EMPLOYMENT TRIBUNALS

Claimant: **Mr Phillip Cortail**

Respondent: **London Borough of Newham**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **4 and 5 March 2021**

Before: **Employment Judge Hallen**

Representation

Claimant: In person
Respondent: Mr Daniel Moher-Solicitor

JUDGMENT

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

The unanimous judgment of the Tribunal is that: -

1. **The Claimant's claim for unfair constructive dismissal is made out and succeeds.**

2. **The remedies hearing is listed for 9 July 2021.**

3. **Directions will be sent out separately in respect of preparations for this hearing.**

REASONS

Background

1. The Claimant was employed as a Site Supervisor working for the Respondent at the Edith Kerrison Nursery School from 17 September 2021 until 2 December 2019. He asserted in his claim form submitted on 7 March 2020 that he was constructively unfairly

dismissed and had had unlawful deductions made in his wages. The unlawful deduction of wages claim was settled. The Respondent in its response form dated 15 April 2020 denied that the Claimant was unfairly constructively dismissed.

2. The claim form and response form were considered at a preliminary hearing on 27 November 2020 before Employment Judge Massarella at which directions were given for the substantive hearing and the issues were agreed between the parties. This substantive hearing was listed for two days on 4 and 5 March 2021 before a Judge sitting alone.

3. At the preliminary hearing the judge identified the issues for the tribunal to consider as follows: -

3.1 Did the Claimant vary his contract of employment by agreement with the previous headteacher:

3.1.1 so as not to be required to carry out all the duties on the site supervisor job description; and

3.1.2 to allow him to take annual leave during term time, irrespective of the needs of the school?

3.2 The Claimant contends that Ms Aylett, the new headteacher, breached the express terms set out, set out above, by:

3.2.1 seeking to alter the Claimant's duties, and to require him to undertake additional duties;

3.2.2 insisting that the Claimant take unpaid leave in June/July 2019.

3.3 If there was a breach, was it a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

3.4 The Claimant also alleges that there was a breach of the implied term of trust and confidence, by the Respondent:

3.4.1 seeking to alter the Claimant's duties;

3.4.2 imposing stricter rules on the taking of annual leave than had been in place before in breach of the former arrangement, by:

3.4.3 the letter of 19 October 2018 – re leave in Jan/Feb 2018 (page 86);

3.4.4 the letter of 28 February 2018 – re annual leave and request (page 94);

3.4.5 the letter 8 March 2018 – re annual leave requested in June 2019 (pages 100-101) and insisting that the Claimant take leave unpaid in June/July 2019;

3.4.6 calling the Claimant into her office on 14 March 2018 to instruct him to stop having tea breaks at work;

3.4.7 in around August 2019 Mrs Wasson gave the Claimant a list of jobs to be carried out over the holidays, and berated the Claimant when the list disappeared;

3.4.8 the headteacher started a disciplinary investigation on 5 September 2019 into whether the Claimant had not taken annual leave when instructed to;

3.4.9 the Claimant was unfairly put through the disciplinary procedure from 4 October 2019 in relation to incorrect timesheets and allegations surrounding the alarm:

3.4.10 suspending the Claimant on 4 October2019, and initiating a disciplinary procedure;

3.4.11 holding an investigation meeting on 14 October 2019;

3.4.12 concluding that there was a case to answer on 18 October 2019;

3.4.13 requiring the Claimant to attend a disciplinary hearing on 6 November 2019.

3.5 If these incidents occurred, did that breach the implied term of trust and confidence? The Tribunal will need to decide:

3.5.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and whether it had reasonable and proper cause for doing so.

3.6 Did the Claimant resign, in part at least, in response to the breach? The Respondent contends that the Claimant's reason for resignation was to avoid being dismissed for gross misconduct.

3.7 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions (for example, by delaying too long) showed that they chose to keep the contract alive even after the breach.

3.8 If the Claimant was constructively dismissed, the Respondent admits that the dismissal was unfair.

4. The Tribunal had before it an agreed bundle of documents and heard first from the Claimant who had prepared a written witness statement made up of 10 pages. The Respondent attended with two witnesses namely Joanne Aylett, the Headteacher of Edith Kerrison School and Rashpal Wasson the Business Manager at the School. All of these witnesses prepared witness statements and were subject to cross examination and questions from the Tribunal.

Facts

5. The Claimant commenced employment with the Respondent on 17 September 2012. He was employed at the Site Supervisor. His letter of appointment was at page 36 to 37 of the bundle and confirmed the job title and commencement date. The statement of written particulars was at page 38 and confirmed the Claimants basic hours as 16 per week. His holiday entitlement was stated to be 23 days per annum and confirmed that three weeks of the leave should generally be taken during the summer school summer closure. The remainder would be by mutual agreement. In addition, it stated he would be employed at scale 5 and receive a salary of £9,500 per annum and would receive overtime at a higher rate.

6. The Claimant gave evidence to the Tribunal which was accepted that his start time was initially 5:30 am to 8 am and his principal duties where to check the school grounds, open this School and do some handy man work. The Claimant gave evidence which was accepted that he agreed that these would be his principal duties with the then head teacher, Ann Collier.

7. The Claimant explained and the Tribunal accepted his evidence that he agreed to take on the position at this time because he had other commitments which was the running of a sole trade business in building contracting and carpentry which he wished to undertake during the remainder of the day and for which he charged clients at a commercial rate. However, he agreed with Ms. Collier that he would undertake duties that included building contracting work for the school such as general building, repairs, painting and decorating and carpentry to school buildings and premises. He agreed that he would undertake these duties at the school overtime rate and not at the commercial rates that he otherwise charged to commercial clients. The Claimant agreed to do these major works in school holiday time so as not to cause disruption to the running of the school. Ms. Collier agreed to this favourable agreement on the basis that the Claimant could take his holiday in four week batches outside the school holidays and in term time. This arrangement worked well for both the Claimant and the Respondent for six years until the new head teacher, Ms. Aylett took over the school and Ms. Collier left.

8. There was dispute between the parties at the hearing as to this agreement between the Claimant and Ms. Collier. However, the Respondent did not call Ms. Collier to rebut the Claimants evidence and the evidence that it did produce did indicate that this agreement was made between Ms. Collier and the Claimant. For example, at paragraph 9 of Mrs. Wasson's statement she says *"I am not aware of there being any agreement between Phil and the previous head, Ms. Ann Collier. However, I cannot say for sure that there wasn't one. I did not line manage Phil while Ms. Collier was head teacher. Meetings were carried out between Phil and Ms. Collier for which I was never present ... it was only a year after Jo Aylett became head teacher that I did start to manage Phil."*

9. In addition, at paragraph 38 of Mrs. Wasson confirmed that the Claimant did not undertake all of the duties of his job description but affectively undertook the limited duties such as opening the school, security work and handyman work and repairs. In addition, both Mrs. Wasson and Ms. Aylett confirmed in evidence that the Claimant undertook building repair work for the school at the overtime rate and not at a commercial rate during the school holidays and principally during the summer holidays so as not to cause

disruption to the school. The work he undertook included refurbishment of school buildings including classrooms and kitchens as well as carpentry and painting and decorating work.

10. Mrs. Wasson confirmed to the Tribunal in evidence and in particular with reference to page 109 of the bundle, although the school did not have holiday request forms for the period prior to Ms. Aylett becoming head teacher, her own investigations of the holidays that the Claimant took prior to Ms. Aylett's appointment confirmed the Claimant's evidence that he took his holidays in four week blocks outside the school holidays and in term time.

11. Therefore, on the Respondents own evidence, the Claimant was not employed on the basis of the written contract but on the basis of the agreement that the Claimant had made with Ms. Collier which both benefited the Claimant as he could take holidays in term time and benefited the school as the school had the services of a building contractor to undertake repairs to its buildings at a cheaper rate paying the Claimant overtime pay only rather than a commercial rate that the Claimant would otherwise charge. In return, the Claimant undertook limited duties for the school such as opening it, providing security and doing other handyman duties in the morning whilst benefiting from paid holiday outside the school holiday period in term time. This arrangement worked very well until September 2017 when Ms. Aylett was appointed head teacher and Ms. Collier the previous head teacher with whom the Claimant had made the agreement left her job. Thereafter, Ms. Aylett and Mrs. Wasson attempted initially to persuade the Claimant to change the agreement that he had reached with Ms. Collier.

12. The first efforts to persuade the Claimant to change his contractual terms can be evidenced at page 59 of the bundle which was a meeting between the head teacher and human resources on 25 September 2018 which confirmed that attempts should be made to have the Claimant agree to a changes in his contract and indicated the possibility of a constructive dismissal claim. The meeting was attended by Ms. Aylett and Jane Carberry, HR advisor for the Respondent. Thereafter, a letter was sent to the Claimant dated 19 October 2018 which was at page 86 which referenced a change in hours for the Claimant to 6 am to 8:30 am as well as a change in his holiday entitlement. The head teacher confirmed the existing arrangement that the Claimant had with Ms. Collier but that he would no longer going forward be able to take his holidays in term time as it necessitated hiring a site supervisor to cover for the Claimants absence. This letter was the initial attempt to mutually vary the Claimants contract of employment by agreement.

13. The Claimant responded to this letter on 26 October 2018 restating the previous agreement with the head teacher noting that he had agreed to start at 5:30 am and end at 8:00 am. However, he confirmed that he would be prepared to agree to change his hours to 6:00 am and end at 8:30 am. However, he did not agree to the change in the holiday arrangement agreed with Ms. Collier stating that he only agreed to take the position with Ms. Collier on this basis in the first place and that he did not accept the new proposal.

14. There was a note taken by Ms. Aylett at page 106 dated 6 November 2018 which confirmed the Claimants position as stated above and specified that the Claimant was not happy with the proposed change to his holiday entitlement.

15. As a consequence of the Claimants not agreeing to the change in his holiday entitlement, Ms. Carberry wrote to the Claimant on 3 December 2018 which was a page

92. In the letter Ms. Carberry confirmed the arrangement that the Claimant had previously mentioned that he accommodated the school by undertaking building works during the school holidays but that the position was now going to change. She stated that school holidays could only be taken subject to the exigencies of the service. Thereafter, the Claimant received a letter dated 31 January 2019 confirming the change to his contractual hours and his wage rate which was at page 93a. In addition, Ms. Aylett wrote to the Claimant on 28 February 2019 specifying when he could take his holiday entitlement for the new financial year from April 2019 to April 2020 and this stipulated that the Claimant could only take his holiday entitlement during school holiday periods and not as previously agreed with Ms. Collier in term time. This letter and supporting documents was at pages 94 to 98 of the bundle of documents.

16. Unsurprisingly, the Claimant was not happy with this direction given to him by Ms. Aylett and had a meeting with her in early March 2019. He expressed his unhappiness and non-agreement with the direction and said that if the school was going to take this approach, he would have to reconsider whether he would be prepared to undertake building projects for the school at a favourable rate. As a consequence of this meeting, Ms. Aylett wrote to the Claimant on 8 March 2019 which was page 100 of the bundle. The letter confirmed that if the Claimant was prepared to undertake building works on behalf of the school at his overtime rate, she would be prepared to allow him to take his four week holiday to St Lucia in June during term time but that some of that holiday would have to be unpaid.

17. The Claimant did not agree to this proposal and consequently, Ms. Aylett wrote to the Claimant on 12 March 2019 which was at page 102 stating that she would not be prepared to grant his request to take four weeks holiday to St Lucia in June during term time and that he must meet with her and Jane Carberry from HR on Thursday 21 March. This meeting did not take place.

18. The earlier meeting with the Claimant at the beginning of March led to an escalation of the situation and Mrs. Wasson wrote to the Claimant on 5 April 2019 which was at page 105 confirming that as the Claimant was not undertaking the full duties of his job description his job would have to be re-evaluated so that it could be regraded at a lower level to confirm that he undertook only handyman duties and not the full duties of the job description. In addition, Ms. Aylett took advice from Jane Carberry in an email dated 14 March 2019 confirming that the Claimant did not agree to a change in his holiday entitlement and asking for advice on what action could be taken. In her response which was at page 106 and was dated 29 April 2020, Ms. Carberry advised Ms. Aylett to institute disciplinary action if the Claimant did not take his holidays when instructed to do so. Ms. Carberry advised in the email, *"if he takes leave which is not authorised, it would be appropriate to make clear that it will be regarded as a disciplinary matter as it has been expressly stated to him that leave is granted subject to the exigencies of the service*".

19. Following the advice from Ms. Carberry and because of the Claimant wished to take his holiday outside the time stipulated by Ms. Aylett in her letter of 28 February 2019, Ms. Aylett wrote to the Claimant on 19 July 2019 (page 132). Ms. Aylett confirmed that as he intended to take leave on 7 to 9 August (outside the period of annual leave stipulated to him) if he decided to go ahead with his plans it would be unauthorised leave and would lead to disciplinary action against him. Subsequently, on 5 September 2019, Mrs. Wasson wrote to the Claimant confirming that she was going to undertake an investigation under

the disciplinary procedure because the Claimant had breached the school leave procedures by failing to take 12 days annual leave as instructed by the head teacher on 28 February 2019 and this was deemed to be a breach of the annual leave procedure.

20. The Claimant was invited to an investigation meeting on 2 October 2019 conducted by Ms. Wasson (page 142) in which he was told that he had to take his holiday entitlement during school holidays and that he had failed to do so to meet the exigencies of the service. The Claimant reiterated the position as he understood it and as had been agreed with Ms. Collier. However, despite his explanation, the Respondent continued with the disciplinary action against him.

21. Following this meeting, the Claimant was suspended by letter dated 4 October 2019 on the basis of additional evidence which related to the alleged deliberate falsification of time sheets (page 143). The Claimant was invited to a further investigation meeting on 14 October at which he was questioned about the alleged falsification of the time sheets. He denied that he had falsified the time sheets but could not comment any further as no evidence of the alleged falsification had been provided to him.

22. He was subsequently invited to a disciplinary hearing by letter dated 18 October 2019 for failing to follow school leave procedure and taking annual leave as instructed by the head teacher and deliberate falsification of school sign in time sheets. The Claimant did not attend a disciplinary hearing as he was subsequently signed off sick from work by his doctor. However, on 2 December 2019 he wrote a letter of resignation (page 153).

23. In this letter he confirmed that he was resigning with immediate effect from 2 December 2019. The resignation was as a direct result of the unreasonable behaviour towards him over the last 18 months which treatment was characterised by efforts to get him to change his contract of employment that he had agreed with Ms. Collier when he started work at the school. He asserted that the Respondent had numerous meetings with him and unreasonably subjected him to disciplinary action when he did not agree to the change of his holiday entitlement and specifically the requirement of Ms. Aylett that he should take his holiday during school holidays rather than in term time as had been previously agreed with Ms. Collier. He confirmed that over the years he had undertaken building contracting work for the school at the cheaper overtime rate which had not been recognised by the school and that he was being forced into a position where he would be disciplined if he did not agree to the change in his holiday entitlement. He felt that due to the effects on his health and the exacerbation of his cluster headaches brought on by the treatment that he had to endure and the disciplinary action that had been instituted against him for not agreeing to change his contract of employment he had no option but to resign from his employment.

24. The Respondent wrote to the Claimant on 6 December 2019 accepting his immediate resignation as of 2 December 2019.

Law

25. Section 95 Employment Right Act 1996 (ERA).

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

26. A term of an employee's contract can only be implied if:

a. it is necessary to give the contract 'business efficacy', or

b. it represents the custom and practice in that employment and is 'reasonable, certain and notorious' — Devonald v Rosser and Sons 1906 2 KB 728, CA.

c. it is an inherent legal duty central to the relationship between employer and employee — for example, the duty to provide a safe system of work or the duty not to undermine trust and confidence.

27. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment (*Western Excavation Limited v Sharp)*.

"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."

28. Whether or not the employer intended to break the contract is irrelevant (Bliss v South East 713 [1987] ICR 700 (CA)).

29. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: (Malik v Bank of Credit and Commerce International [1998] AC20 34h -35d and 45c-46e).

30. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Limited [1981] ICR 666 at 672, Morrow v Safeway Stores [2002] IRLR 9.

31. The test of whether there has been a breach of the implied term of trust and confidence is objective (Lord Nicolls, Malik page 35c) The conduct relied on as constituting the breach must impinge on the relationship that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence that the employee is reasonably entitled to have in its employer.

32. A breach occurs when the proscribed conduct takes place: See Malik.

33. Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach, but it is not a legal requirement: See *Bournemouth University v Buckland [2010] ICR 908 at para 28.*

34. The Claimant must not affirm the breach: Lord Denning said in Western Excavating v Sharp (referring to an employee who had been the subject of a repudiatory breach):

> "the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.":

35. Court of Appeal's decision in *Marriott v Oxford Co-operative Society [1970] 1 QB 186* is an authority for the proposition that, provided the employee makes clear their objection to what is being done, they are not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time after the breach, even if their purpose is to enable them to find alternative work.

36. The Claimant must show that it resigned in response to this breach, not for some other reason. However, the breach does not need to be the sole or primary cause of the resignation; only an effective cause (Nottinghamshire County Council v Meikle [2004] IRLR 703).

37. In Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR, the Court of Appeal approved the guidance given in Waltham Forest LBC v Omilaju (at paragraph 15-16).Those authorities give the following guidance on the "last straw" doctrine:-

> The repudiatory conduct may consist of a series of acts or incidents some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: Lewis v Motorword Garages Ltd [1986] IRLR 157, per Neil LJ (p167C).
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> In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is does the cumulative series of acts taken together amount to a breach of the implied term?
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> Although the final straw may be relatively insignificant it must not be utterly trivial: the principle that the law is not concerned with very small things is of general application.
>
> The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. The act does not have to have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
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> The "final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps,

even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

The last straw must contribute, however, slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality referred to.

If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

If an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign, soldiers on and affirms the contract s/he cannot subsequently rely on these acts to justify a constructive dismissal unless s/he can point to a later act which enables her to do so. If the later act on which s/he seeks to rely is entirely innocuous, it is not necessary to examine earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer's conduct will have cross the Malik threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the *Malik* term.

Even when correctly used in the context of a cumulative breach, there are two distinct legal effects to which the "last straw" label can be applied. The first is the legal significance of the final act in the series that the employer's conduct had not previously crossed the *Malik* threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered no until the later act which triggers her/his resignation: in this case by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so.

The affirmation point discussed in Omilaju will not arise in every cumulative breach case:
"*There will be such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant,*

even though the claimant seeks to rely on them just in case (or for their prejudicial effect)." (per Underhill LJ).

Tribunals Conclusions

38. The Tribunal accepted the Claimants evidence that he took on the position of Site Supervisor at the school in 2012 because he had other commitments which was the running of a sole trade business in building contracting and carpentry which he wished to undertake during the remainder of the day and for which he charged clients at a commercial rate. However, he agreed with Ms. Collier that he would undertake duties that included building work for the school such as carpentry, repairs, painting and decorating and refurbishment to school buildings and premises. He agreed that he would undertake these duties at the school overtime rate and not at the commercial rates that he otherwise charged to commercial clients. The Claimant agreed to do these major works in school holiday time so as not to cause disruption to the running of the school. Ms. Collier agreed to this favourable agreement on the basis that the Claimant could take his holiday in four-week batches outside the school holidays and in term time. This arrangement worked well for both the Claimant and the Respondent for six years until the new head teacher, Ms. Aylett took over the school and Ms. Collier left.

39. The Respondents witnesses disputed that the Claimant had agreed this with Ms. Collier. However, the Respondent did not call Ms. Collier to give evidence at the hearing to dispute the Claimants evidence. Furthermore, the evidence that the Respondent gave to the Tribunal confirmed the Claimants version of events. For example, at paragraph 9 of Mrs. Wasson's statement she said *"I am not aware of there being any agreement between Phil and the previous head, Ms. Ann Collier. However, I cannot say for sure that there wasn't one. I did not line manage Phil while Ms. Collier was head teacher. Meetings were carried out between Phil and Ms. Collier for which I was never present ... it was only a year after Jo Aylett became head teacher that I did start to manage Phil."* In addition, at paragraph 38 of Mrs. Wasson confirmed that the Claimant did not undertake all the duties of his job description but affectively undertook the limited duties such as opening the school, security work and handyman work and repairs to which the Claimant testified. In addition, both Mrs. Wasson and Ms. Aylett confirmed in evidence that the Claimant undertook building repair work for the school at the overtime rate and not at a commercial rate during the school holidays and principally the summer holidays. The work he undertook included refurbishment of school buildings including classrooms and kitchens as well as carpentry and painting and decorating work. Most tellingly, Mrs. Wasson confirmed to the Tribunal in evidence (page 109) that although the school did not have holiday request forms for the period prior to Ms. Aylett becoming head teacher, her own investigations of the holidays that the Claimant took prior to Ms. Aylett's appointment confirmed the Claimant's evidence that he took his holidays in four-week blocks outside the school holidays and in term time.

40. Therefore, on the Respondents own evidence, the Tribunal finds that Claimant was not employed on the basis of the written contract but on the basis of the agreement that the Claimant had made with Ms. Collier which both benefited the Claimant as he could take holidays in term time and benefited the school as the school had the services of a building contractor to undertake repairs to its buildings at a cheaper rate paying the Claimant overtime pay only rather than a commercial rate that the Claimant would otherwise charge. In return, the Claimant undertook limited duties for the school such as opening it, providing security and doing other handyman duties in the morning whilst benefiting from paid holiday outside the school holiday period in term time. This

arrangement worked very well until September 2017 when Ms. Aylett was appointed head teacher and Ms. Collier the previous head teacher with whom the Claimant had made the agreement left her job. Thereafter, Ms. Aylett and Mrs. Wasson attempted initially to persuade the Claimant to change the agreement that he had reached with Ms. Collier by consent. However, when this did not work, the Respondent took advice from Ms. Carberry, its HR advisor who confirmed that the way to proceed if the Claimant did not agree to take his holiday entitlement during the school holidays was to take disciplinary action against him.

41. Following the advice from Ms. Carberry and as a consequence of the Claimant wishing to take his holiday outside the time stipulated by Ms. Aylett in her letter of 28 February 2019, Ms. Aylett wrote to the Claimant on 19 July 2019 (page 132). Ms. Aylett confirmed that as he intended to take leave on 7 to 9 August (outside the period of annual leave stipulated to him) if he decided to go ahead with his plans it would be considered to be unauthorised leave and would lead to disciplinary action against him. Subsequently, on 5 September 2019, Mrs. Wasson wrote to the Claimant confirming that she was going to undertake an investigation under the disciplinary procedure because the Claimant had breached the school leave procedures by failing to take 12 days annual leave as instructed by the head teacher on 28 February 2019 and this was deemed to be a breach of the annual leave procedure. In addition, Mrs. Wasson commenced action to re-evaluate the Claimants job role and to re-grade him to a lower level than grade 5 as he was only undertaking the role of handyman.

42. The Tribunal finds the taking of disciplinary action and the re-evaluation of the role to effectively down grade the Claimant so that his pay rate would decrease was conduct which was a significant breach going to the root of the contract of employment and showed that the employer no longer intended to be bound by one or more of the essential terms of the contract. In addition, it amounted to a breach of the implied term of trust and confidence. The taking of unjustified disciplinary action to force the Claimant to change the terms of the contract of employment that he had negotiated with Ms. Collier was a significant breach by the Respondent. It was clear to the Tribunal that the Claimant had not agreed to the change that had been proposed to his duties and his entitlement to take holidays in term time and made his disagreement clear to the Respondent. However, despite this, the Respondent decided to take disciplinary action against him when it was not entitled to do so. It also decided to re-evaluate the Claimants role and regrade it to that of handyman with the result that it was likely that his pay grade would change and he would be paid less. The Respondent was not entitled to unilaterally change the Claimants entitlement as to when he could take his holiday as it did in Ms. Aylett's letter of 28 February 2019 (page 94) when she stipulated that he must take all his holiday in term time. Furthermore, the Respondent was not entitled to take disciplinary action against the Claimant when he refused to do so. Nor was the Respondent entitled to make a decision to unilaterally change re-evaluate the Claimants role from that which was agreed with Ms. Collier in 2012. These actions amounted to a fundamental breach of contract and the Claimant resigned as a consequence of such breach by letter dated 2 December 2019 making his position entirely clear and stating that the reason for resignation was as a direct result of the unreasonable behaviour towards him over the last 18 months which treatment was characterised by efforts to get him to change his contract of employment that he had agreed with Ms. Collier when he started work at the school. He asserted that the Respondent had numerous meetings with him and unreasonably subjected him to disciplinary action when he did not agree to the change of his holiday entitlement and

specifically the requirement of Ms. Aylett that he should take his holiday during school holidays rather than in term time as had been agreed.

43. As a consequence, the Claimant succeeds with his claim for constructive dismissal. The remedies hearing is listed for 9 July 2021 and directions for this hearing will follow. It is hoped that the parties can come to an amicable agreement on compensation which the Claimant confirmed was his primary remedy. The Tribunal noted that the Claimant had modified his claim for compensation after taking advice on the compensation cap that would apply. It is also noted by the Tribunal that the Respondent accepted the valuable contribution that the Claimant made to the school as a Site Supervisor but also in respect to the building works that he had undertaken at a reasonable rate in his role as independent contractor during his time at the school.

Employment Judge Hallen
Date: 18 March 2021