always been in reality. We certainly do not accept that the content or tone of the memorandum or indeed any other communication from Mr. McCarthy to which we have been taken was bullying or harassing as the Claimant contends. Moreover, Ms. Korotko as part of the grievance process set out that she would speak with Mr. McCarthy about an appropriate use of tone in the future and we are satisfied that the content of the Expectations Memorandum notwithstanding, the Claimant was aware that she would continue to assist him with regard to shift preferences, including his request not to work weekends, as she had under the tenure of the Davies's and despite the email from Mr. Davies of 11th December 2015. Again, nothing in that regard had changed.

167. Whilst therefore matters could perhaps have been handled more sensitively in respect of some communications, we are satisfied that the situation did not amount to one which was anywhere near approaching a breach of mutual trust and confidence. It was not such that it went to the root of the employment contract and, in reality, the Respondent did its best in difficulty circumstances imposed upon them by the Local Authority and financial

constraints. We are therefore satisfied that neither singularly nor cumulatively did the Respondent act in a way which breached the implied term of mutual trust and confidence. The complaint of constructive dismissal therefore fails and is dismissed.

Failure to make reasonable adjustments

168. As set out in the list of issues prepared by the Claimant, the PCP relied upon is the requirement to travel long distances to meet clients for work. It is said that that placed the Claimant at a substantial disadvantage in comparison to non-disabled employees as a result of the fact that it caused him fatigue.

169. We do not accept that to have been the case. The Claimant was clearly travelling long distances throughout his employment without any complaint or concern being raised. Particularly, as we have already observed above the Claimant discussed in detail his work and the clients that he was assisting at the time of his appraisal with Ms. McLeod. He made no mention at that time, or indeed any other, regarding difficulties with regard to fatigue in respect of travel. Moreover, no mention at all was made of that issue within the Claimant's witness statement prepared for the purposes of these proceedings and his oral evidence, despite supplemental questions from Mr. Bidnell-Edwards, did not suggest any difficulties in that regard.

170. We are satisfied that the issue for the Claimant in respect of travel was the removal of payment for the first six miles of travel. The requirement to travel long distances was not the issue. Those matters were financial issues, not ones which put the Claimant at a substantial disadvantage when compared to non-disabled employees. The financial issue would impact all support workers irrespective of the question of disability. There is no evidence of the substantial disadvantage of fatigue on which this part of the claim relies.

171. The complaint of a failure to make reasonable adjustments therefore fails and is dismissed.

Unauthorised deductions from wages

172. The Claimant contends that his hours of work were reduced by the Respondent from the 25 hours that he was contracted to do. We are satisfied that the Claimant was, in fact, contracted to work a minimum of 18 hours per week. Although at his request he was, it seems, regularly allocated more hours than that (we have not seen the entirety of the Claimant's time sheets in that regard), there was never any formal variation to his terms and conditions of employment.

173. However, we are satisfied that to any degree that the Claimant did work less hours towards the end of his employment with the Respondent, the reason for that was that the Claimant was not prepared to engage with Ms. Korotko regarding shifts. He took an intransigent position. Had the Claimant been willing to engage, we are satisfied that he would have continued to be allocated as many hours as he was prepared to work.

174. Given the fact that the Claimant refused to engage other than on very specific terms, it is hardly surprising that there may have been a decline in

the shifts which could be allocated to him (although as set out above from his time sheets it is difficult to discern any particular reduction in the weeks that we have seen). Equally, the Respondent was entitled to rely on the clause in the Claimant's contract of employment relating to "Contracted Hours" which disapplied the guaranteed payment for a minimum of 18 hours per week in circumstances where the Respondent had offered hours that the Claimant had *"declined without reasonable cause".*

175. On that basis, the Claimant was at no stage paid less than the sums which were contractually properly payable and accordingly there was no unauthorised deduction from his wages. That aspect of the claim therefore fails and is dismissed.

176. Insofar as the Claimant advances any complaint regarding the payment of £2.70 (see page 25 of the hearing bundle) then that cannot be advanced as a complaint of unauthorised deductions from wages given the provisions of Section 27(2)(b) Employment Rights Act 1996.

177. The complaint of unauthorised deductions from wages therefore fails and is dismissed.

Failure to pay holiday pay

178. The basis of the holiday pay claim is somewhat unclear, a point to some degree acknowledged by Mr. Bidnell-Edwards in his closing submissions. The Claimant was made the subject of a payment in lieu of accrued annual leave on or around 31st March 2017 by cheque (see page 117 of the hearing bundle) and it does not appear to be disputed that he received that sum.

179. However, as we understand matters the basis of the claim as set out at page 26 of the hearing bundle is that the Claimant received less holiday entitlement because he was working less hours. In essence, he complains that the reduction in the number of hours that he worked for the Respondent had a knock-on effect on his holiday entitlement.

180. However, as we have already found above, to any degree that the Claimant worked less hours, that was a situation of his own making. He would not engage with Ms. Korotko and was only prepared to accept work on his own very specific terms. Any effect on his holiday pay was therefore of the Claimant's own making. He was, as far as we can ascertain the position, paid the correct amount of holiday pay to which he was entitled having regard to the hours that he had stipulated that he was prepared to work.

181. The complaint regarding unpaid holiday pay therefore fails and is dismissed.

182. For those reasons, the remainder of the complaints before us fail and are dismissed and accordingly there can be no adjustment pursuant to Section 38 Employment Act 2002 even had we found the Respondent to have been in breach of Section 4 Employment Rights Act 1996.

Employment Judge Heap

Date 16th November 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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