EMPLOYMENT TRIBUNALS

Claimant:	**Mr T McGuinness**		
	and		
Respondent:	**Hughes Bros (Llanrwst & Trefriw Limited) t/a Alpine Travel**		
Heard at:	**Cardiff via CVP**	**On:**	**13 and 14 April 2022**
Before:	**Employment Judge**	**R Havard**	
	Members:	**Ms J Kiely**	
		Ms R Hartwell	

Representation:
Claimant: In person
Respondent: Mr Rad Kohanzad, Counsel

RESERVED JUDGMENT

1. The unanimous judgment of the Tribunal is that the Claimant's claim of unfair constructive dismissal is not well-founded and is dismissed;

2. The unanimous judgment of the Tribunal is that the Claimant's claim under section 44 of the Employment Rights Act 1996 is not well founded and is dismissed.

3. The unanimous judgment of the Tribunal is that the Claimant's claim of breach of contract is not well founded and is dismissed.

4. The unanimous judgment of the Tribunal is that the Claimant's claim in respect of the unauthorised deduction from wages is not well-founded and is dismissed.

REASONS

Introduction

1. By a claim form dated 4 February 2021, the Claimant indicated that he wished to pursue a claim that he had been unfairly constructively dismissed and that he had suffered a detriment pursuant to section 44 of the Employment Rights Act 1996, breach of contract and unlawful deduction from wages.

Issues

2. At the commencement of this hearing, the Tribunal was provided with a document entitled "Respondent's Draft List of Issues". The content of the document was not agreed. However, it was agreed that, in the course of the day, the Claimant would discuss the draft list of issues with Mr Kohanzad in the hope that agreement could be reached.

3. Once the hearing commenced, it was not considered appropriate for the Claimant to hold a discussion with Mr Kohanzad about the draft list of issues at the time that he was giving evidence. Nevertheless, before the conclusion of the hearing, and prior to the stage at which closing submissions were made, it was confirmed that the list of issues set out below had been agreed.

4. Those issues are:

Constructive unfair dismissal (section 98 Employment Rights Act 1996)

1. The Claimant claims that the Respondent acted in repudiatory breach of contract. He relies upon the following purported breaches of contract:

    (i) on or around 27 April 2020 and 12 June 2020 the Respondent asked the Claimant to finance his own training, undertake unnecessary training and threatened to provide no future training;
    (ii) in the summer of 2020, the Respondent deliberately made “errors” in the Claimant’s pay with the hope that the Claimant would not notice;
    (iii) on or around 19 June 2020 the Respondent proposed to change the Claimant’s the job role to include extra work relating to health and safety matters;
    (iv) on notice, the Respondent changed pay from being weekly to monthly without consultation;
    (v) the Respondent proposed to reduce the Claimant’s pay by 20% withhout consultation;
    (vi) between March 2020 until the Claimant’s resignation, the Respondent failed to provide the Claimant with a new contract; and

(vii) the Respondent did not pay the Claimant in October & November 2020.

2. Purported breaches (i), (ii) and (iv) appear to rely upon express terms within the Claimant's contract. It is not clear whether (iii) is said to be a breach of the implied term of trust and confidence or is simply part of the chronology.

3. The Respondent's position is that it was not in breach of contract because it was contractually entitled to make changes (i) & (ii) and, in relation to (iv), that the Claimant unreasonably refused to attend work and so the Respondent was entitled to withhold his pay.

4. Did any proven or conceded act or omission, whether taken in isolation or cumulatively constitute a repudiatory breach or breaches of contract by the Respondent?

5. If so, did the Claimant resign in response to any such conduct within the meaning of section 95(1)(c) ERA, and/or any such repudiatory breach?

6. Alternatively, did the Claimant affirm the contract following such conduct or breach?

7. If the Claimant was constructively dismissed, was the dismissal fair within the meaning of section 98(4) ERA? The Respondent contends that it dismissed the Claimant for a fair reason, namely some other substantial reason, and that its conduct was within the range of reasonable responses.

Unauthorised deductions from wages/breach of contract

8. The Claimant claims his pay for October and November 2020 (until his resignation) and pay for his accrued but untaken holiday outstanding at the final day of his employment.

9. It is accepted that the Respondent did not pay the Claimant's salary from 1 October 2020 onwards nor make any payment in respect of accrued but untaken holiday upon the termination of the Claimant's employment.

10. Did the Respondent make any deduction from the Claimant's wages in October and/or November 2020, within the meaning of section13 ERA?

11. Is so, was such deduction unlawful?

12. In the alternative, was the non-payment referred to above in breach of any express term of the Claimant's contract of employment?

Section 44 ERA detriment

13. Did the Claimant suffer a detriment on the grounds that:

    (i) in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he refused to return to his place of work (section 44(1A)(a));
    (ii) in circumstances of danger which he reasonably believed to be serious or imminent he took (or proposed to take) appropriate steps to protect himself from the danger (section 44(1A)(b)).

14. The Claimant relies on the following detriments:

    (i) not paying the Claimant; and
    (ii) the detriment of potential risk to the claimant's personal safety by the failure of the respondent to put in place full protective measures for the Covid-19 pandemic. Such failure potentially affected not only the claimant but also other employees, customers and passengers of the company and other members of the public engaging with the respondent. It is further contended by the claimant that the respondent did not respond to his queries about new safety protocols.

Remedy

15. In respect of any breach of contract claim: what are the Claimant's losses flowing from such breaches of contract, and has the Claimant made proper efforts to mitigate such losses?

16. In respect of unlawful deduction from wages: what is the extent of the unlawful deduction?

17. In respect of unfair dismissal: what compensation is just and equitable in light of the Claimant's losses and his efforts at mitigation; should any compensation be reduced to reflect the Claimant's contributory conduct and/or pursuant to ***Polkey v AE Dayton Services Ltd*** [1987] ICR 142 to reflect the likelihood that the Claimant might have been fairly dismissed or resigned in any event?

Evidence

5. The Claimant gave evidence on his own behalf.

6. The Respondent called:

   i. Mr Chris Owens, who is the Managing Director and shareholder of the Respondent;

   ii. The Claimant and Mr Owens had provided written witness statements. Mr Owens had also provided a supplemental witness statement. An agreed Bundle had been prepared by the Respondent and submitted together with an index running to 415 pages. No further documents were added to the Bundle in the course of the hearing. Unless otherwise stated, any page references in this Judgment refer to pages in the Bundle. Finally, the Respondent had prepared a reading list and a chronology to assist the Tribunal in its preparation prior to the commencement of the hearing.

Submissions

7. At the conclusion of the evidence, both Mr Kohanzad and the Claimant made oral submissions.

Findings of Fact

8. The Respondent is a coach operator based at Llandudno, North Wales. It operates a fleet of over 80 vehicles and employs approximately 80 staff. The Respondent's activities include the hire of private chartered coaches, tailor-made

tours travelling across Wales and the rest of the UK, local sight-seeing tours, heritage bus tours, local tourist bus and home-to-school travel contracts with which the Respondent has entered into with local authorities. It is a family run business founded in 1972 by the parents of the current Managing Director of the Respondent, Mr Chris Owens.

9. On 2 June 2015, the Claimant commenced his employment with the Respondent as a Home-to-School Passenger Carrying Vehicle ("PCV") Transport driver. He worked for the Respondent for 15 hours per week and was employed during term times to drive school children to and from school.

10. The Respondent maintained that, following the probationary period, the Claimant would have signed a contract of employment but Mr Owens was unable to produce a copy of the signed contract. The Respondent relied on the template to illustrate the terms and conditions under which the Claimant was employed (pages 267-284).

11. Mr Owens was certain that, when the Claimant commenced his employment, he would have been sent the contract. The Claimant stated that he had not been sent a contract at the start of his employment, and that the first time he had seen a contract of employment was when it was sent to him in the course of the proceedings. In his oral evidence, the Claimant said that he had no recollection of receiving the contract and he had searched his home but was unable to find it.

12. The Tribunal had listened carefully to Mr Owens giving evidence. The Tribunal had found him to be a credible and reliable witness. His evidence had remained consistent. He was prepared to accept when he was uncertain about any particular issue.

13. However, with regard to the Claimant, the Tribunal was concerned that aspects of his evidence, both written and oral, were inconsistent. For example, and whilst more detailed reference will be made to the issue below, in his claim form and witness statement, the Claimant had maintained that, during the period in which he was furloughed in 2020, he was required to bear the cost of online training. However, he conceded in the course of his oral evidence that all staff had to pay initially for online training, but that Mr Owens had confirmed to them on two separate occasions that he would reimburse them for the cost incurred.

14. There were a number of other occasions when the Claimant suggested to the Tribunal that his view was shared by a number of other drivers working for the Respondent but no evidence had been produced to support his claim.

15. Again, whilst further reference will be made to this issue, the Claimant maintained that the change in September 2020 from payment of wages from weekly to monthly represented a fundamental breach of his contract. Whilst the Claimant maintained that he had never received a contract, he stated that Mr Owens had endeavoured to introduce this change some two to two and a half years before and that, "it had ended badly". The Tribunal found, on the balance of probabilities,

that the Claimant would have made sure that he was fully aware of the terms of his contract at that time. Finally, whilst it was denied that the actual contract documents were produced, the Claimant accepted that he had represented a colleague at a disciplinary hearing when the terms of the contract of employment were discussed.

16. On balance, the Tribunal found that that, at the outset of his employment, the Claimant was issued with a contract of employment and that the contract found within the Bundle (pages 267-284) reflected the terms of that contract between the Claimant and the Respondent.

17. At the time that he commenced employment with the Respondent, he was also working as a driver on a Saturday for Afonwen Laundry on a part-time basis. This was known by the Respondent although, as stated in the email to the Claimant from Mr Spotswood of 30 September 2020, it was understood that this employment came to an end when Afonwen Laundry ceased trading.

18. At paragraph 11 of the contract of employment (page 274), there is a provision which prevents employees from working elsewhere without the prior written consent of the Respondent. This is an important provision, and paragraph 11 sets out the requirements, and the reasons for them, for an employee to provide full information of the work being undertaken for another organisation to make sure that there is compliance with the legislation with regard to drivers' hours.

19. The Claimant suggested that the Respondent was fully aware of the part-time work that he was undertaking at the time he commenced employment with the Respondent. However, the Tribunal accepted Mr Owens' evidence, supported by what was said by Mr Spotswood in his emails to the Claimant, that the Respondent was not aware that the Claimant had been working for M&H Coaches throughout the material time in March to November 2020.

20. Prior to the onset of the Covid-19 pandemic, the Respondent's business was performing well. However, the 'lockdown' announced by the UK Government on 15 March 2020, had a very substantial and far-reaching adverse effect on the Respondent's business.

21. The circumstances concluding with the Claimant resigning from his position of employment on 17 November 2020 began at the outset of the measures announced by the UK Government in respect of the pandemic in March 2020.

22. In March 2020 and in the ensuing months, as well as individual exchanges of emails with the Claimant, Mr Owens would send what he described as "missives" to the workforce. Whilst each missive was sent to all staff, Mr Owens personalised them by addressing the missives to each individual member of staff.

23. In those missives, the Tribunal found that Mr Owens was endeavouring to communicate to his staff the current situation, the consequences or potential consequences for the business and the individual employees. They also set out measures to be taken to try and protect the business and the jobs of the employees, together with compliance with the legislation and guidance

introduced by the UK and Welsh governments with regard to health and safety and protection from the virus.

24. The first missive was sent by Mr Owens to his employees on 18 March 2020 (page 70). It set out the immediate consequences of the pandemic with the cancellations of work being at unprecedented levels. It was an informative letter and the Tribunal found that the main thrust of Mr Owens' letter was to ensure the health and wellbeing of the workforce and also his aim to protect their jobs as much as possible. However, it was also realistic when stating that he could not rule anything out, to include reduced working, temporary lay-offs or compulsory redundancies. The Tribunal found that, taking account of the exceptional circumstances, it was a supportive and, at the same time, realistic communication.

25. On 20 March 2020, Mr Owens sent a further missive to his staff (page 73), reinforcing his message that the health and safety and wellbeing of all the staff was his top priority. Furthermore, even though the Respondent's business had been hugely affected, Mr Owens confirmed that he would be using the Respondent's resources to provide support to local community groups and the more vulnerable.

26. In an email of 20 March 2020, the Claimant wrote to Mr Owens confirming that he completely agreed with the approach set out in Mr Owens' letter of 20 March 2020.

27. Shortly after this missive of 20 March 2020, the government introduced the Coronavirus Job Retention Scheme ("CJRS") which marked the introduction of the furlough scheme.

28. On 23 March 2020, Mr Owens wrote to the staff (page 77) to confirm the announcement of the furlough scheme. At that point, schools remained open for children of essential workers and there was also the ongoing effort to support the local community. In the email of 23 March 2020, all members of staff, including the Claimant, were asked whether they were happy to go into work, and, if they were not, whether they were prepared to be placed on furlough and receive 80% reimbursement or to receive 100% on the understanding that the balance of 20% would be effectively paid back by the member of staff in the form of overtime.

29. In that email, Mr Owens also said the following: *"Please excuse any delay in responding and mistakes, because Carolyn has now finished as she lives with her Mum who is older and therefore more vulnerable."*

30. Carolyn had been employed by the Respondent for many years and was responsible for payroll and other administrative tasks. However, she lived with her mother who was a vulnerable person and it was agreed that she would remain home with her mother. Carolyn did not have access at home to the internet. At a later date, Carolyn took the decision to retire. Mr Owens confirmed that this was entirely Carolyn's decision.

31. In answer to the questions posed by Mr Owens in his email, and on the same day, the Claimant responded to Mr Owens saying that he would agree to be furloughed and to receive 80% pay.

32. Again, on the same day, Mr Owens wrote to the Claimant asking him how he was feeling and confirming that if schools remained open and he was happy to come into work, then he would be paid in full. Mr Owens then said*, "the 80% was simply if you weren't able or willing to come in, or we have no work I suppose".* The Tribunal accepted his evidence when he stated that there was still a level of uncertainty about how exactly the furlough scheme would operate.

33. On 27 March 2020, the Claimant was informed that he had been placed on furlough. In that email, Mr Owens stated:

> *"During this period of "Furlough" you cannot be engaged in paid employment by us although you are permitted to take part in volunteer work or training, as long as it does not provide services to or generate revenue for, or on behalf of, Alpine Travel or Jones Holidays."*

34. At or about this time in March 2020, Mr Owens received a call from the proprietor of M&H Coaches ("M&H"), Ms Margaret Owen, to say that the Claimant had been working for her and asking whether the Respondent would be furloughing the Claimant. The Tribunal found that the Claimant's contract of employment prohibited the Claimant from working elsewhere without written permission from the Respondent. The Tribunal also preferred the evidence of Mr Owens and found that the Claimant had not informed the Respondent about his employment with M&H. As stated above, there is a clear and obvious reason why it was important for the Respondent to be aware of drivers working for other organisations to ensure compliance with legislation which prescribes the number of hours a PCV transport driver such as the Claimant was entitled to work in any given period. At that time, as the Claimant was furloughed, and there were other priorities that Mr Owens was required to resolve, he did not take this issue further with the Claimant at the time.

35. On 3 April 2020, Mr Owens wrote to all staff (page 81) updating them on the current situation. Once again, reference was made to the fact that Mr Owens had been required to step in and take control of the payroll in Carolyn's absence. Mr Owens stated:

> *"Finally, if I have made mistakes in running your payroll, please excuse me. As you know, Carolyn runs our payroll system, but she is no longer able to come into work, so I am trying to navigate my way around a very complex payroll system with new rules, something that I haven't done in a decade! It's testing my grey matter!!!!"*

36. On 7 April 2020, the Claimant sent an email to Mr Owens (page 86) stating that he had worked a regular 29.5 hour week and he should therefore have been paid 23.6 hours to reflect the 80% furlough scheme.

37. Mr Owens responded to the Claimant on the same day (page 85) accepting that he was in error. He explained the basis on which the error was made and proposed a way in which to put it right which the Claimant confirmed in an email of the same day was acceptable. Indeed, the Claimant stated (page 85), *"Hi Chris, That's fine leave it as it is. It balances out when you carry holiday over".*

38. In August 2020, there were exchanges between the Claimant and Mr Owens (pages 81-84) with regard to payment of holiday pay and, whether during furlough, the Respondent was required to pay for time taken as holiday. The Claimant stated that Mr Owens had been mistaken and had provided a spreadsheet setting out what he said he should have been paid. On the same day, Mr Owens had considered what had been written by the Claimant and had responded immediately to confirm his error and that he would rectify the position. The Claimant replied stating*, "Hi Chris, That would be fine. Thanks for the quick response, I appreciate that."*

39. However, in the Claimant's oral evidence, he suggested that this was not a mistake but rather a deliberate attempt on Mr Owens' part to underpay him. The Tribunal rejected this assertion. It was entirely unsupported by any other evidence. By contrast, as outlined above, Mr Owens had said from the outset in his communications with the staff that, having taken on the complex task of the payroll, mistakes may be made and he asked the staff to bear with him. The Tribunal also took into consideration the initial uncertainty with regard to the way in which the furlough scheme would work. The Tribunal was satisfied that the miscalculation of the Claimant's pay was an honest mistake which Mr Owens rectified immediately.

40. On 14 April 2020, Mr Owens sent a further missive to all staff (page 88) looking to reassure them about their job security.

41. In the week of 17 April 2020, Mr Owens, who had assumed responsibility for the payroll of the staff, some of whom were paid weekly and some who were paid monthly had sent the payroll list to the bank but had overlooked to authorise the bank to transfer the wages which meant tht no-one was paid. However, on realising his mistake, he arranged for immediate transfers to those members of staff who needed payments that day and the remaining staff received their money on 21 April 2020.

42. On 17 April 2020, Mr Owens sent an email to all staff (page 89) to update them on the payroll issues which had been resolved and also to provide further reassurance, inviting members of staff to contact him if they needed to.

43. On 27 April 2020, as well as sending a further missive to members of staff to update them (page 90), he also requested employees who had a PCV licence to complete some online training modules. Before the pandemic, training took place on site, face-to-face, and the staff were paid for their time in attending such training.

44. Once the furlough system had been introduced and the vast majority of staff were furloughed, Mr Owens stated that it was permissible for employees to undergo training. He therefore required the staff to participate in online training. When arranging such training, it was necessary for the employee to make the initial payment for that training, again online, but Mr Owens confirmed in his letter that, on presentation of a receipt, he would reimburse the employee for the cost of the online training module.

45. It was a requirement of drivers such as the Claimant to hold a Driver Certificate of Professional Competence ("DCPC") card, also known as the Driver Qualification Card. In order to continue to hold that card, there was a legal requirement for drivers such as the Claimant to carry out 35 hours of periodic training every five years.

46. The Claimant stated in his witness statement and oral evidence that it was perfectly acceptable for an individual to leave the 35 hours training until the fifth year if he or she so wished.

47. Mr Owens maintained that it made good sense, both from the business's perspective and also that of the employee, to utilise the time when the staff were furloughed to undertake such training. First, the driver would, or should, be at home because he or she was unable to work and secondly it would save the business the cost of paying the members of staff for their time in attending face-to-face training when people were able to return.

48. The Tribunal noted under paragraph 18 (page 281) that the contract of employment provided*, "Drivers CPC training, a total of seven hours training per year at the Company's chosen time and venue with pay must be undertaken."*

49. Mr Owens sent further missives to his staff on 7 May 2020, 22 May 2020, 29 May 2020 and 5 June 2020. The Tribunal found that the content of those emails were designed by Mr Owens to provide the staff, to include the Claimant, with an update on progress being made by the business to adjust to the consequences of the pandemic.

50. In the email of 5 June 2020, following an announcement from the Minister of Education that schools would be returning on 29 June 2020, the Respondent's Compliance Manager, Mike Spotswood, had been calling staff to find out who would be happy to return to work at that stage and also to reassure staff that risk assessments were being prepared to ensure that safe methods of work were followed.

51. Mr Spotswood was a qualified nominated transport manager as well as a risk manager having received accreditation through the IoSH Managing Safely scheme. He had also attended online courses and seminars on how to assess and manage the specific risk of Covid.

52. On 12 June 2020, Mr Owens sent a missive to all members of staff, (page 97) making reference to risk assessments and safe operating procedures which would be sent out to members of staff and which should be read carefully and followed.

53. In that same communication, Mr Owens reminded staff to register for online training, repeating that he would refund its cost on completion and production of a receipt. He also stated that, taking account of the availability of such training, his offer to reimburse the cost, and the fact that drivers were furloughed and not working, he would not pay for face-to-face training in the future.

54. In his claim form and his witness statement, the Claimant maintained that it was inappropriate for the Respondent to expect the Claimant and other members of staff to undertake online training and to pay for it. The Claimant made no mention or acknowledgement in the claim form or witness statement that the cost of online training would be reimbursed by the Respondent. The Tribunal considered this omission, and the overall approach of the Claimant towards the Respondent's request for staff to undergo online training, impacted on the Claimant's credibility.

55. In his oral evidence, the Claimant stated that, when the first request was made by Mr Owens for staff to undergo online training, he said*, "I thought what's he up to asking us to finance training. That is not normal."* He also maintained that there was no need for him to do the training at that time as he had four years on his card to do that training. Therefore, it was not, *"a good idea to ask drivers to pay for something unnecessary."* The Claimant accepted that at the time he was on furlough but did not consider he was obligated to do the training. He maintained that the normal person who would pay for training was the employer and he did not know how to pay for online training. The Claimant believed this was a fundamental breach because normally the training was in the classroom and the employer would pay. He considered this was the first issue of the breakdown of trust and that, *"it was unreasonable and insensitive for him to ask me to train whilst furloughed."*

56. The Tribunal found that it was entirely reasonable for the Respondent to request the staff to undergo online training whilst unable to work and on furlough. The Tribunal also found that the Respondent had made it very clear to staff that, on presentation of a receipt, they would be reimbursed for the cost of online training and therefore it was not a question of members of staff having to fund such training themselves.

57. On 19 June 2020, Mr Spotswood sent to members of staff by email the risk assessments and a document entitled *"Driver Requirements for the Post-Covid 19 return to work"* (pages 100-116). This was described as *"new working conditions"* to reflect the guidance issued by the Government for employees such as the Claimant to follow.

58. The first risk assessment was entitled *"Provision of services after resumption of schools: Learner Transport Operators / Coronavirus"* and was provided to all drivers, mechanics and yard staff. A second risk assessment (pages 102-118) was issued with the same title but with a different reference. The second risk assessment was for the benefit of drivers and included guidance with regard to risks which existed when transporting pupils on school runs and the measures to be taken to deal with those risks. The Claimant maintained that, whilst he had read the risk assessments, he had found them difficult to follow and believed that there should have been greater consultation with the drivers and more detailed instruction on the implementation of the measures proposed.

59. The Tribunal had considered the risk assessments carefully. They broadly reinforced the guidelines already set out clearly by the Government for all individuals to follow with regard to social distancing and the use of sanitisers together with steps that needed to be taken if a child, described as a learner, became symptomatic. There were specific measures relating to the need for deep-cleaning of vehicles and staggering seating so that learners were "zig-zagged" throughout the vehicle and no-one should sit directly behind the driver. The Tribunal did not consider that the requirements set out in the risk assessments were particularly complex or difficult to understand. They also contained instruction to drivers to avoid congregating with each other and also a requirement to wipe down all surfaces after a school run (page 109).

60. On 22 June 2020, the Claimant wrote to the Respondent (page 99-100) stating that, due to childcare issues, this would impact on his ability to return to work on 29 June 2020 and asked for the Respondent's agreement to him continuing on furlough. At this stage, there was no comment made about the risk assessments or any health and safety concerns or that his role had been changed (page 100).

61. On the same day, Mr Spotswood replied (page 99) to say that if the Claimant was having problems with the children, he could stay on furlough and that the spreadsheet would be changed to confirm the Claimant was unable to recommence work on 29 June 2020.

62. On 24 June 2020 Mr Owens wrote to those staff who were paid weekly, which included the Claimant, to indicate that he would be intending to move everyone to monthly salary payments. Based on Mr Owens' oral evidence, which was not challenged, the Tribunal found that, of the total staff of 86, 26 members were paid weekly. It was proposed that the final weekly payroll run would be 28 August 2020 which meant that the Respondent was giving two months for the transition to take place but that if anyone needed assistance closer to the transition, they should speak with him (page 118).

63. The Tribunal found that the reason for the change was to ease the administrative burden on Mr Owens who had picked up responsibility for the payroll, a task with which he was not fully conversant and the current arrangement meant that there were five payroll runs per month. Furthermore, clause 20 of the contract of

employment (page 235) entitled the Respondent to change the intervals of salary payments on giving reasonable notice.

64. The Claimant suggested to the Tribunal that Mr Owens had attempted to introduce this change some two to two and a half years previously but "*it had not gone well"* and that the plan had been abandoned. The Claimant suggested that Mr Owens was taking advantage of the pandemic to force this change through. The Tribunal rejected his evidence. It found that the explanation provided by Mr Owens was credible, namely that he was attempting to simplify the administrative burden he had taken on in the absence of the person who had been responsible for payroll and also he had given those members of staff who were paid weekly adequate notice of his intention to change.

65. Furthermore, whilst the Claimant again complained of the lack of consultation, it was not until 7 August 2020 that the Claimant wrote to Mr Owens stating that he wished to continue to be paid weekly (page 121) asking for more detail about how the proposed transition would work. The Claimant also said*, "I would need to take some form of financial assistance for the month of September at the very least."*

66. Mr Owens replied on the same day (page 121) explaining how the change would be brought into effect. In response to a further enquiry by the Claimant, Mr Owens wrote on 10 August 2020 (page 120) saying:

"Hi Trevor,

Thanks for your email, don't worry, I'll do everything possible as always but I would say that we are millions down and will need to do what we can to simply ensure our survival into 2021. Unfortunately Alpine Travel isn't part of some multi-national with huge reserves but simply a small family business struggling to survive these difficult times.

Kindest regards

Chris Owens"

67. The Claimant was one of three members of staff who requested assistance. On the same day as the email from the Claimant, Mr Owens wrote to the Claimant to confirm that he would make weekly payments on account for September 2020 and then the monthly payment. He would claim back over the successive months the weekly payments that had been made on account. Indeed, whilst those additional weekly payments were made in September 2020 totalling £460, Mr Owens never pursued recovery of those sums.

68. On 21 August 2020, Mr Owens wrote to all staff, including the Claimant, stating that the impact of Covid-19 was such that, instead of growth, the business had virtually ground to a halt and Mr Owens was considering how to survive what was likely to be a very tough winter. In that email, Mr Owens stated as follows:

"*I am therefore proposing that, in order to maintain as close to 100% continuity of employment across both businesses that we introduce a period of short time working for the period November to April 2021. The proposal for short time working will be across all sectors of the business and will see all guaranteed minimum hours reduced by 20%.*"

69. The Claimant maintained that there was no consultation with regard to this proposal. The Tribunal accepted the evidence of Mr Owens and found that this was simply a proposal, taking account of the state of the business at the time, and it was with the aim of trying to ensure that all employees kept their jobs. In any event, this proposal was never brought into effect

70. On 26 August 2020, the Claimant wrote to Mr Owens asking whether he was *"planning on using the furlough to the max*" (page 142) and Mr Owens confirmed that, as it was now possible for the drivers to return to work, Mr Spotswood and Mr Williams of the Respondent would be calling everyone that day. The Claimant called Mr Owens to say that he was happy to remain on furlough but he was told that those responsible for scheduling the work, namely Mr Spotswood or the Depot Manager, Jon Hughes, would be in contact with him.

71. An updated risk assessment had been sent out entitled *"Back to work during Covid-19"* (page 158-160) which reinforced the existing and additional control measures in place to mitigate the risk of infection and the manner in which to reduce risk.

72. On 11 September 2020, Mr Owens sent an email to the staff (page 162). By this time, a majority of drivers had returned from furlough and there was a concern at the behaviour of certain of the drivers on coming to the depot in failing to adhere to social distancing guidelines. Mr Owens said that *"It is all potentially very dangerous".*

73. At this time, whilst this was disputed by the Claimant, the Tribunal found that the Respondent had been endeavouring to contact the Claimant to discuss his return to work. The Tribunal had taken account of the emails to the Claimant and indeed to Mr Owens confirming the attempts that had been made to contact him.

74. Mr Owens wrote to the Claimant on 16 September 2020 to confirm that the Operations Team had been trying to make contact with him and Mr Hughes wrote later that day to Mr Owens to confirm the attempts that he had made. It was suggested by the Claimant that no attempts had been made to contact him. The Tribunal rejected his evidence. He further stated that, when contact was finally made, the message he received was a confused one. Again, the Tribunal did not accept his evidence and found that it had been made clear that there was a requirement for the Claimant to return to work.

75. In any event, the Claimant then wrote to Mr Owens on 22 September 2020 (page 166), stating that he was not prepared to return to work as Mr Owens' email of 11 September 2020 raised serious concerns about safety at the Respondent's depot and that he was also seeking clarification of new protocols to be followed by drivers. He concluded by saying that he did not consider that he could return to work at the Respondent.

76. On 22 September 2020, Mr Spotswood replied to the Claimant's email (page 168) attaching the risk assessment for him to read as well as the September re-start document to inform him of how working practices were being adopted during Covid-19. It included measures to avoid social contact such as clocking in and clocking out which was to be replaced by a digital process but it was confirmed that he would receive instruction on the new procedure when he attended the depot the following day. Indeed, Mr Spotswood said, *"but all will be shown to you tomorrow…".*

77. In that email, Mr Spotswood also made reference to the Claimant working for M&H on a weekend and more recently during the week. The Claimant was informed that this was, *"totally unacceptable as this has placed myself and Helen your Transport Manager into a very difficult situation".* Mr Spotswood reinforced the message that had been provided to the Claimant at the end of August 2020 about returning to the Respondent to drive the school buses. At that stage he was given the choice to stay on furlough which he chose to do but *"if we need you we will call you"*.

78. Despite the fact that the Claimant refused to return to work for what he suggested were health and safety reasons, the Tribunal had been provided with evidence, which was not challenged by the Claimant, that, in fact, during this time, the Claimant had been working extensively for M&H. Indeed, the timesheets showed that, between 31 August 2020 and his resignation on 17 November 2020, the Claimant had worked the following hours at M&H:

    (a) w/b 31 August 2020 – 36 hours;

    (b) w/b 7 September 2020 – 60 hours;

    (c) w/b 14 September 2020 – 60 hours;

    (d) w/b 21 September 2020 – 48 hours;

    (e) w/b 28 September 2020 – 60 hours;

    (f) w/b 5 October 2020 – 36 hours;

    (g) w/b 12 October 2020 – 48 hours;

    (h) w/b 19 October 2020 – 24 hours;

(i) w/b 26 October 2020 – 48 hours;

(j) w/b 2 November 2020 – 24 hours;

(k) w/b 9 November 2020 – 36 hours;

(l) w/b 16November 2020 – 48 hours.

As a result, and taking account of the school runs which the Claimant would be expected to do for the Respondent, there was no possibility of the Claimant being able to drive for the Respondent due to the number of hours he was driving for M&H for which he confirmed he would ordinarily drive only on weekends.

79. Whilst the Claimant maintained that he was unable to return to work for the Respondent due to health and safety concerns, he accepted that, in the many hours he drove for M&H in the period August – November 2020, he would have transported hundreds of passengers to various destinations.

80. In addition, the Claimant maintained that he was not prepared to return to work without consultation about the additional requirements expected of him to do with sanitation of the coaches he would be driving. He maintained that this amounted to a major change in his job description. Mr Owens indicated that the additional tasks expected of the Claimant were simply to wipe down those parts of the coaches which may have been occupied by the children. Mr Owens' assessment was that this would have only taken an additional three to four minutes. His explanation was that, as part of their everyday duties, every driver had to carry out a thorough check around the vehicle each time the coach was taken out and returned to the depot. Furthermore, due to the social distancing measures and the occupants of the coaches being 'zig-zagged', the number would be greatly reduced. The additional requirement was simply wiping down those handles and seat belts which may have been touched with an antibacterial wipe which would be provided. In any event, on the basis that the Claimant was paid on an hourly basis, if he did incur more time, he would be paid for that time.

81. The Tribunal rejected the Claimant's claim that he refused to return to work because of health and safety concerns. First, the measures taken by the Respondent to address the health and safety issues caused by the pandemic were extensive. Secondly, he had been told that the new processes would be explained to him on coming to the depot. Thirdly, what was expected of the Claimant by the Respondent was no different to the expectation of M&H Coaches Limited as explained in the letter to him from M&H of 19 August 2020 (page 354).

82. When the Claimant refused to return to work, Mr Owens wrote to him on 27 September 2020 (page 187) expressing his extreme disappointment at the Claimant's email of the same date. Mr Owens set out the chronology and

emphasising the measures that had been taken to ensure the safety of the workforce and suggesting the real reason for his failure to return was as a result of the additional work he was undertaking for M&H. He concluded that email by pointing out that, unless the Claimant returned to work at 8 a.m. the following morning, *"at which point he will be led through what systems we have put in place to manage your and your colleagues' safety under these very difficult conditions. Failure to report to work as requested will be reviewed as Unauthorised Absence and treated under our company's disciplinary procedures."*

83. Based on the date of this email, in the week beginning 21 September 2020, the Claimant worked 48 hours for M&H. In the week beginning 28 September 2020, which was the date on which the Claimant was required to return to work for the Respondent, he worked 60 hours for M&H. He therefore failed to return to work for the Respondent.

84. The Claimant continued to maintain that he was unable to return to work.

85. On 30 September 2020, Mr Spotswood wrote again to the Claimant (page 198 - 199) stating:

> "*It is with regret that I find that I must write to you once again regarding your unauthorised absence from work.*
>
> *As you are fully aware, your services have been required at Alpine Travel for some weeks now. … we have struggled to make contact with you to arrange for your return to work at Alpine Travel.*"

It was again emphasised that, whilst the Respondent was aware of the Claimant working in 2015 not only for the Respondent but also Afon Wen Laundry on a Saturday, the Respondent was completely unaware of the Claimant working for M&H.

86. In the same email, Mr Spotswood stated that it had been understood and agreed that the Claimant would report for work and training on 23 September 2020 and the Claimant had written, stating that he would not attend to work citing concerns over his health and wellbeing. It was as a result of that email that Mr Owens instructed Mr Spotswood to send the risk assessments and other procedures that had been introduced. Mr Spotswood set out the chronology and attempts that had been made to ensure the Claimant returned to work and he scheduled a meeting for the Claimant to attend the depot on 5 October 2020 for an investigatory meeting.

87. The Claimant responded saying that he had not been provided with information regarding measures that had been put in place for his safety. This was despite the risk assessments being sent to him on more than one occasion and that he would be trained in the requirements of the risk assessment when he attended

the depot. Mr Spotswood again set out the chronology, concluding by asking him to attend an investigatory meeting on 5 October.

88. The Claimant continued to refuse to attend work, nor did he attend the investigatory meeting on 5 October 2020 despite the issues that would have been covered at the investigatory meeting being relayed to him, to include measures taken to ensure safety of the drivers incorporating, amongst other measures, the issue of personal PPE kits and written guidance.

89. Further correspondence was exchanged between the Claimant and Mr Spotswood with the Claimant insisting on being provided with a copy of his "revised contract" and also his current contract which was duly sent to him. Whilst the Claimant stated that he had not seen that contract before, the Tribunal had already found that he had sight of that contract and also knew its provisions.

90. On 25 October 2020, the Claimant had emailed all drivers to ask them whether anyone had seen the "summary document" and also made reference to his assertion that he had not been provided with his contract. However, the Claimant had not produced any responses from any drivers to his email.

91. On 27 October 2020, Mr Owens sent his payslip for October which clearly showed that he was not being paid any amount as he had not attended work when he had been required to do so. Despite the fact that he had been working extensive hours for M&H during that period, he responded to complain that he had not been paid and wondered whether there was a mistake although he had been told clearly that his absences were unauthorised.

92. Further exchanges took place with regard to his unauthorised absences which led to the email from the Claimant on 17 November 2020 (page 309) containing his resignation.

93. In the resignation letter, the Claimant claimed that:

"*You have knowingly used the Coronavirus pandemic and subsequent furlough scheme, as an opportunity to force through significant changes at Alpine Travel without seeking any necessary meaningful consultation first.*

In addition to this you have failed to pay me my contracted wage at the expected interval despite my requests. You have also meaningfully failed to remedy my safety concerns as mentioned in my email to you dated 22/09/2020 in relation to your email "Give me some space" dated 11/09/2020"

94. The grounds on which the Claimant justified his resignation were:

(i) a failure to provide a new contract;

(ii) the fact that Mr Owens had taken advantage of the pandemic;

(iii) due to the Claimant being furloughed, he would be unable to take part in any debate or discussion about changes the Respondent wished to make to his contract;

(iv) Mr Owens had tried to manipulate the situation which was illustrated by the tone and content of Mr Owens' communications during this period, and illustrated as an example the requirement of the staff to undergo online training.

95. The Claimant summarises the reasons for his resignation as follows:

"*My reasons for my constructive dismissal are as follows:*

1. Due to: significantly changing my job role, duties, method of payment and responsibilities without my agreement and without consulting me first.

2. Due to: failure to pay my contracted wages or furlough.

3. Due to: Health & Safety concerns. As outlined above."

96. Despite the allegations made by the Claimant regarding Mr Owens' conduct, Mr Owens responded on 27 November 2020 to accept the Claimant's resignation but inviting him to a grievance meeting stating that the Company was willing to address the issues raised in his letter and afford his full rights under the Company's grievance procedure.

97. Mr Owens invited the Claimant to offer some dates for such a hearing to take place and said that it could be undertaken by video call or face-to-face. Mr Owen concluded by saying *"Following the conclusion of the grievance procedure the Company is willing to allow you the opportunity to rescind your resignation should you wish."*

98. The Claimant did not take this opportunity and on 7 December 2020, confirmed his resignation.

99. Mr Owens wrote to the Claimant subsequently to say that there were no payments outstanding to him.

100. The Tribunal found that, during the course of the pandemic, the Respondent, through its "Here to Help Programme" delivered some 30,000 food and medical parcels and transported over 150 residents for their Coronavirus vaccinations, all free of charge. Some 7,100 student journeys per day had taken place and there had not been one work-related Covid transmission. Further, on two separate occasions, the Health and Safety Executive had attended the Respondent's depot and reviewed the measures in place to safeguard the staff and the

Respondent's customers. On both occasions, the HSE were satisfied with the measures that were being taken.

101. It was confirmed by Mr Owens that it was not until March 2021 that a revised contract was issued to members of staff.

The Law

Unfair constructive dismissal

102. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

103. In the leading case in this area, **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA,** the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract.

104. As Lord Denning MR put it: '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.'

105. In order to claim constructive dismissal, the employee must establish that:

a. there was a fundamental breach of contract on the part of the employer;

b. the employer's breach caused the employee to resign, and

c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

106. In order to identify a fundamental breach of contract on the part of the employer, it is first necessary to establish what the terms of the contract are.

107. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining the trust and confidence inherent in every contract of employment. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract — **Lewis v Motorworld Garages Ltd 1986 ICR 157, CA**

108. In such cases, the decision of the Court of Appeal **in London Borough of Waltham Forest v Omilaju [2005] ICR 481** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial.

109. In **Western Excavating (ECC) Ltd v Sharp** (above) the Court of Appeal expressly rejected the argument that s.95(1)(c) introduces a concept of reasonable behaviour by employers into contracts of employment. This means that an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably.

110. This was confirmed in **Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA**, where the Court upheld the decision of the EAT that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

111. The implied term of mutual trust and confidence is defined in **Malik v Bank of Credit and Commerce International [1997] IRLR 462:**

"*The employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee*".

112. A breach of that term may give rise to constructive dismissal, but both elements of the 'test' must be met for a claim to succeed:

i. the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; and

ii. that there be no reasonable or proper cause for the conduct.

113. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in Malik recognises that the conduct must be likely to destroy or seriously damage the relationship of trust and confidence.

Unauthorised deduction of wages/breach of contract

114. There is no right to be paid for any period during which an employee refuses to work. If the employee is refusing to perform certain duties but not others, the employer can refuse to accept part-performance and can refuse to pay the employee in respect of the period during which the employee is refusing to offer full performance. In such circumstances, it is expected that an employer should instruct the employee that it is not willing to accept an unauthorised absence.

115. Withholding wages in such a situation would no count as an unlawful deduction from wages under section 13 Employment Rights Act 1996 which only protects such sums to which an employee is legally entitled (New Century Cleaning Co Ltd v Church [2000] IRLR 27.

Health and Safety Detriment

116. **Section 44 Employment Rights Act 1996**

(1A) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that—

(a) in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work, or

(b)in circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.

(2) For the purposes of subsection (1A)(b) whether steps which a worker took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) A worker is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1A)(b) if the employer shows that it was (or would have been) so negligent for the worker to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.

Analysis and conclusions

117. In respect of the agreed issues between the parties, the Tribunal had carried out an analysis of the facts that it had found and, having applied the relevant law, had reached the following conclusions.

118. The Tribunal had also taken account of the submissions made by the Claimant and Mr Kohanzad on behalf of the Respondent following the oral evidence of the Claimant and Mr Owens.

119. In relation to the purported breaches of contract claimed by the Claimant at paragraphs 1 (i) – (vii) of the agreed issues, the Tribunal reached the following conclusions based on the evidence it had heard and on its findings of fact.

Paragraph 1(i)

120. The Tribunal had found that, on behalf of the Respondent, Mr Owens had made it perfectly clear in correspondence to the staff, to include the Claimant, that, on

presentation of a receipt of the cost incurred, the Claimant would be refunded the amount paid for online training. The Tribunal also had rejected the Claimant's assertion that such training was unnecessary. Finally, taking account of the fact that the Claimant was at home, not working for the Respondent, but in receipt of 80% of his salary, it was not unreasonable to expect him to undertake training which was permitted under the furlough scheme. The Tribunal also concluded that it was not unreasonable for Mr Owens to indicate that, as it was permitted, training should be undertaken whilst on furlough and a failure to do so would mean that any training which needed to be undertaken and which had not been undertaken during the time at which the Claimant was on furlough would not be funded by the Respondent.

121. Furthermore, the Tribunal had found, on the balance of probabilities, that the Claimant had been provided by the Respondent with a contract of employment and that he was aware of the terms of his contract of employment. The Tribunal noted under paragraph 18 (page 281) that the contract provides *"Drivers CPC training, a total of seven hours training per year at the Company's chosen time and venue with pay must be undertaken."* The fact that the Claimant asserted that the 35 hours required training in a five-year period could be condensed into one week at the end of that five-year period did not mean in any way that the Respondent's approach was unreasonable or represented a breach of contract, whether express or implied.

Paragraph 1(ii)

122. The Tribunal had found no evidence at all to support the assertion made by the Claimant that the errors made by Mr Owens with regard to the Claimant's pay were deliberate in the hope that the Claimant would not notice. The disruption caused to the Respondent's business by the pandemic was very substantial and wide-ranging. Due to the absence of the person who ordinarily had responsibility for the payroll, this was an additional responsibility added to Mr Owens' commitments in endeavouring to navigate the Respondent through the months of disruption caused by the measures introduced by the UK Government.

123. As early as 23 March 2020, when Mr Owens sent his third 'missive', he stated as follows:

> "*Please excuse any delay in responding and mistakes, because Carolyn has now finished as she lives with her mum who is older and therefore more vulnerable.*"

124. On each occasion that Mr Owens made a mistake and this was brought to his attention, it was rectified immediately. The Claimant suggested that the immediate rectification of the mistake supported his assertion that it was deliberate. The Tribunal reached the opposite view and that, once the error which the Tribunal found to be an innocent one was detected, Mr Owens investigated

it promptly. If and when he discovered an error had been made, he rectified it immediately.

125. Indeed, based on its findings of fact, the Tribunal considered that Mr Owens had endeavoured consistently to keep the staff informed of developments throughout the unfolding and unpredictable events of the pandemic from March 2020 onwards.

Paragraph 1(iii)

126. The Claimant asserted that the Respondent was in repudiatory breach of contract for requesting the Claimant and all other drivers to comply with the requirements of the risk assessment which had been prepared to deal with the risks posed by the Coronavirus. He suggested that this was a fundamental change as it included extra work in sanitising the coach used on school runs when conveying pupils.

127. The Tribunal had accepted the evidence of Mr Owens and found that the additional work of wiping down surfaces would add minutes to the pre- and post-journey checks expected of drivers in any event. Furthermore, if additional time was taken, Mr Owens confirmed that the Claimant would be paid for that time as he was paid on an hourly rate. Finally, under paragraph 2 of the Claimant's contract, it stated

> "*In addition to your normal duties you may be required to undertake other duties and you will be required to obey all reasonable directions from time to time given by the Company. The Company reserves the right to vary your duties.*"

128. The Tribunal concluded that the requirement for drivers to use antibacterial wipes provided to them by the Respondent to wipe down surfaces was an entirely reasonable request at the time that it was made and could not on any basis amount to a breach of contract let alone a repudiatory breach.

Paragraph 1(iv)

129. The Claimant claims that the Respondent changing the payment of salaries from weekly to monthly without consultation represented a repudiatory breach of contract.

130. At clause 4 of the contract, it states *"the Company reserves the right to alter the time, method and frequency of payment by issuing you with reasonable notice of any such change."*

131. The Claimant placed great store by the fact that Mr Owens had endeavoured to introduce monthly pay to those members of staff who were paid weekly some two to two and a half years before the pandemic and that this had been

abandoned. The Tribunal concluded that the Claimant was fully aware of the Respondent's ability under the contract to change the time and frequency of payment.

132. On this occasion, with Mr Owens having taken on responsibility for payroll, which was complex due to 26 members of staff being paid weekly and the remainder being paid monthly, he gave members of staff being paid weekly some two months' notice of his intention to change the frequency of payments so that everyone was paid monthly. In addition, he offered assistance to those who may be affected by the change. Indeed, the Claimant was one of three of the 26 who sought financial support and this was forthcoming from Mr Owens.

133. The Tribunal was entirely satisfied that sufficient notice had been given to all those being paid weekly, to include the Claimant, of the intended change. The Respondent had then provided appropriate support to the three employees, to include the Claimant, who asked for it. Indeed, the Tribunal had found that the additional support, namely three payments of the weekly salary made to the Claimant in September 2020 which the Claimant was told would be recouped over the following months in a total sum of £460 had not actually been repaid by the Claimant.

134. The Tribunal was satisfied that this change from weekly to monthly salary payments did not amount to a breach of contract, whether in respect of the express term or in relation to the implied term of trust and confidence.

Paragraph 1(v)

135. It was perfectly proper for the Respondent to propose a reduction not only in the Claimant's pay of 20% but all members of staff. The purpose of such a proposal was made clear in the communication sent to all members of staff, namely as an action which was designed to avoid any redundancies. In the event, the proposal was not put into effect and therefore the question of whether such an action would amount to a repudiatory breach of contract does not arise. Further, in accordance with clause 20 of the contract, it provides that:

> "*In view of the fluctuating nature of th Company's business, the Company reserves the right……. to reduce your normal working hours and reduce your pay proportionately.*"

Paragraph 1(vi)

136. It was admitted by the Respondent that, whilst the Claimant was an employee, no new contract had been issued to its staff which effectively meant that the existing contract remained in force. It was not until March 2021 that a new contract was issued to the staff by which time the Claimant had not been employed by the Respondent for over three months.

Paragraph 1(vi)

137. It was admitted by the Respondent that the Claimant was not paid for the months of October and November 2020. The reason for the non-payment was as a result of the Claimant's refusal to attend work without a proper explanation or excuse. Furthermore, during the two months of October and November 2020, the Claimant had been working an average of 39. 4 hours per week for M&H.

138. The Tribunal had not accepted the Claimant's evidence with regard to the reason for his refusal to attend work, namely concerns with regard to his health and safety, and found that his conduct was unreasonable. He relied on words used by Mr Owens in his email to all staff of 11 September 2020. This was the email which sought to reinforce the need for staff to abide by government guidance and also the provisions of the risk assessment. Mr Owens quite properly expressed his concern at the conduct of certain colleagues in failing to adhere to the requirements for social distancing stating, *"it is all potentially very dangerous."*

139. The Tribunal found the Claimant's reliance on those words to be wholly unrealistic and lacked credibility, particularly taking account of the fact that, at the same time, he was working effectively full-time for M&H.

140. In addition, it was unreasonable for the Claimant to refuse to attend work when a number of reassurances had been provided by the Respondent that, on his return, he would receive the necessary level of induction and training on the health and safety measures in place.

141. In the circumstances, the Tribunal concluded that this did not amount to a breach of contract, let alone one which was repudiatory.

142. The Tribunal has found that the conduct of the Respondent as particularised under paragraph 1(i) – (vii), whether considered individually or cumulatively, did not constitute a repudiatory breach of contract by the Respondent and the Claimant's claim of unfair constructive dismissal is dismissed.

<u>Unauthorised deductions from wages / breach of contract</u>

143. It was accepted, and the Tribunal found, that the Respondent did not pay the Claimant his wages for October 2020 and November 2020 up until the date of his resignation on 17 November 2020, nor did the Respondent pay the Claimant's accrued but untaken holiday pay outstanding at 17 November 2020.

144. The Tribunal fully understood the basis on which the decision was taken not to pay the Claimant during that period, namely that the Claimant had refused unreasonably to return to work and during the time that he had refused to return to work at the Respondent, he was working full-time at M&H. The Tribunal has rejected the Claimant's claim that he was justified in not attending work at the Respondent due to concerns with regard to health and safety.

145. The Respondent, and in particular Mr Owens and Mr Spotswood, had been endeavouring to ensure the Claimant returned to work for some weeks.

146. As stated, on 22 September 2020, Mr Spotswood wrote to the Claimant asking him to return to work on 28 September 2020.

147. On 27 September 2020 the Claimant stated that he would not be attending the meeting and Mr Owens responded asking him to attend the meeting at which time he would be led through all the systems put in place to manage the Claimant's and other employees' health and safety but he failed to do so.

148. On 29 September 2020, Mr Spotswood wrote to the Claimant who continued to refuse to return to work and he was warned that, if he failed to return to work, it would amount to an unauthorised absence from work.

149. On 2 October 2020, Mr Owens wrote to the Claimant stating he was required to attend a meeting on 5 October 2020 and that if he did not do so, such absence from work would be unauthorised. He also said to the Claimant if he did not attend, "*how can we demonstrate the measures that we now have in place to ensure the health & welfare of you and your colleagues*.""

150. In the Claimant's contract of employment it states at section 7 that *"You are required to be available for work during your normal working hours. You must make every effort to attend work."*

151. In all the circumstances, the Tribunal concluded that the Claimant's absence from work in October and November 2020 was unauthorised and he had failed, without reasonable excuse, to attend. Indeed, throughout this period, he was working full time for M&H.

152. In the circumstances, he was not entitled to be paid for the time he was absent without reasonable excuse, and his claims in respect of unpaid wages and breach of contract are dismissed.

Section 44 ERA Detriment

153. The Tribunal was satisfied that the Claimant did not suffer a detriment.

154. As has been explained above, the Claimant's reliance on the words of Mr Owens in his email of 11 September 2020 did not hold up to any scrutiny. At this time, he was working full-time for M&H taking on, and conveying, hundreds of members of the public as passengers.

155. By contrast, he was suggesting that it was not safe for him to return to work at the Respondent.

156. The Tribunal was entirely satisfied that the Respondent, through the efforts of Mr Owens and his management team, had taken very considerable, and responsible, steps to ensure the safety of the workforce. The constant correspondence sent by Mr Owens to the staff was appropriate and illustrated someone who cared for the wellbeing of his staff and at the same time trying to ensure the survival of the business.

157. The Respondent had put in place appropriate risk assessments and system of work. The Claimant had been requested on more than one occasion to attend work in order to receive an induction and training on the measures that had been put in place to safeguard the workforce.

158. Those measures were clearly appropriate as the Health and Safety Executive had paid two separate visits to the Respondent and was satisfied with the measures that were in place. It is illustrative that despite the many thousands of pupils and other members of the public who were conveyed by the drivers of the Respondent during the pandemic, not one case of Coronavirus was linked to the Respondent.

159. The Claimant was not prepared to afford any credit to the Respondent, and Mr Owens in particular, for the efforts that had been made to safeguard the staff and the Respondent's customers. When asked whether content of the missives sent by Mr Owens to the staff reflected someone who cared for his staff and customers, the Claimant's response was that such missives included 'buzzwords' just to give the appearance of someone who wished to ensure the safety and wellbeing of his staff. The Tribunal fully rejected that categorisation. The measures taken by the Respondent were all directed towards making sure that circumstances of danger were not serious and imminent. The Claimant's assertion that he reasonably believed the circumstances of danger to be serious and imminent was not credible.

160. The Claimant's claim under section 44 ERA is dismissed.

Employment Judge M R Havard
Dated: 12 May 2022

JUDGMENT SENT TO THE PARTIES ON 14 May 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N ROCHE