EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102188/2022

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Held in Glasgow on 2, 3, 4 and 5 August; 31 October; 1 and 2 November 2022

Employment Judge P O'Donnell

Mr R Devine	**Claimant** **In Person**
Telefonica UK Ltd	**Respondent** **Represented by:** **Ms K McColl -** **Counsel [Instructed by Shoosmiths]**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Claimant's claims for unfair dismissal and holiday pay are not well-founded and are hereby dismissed.

REASONS

Introduction

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1. The Claimant has brought a complaint of unfair dismissal under the Employment Rights Act 1996 arguing that he was dismissed as defined in s95(1)(c) of the Act (that is, constructive dismissal). He also brings a claim for pay in lieu of untaken holidays.

2. The Respondent resists all claims. They argue that the Claimant was not dismissed and, rather, resigned. They also contend that the Claimant has been paid all sums due on the termination of his employment.

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3. The hearing took place over two diets due to the fact that issues which arose during the first diet (in particular, an amendment application by the Claimant)

meant that the hearing of the evidence could not be concluded in the time originally allocated.

4. The hearing was predominantly conducted in person. However, during the second diet, two witnesses, (identified below) gave evidence remotely by way of Cloud Video Platform (CVP) for reasons set out below.

Preliminary and case management issues

5. At the outset of the hearing, the Claimant sought to add further documents to the bundle. On the basis that no evidence had been heard at this point and with the caveat that no view had been taken on the relevance, credibility or weight to be given to these documents.

6. During the course of the first diet, it became necessary to deal with an amendment application by the Claimant. The Tribunal gave an oral judgment on that application and a written judgment was issued between the diets. The Tribunal does not propose to repeat that judgment which is referred to for its terms.

7. At the outset of the second diet, the Respondent made an application for two of their witnesses to gave evidence remotely by CVP. These witnesses were travelling from other parts of the UK to attend the hearing (one by plane from Northern Ireland and one by train from England) and both had had their journeys cancelled by the relevant travel providers. The Respondent was concerned that there may be further difficulties in travel which could cause delays with the hearing. In particular, industrial action on the railways was causing delays and cancellations.

8. The Claimant opposed the application on the basis that the evidence of the witnesses was important and should be heard in person.

9. For the reasons set out below, the Tribunal granted the Respondent's application:-

    a. The paradigm situation would be for all witnesses to attend in person.

b. The difficulties with the attendance of these witnesses are for reasons beyond their control and they have made efforts to attend in person.

c. The hearing has had to be continued once already and a further delay is not in the interests of either party or in keeping with the overriding objective.

d. The ability of the witnesses to attend was unpredictable and there is a real chance that further issues with travel could arise.

e. The experience of the Tribunal in conducting remote hearings during the pandemic is that these can be conducted fairly with little or no prejudice to either party. The Tribunal is conscious that the Claimant is a litigant-in-person and will bear in mind that he may not have experience of remote or hybrid hearings.

f. The balance falls on the side of avoiding further potential delay against any prejudice in taking evidence remotely.

10. The Tribunal made Orders orally for the giving of evidence remotely by these witnesses:-

a. The witnesses must be provided with a copy of the bundle in a format that they can access whilst giving evidence.

b. The witnesses must be advised not to mark-up the bundle in any way.

c. The witnesses must not have any notes (written or electronic) in front of them when giving evidence.

d. The witnesses should ideally alone when giving evidence but if anyone else is present then they should not prompt or otherwise influence the witness.

Evidence

11. The Tribunal heard evidence from the following witnesses:-

a. The Claimant.

b. Chris Norris (CN), a loss prevention manager with the Respondent, who looked into the initial complaint that led to the disciplinary process.

c. Chris Parker (CP), the manager of the Respondent's Stirling store, who carried out the disciplinary investigation.

d. Alex Sewell (AS), a store manager with the Respondent based in Northern Ireland, who conducted the disciplinary hearing.

e. Kerry McLaughlin (KMcL), a retail performance manager with the Respondent, who heard the Claimant's appeal.

12. AS and KMcL gave their evidence remotely by way of CVP. All of the other witnesses gave evidence in person.

13. There was an agreed bundle of documents prepared by the parties running to 213 pages. A reference to page numbers below is a reference to pages in the bundle.

14. The relevant facts in this case were, for the most part, not in dispute. Parties were almost entirely in agreement as to what had happened at the various stages of the disciplinary process and the contemporaneous documents supported the evidence given at the hearing.

15. The only real dispute of fact related to certain of the questions and answers during the investigation meeting between the Claimant and CP. They had a different recollection as to whether certain questions were asked and the answers given. For reasons which will become clear below, this dispute did not have any real bearing on the issues to be determined in this case and so it was not necessary to resolve this dispute.

16. Broadly speaking, the Tribunal considered that all the witnesses including the Claimant gave their evidence honestly and openly. There were times when all the witnesses could not recall specific matters but that is only to be expected given the passage of time.

17. The Claimant did, during his cross-examination of the Respondent's witnesses, assert that they were not answering his questions. However, it

was quite clear that these were instances where the witnesses were not giving the Claimant the answer that he wanted them to give rather than being evasive or refusing to answer the question. The Tribunal did have to intervene on these occasions to make it clear that an answer had been given.

5 **Findings in fact**

18. The Tribunal made the following relevant findings in fact.

19. The Claimant was employed as a sales adviser by the Respondent from 28 June 2018 until his resignation which took effect on 14 January 2022. He worked at the Respondent's Falkirk store for the whole of his employment.

10 20. The Respondent is a telecommunications business which operates a mobile phone network throughout the UK. The stores operated by the Respondent sells two types of contract to customers. The first is known as a "device contract" in which the customer purchases mobile devices such as phones, tablet computers and mobile broadband devices referred to as "dongles". A
15 customer may purchase a device outright or they may engage in a credit agreement in which they pay off the device over a variable period of time. The second type of contract is known as an "airtime contract" in which the Respondent provides the customer with access to their mobile phone network. The airtime contracts provide for a variable amounts of free airtime,
20 text messages or mobile data depending on the price being paid.

21. Customers may purchase both types of contract at the same time. For example, they may be purchasing a mobile phone and an airtime contract as a package. When they have paid off the phone then they can continue with the airtime contract. However, a customer may already have a phone that
25 they intend to keep using and only wish to enter into an airtime contract. This is also referred to as "SIM only" contract.

22. The Respondent operates promotions from time to time. For the purposes of this case, the Respondent had a promotion called "Speed to Refresh" (S2R) where a customer who was nearing the end of a device contract could
30 upgrade to a new phone early before the end of that existing contract. The

Respondent would, in effect, write off the remaining balance on the device contract in return for the customer taking out a new device contract. Importantly, S2R could not be used to write off the remaining balance on a device contract where the customer wanted to move to a SIM only contract. The terms of S2R are set out at pp48-49.

23. The S2R promotion was first introduced in or around 2017 and was operated from time-to-time. If a customer had the S2R promotion applied to them then the Respondent's computer system would restrict the sales adviser from being able to move that customer to a SIM only contract and they were, instead, directed to selecting a device to which the customer was being upgraded.

24. The Respondent operates an internal process called "Speak Up" whereby employees could raise issues of concern anonymously.

25. On or before 15 July 2021, a query was raised through the Speak Up process regarding the Falkirk store (p70). The query identified that the person in question (who, by the design of the Speak Up process, remained anonymous) had noticed that the Falkirk store had made 17 mobile broadband sales in the previous week and that the person wanted to identify how this had been achieved in order to replicate this at their store. In looking at the sales data, this employee had identified a number of sales that they considered to be suspicious because the customer had been upgraded from a voice plan to a mobile hotspot device (dongle) and then upgraded again on the same day to a SIM only contract. The query identified a number of transactions where the same thing had happened.

26. The query was referred to Brooke Darlington, territory leader north, who ask CN to look into this. CN was a loss prevention manager with experience of looking at sales data. He looked at the transactions in question and emailed Brooke Darlingtion with his findings on 15 July 2021 (p69). He confirmed which sales advisers had carried out the transactions in question and the Claimant was one of them. He noted that none of the accounts showed any

usage of the dongle device. He also confirmed that the information about the transactions set out in the Speak Up query was correct.

27. CN also produced a spreadsheet of other transactions (p66) beyond those mentioned in the Speak Up query which he identified when he looked at the sales data. These all showed customers who were upgraded to a dongle device (which was considerably cheaper than a phone) and then upgraded to a SIM only contract the same day after paying off the dongle. Three of these transactions involved the Claimant. This was provided with the email at p69.

28. On receiving CN's email, Brooke Darlington decided that a fact finding investigation was required and asked for one to be arranged. He asked that the store leader from the Falkirk store not carry out this investigation, as would normally be the practice, in case they were involved in these transactions. As a result, CP, who was the store leader in Stirling, was appointed.

29. CP arranged to meet with the Claimant at 12.30pm on 26 July 2021 to carry out a fact finding interview. CP was conducting similar interviews with other staff in the Falkirk store on that day and on surrounding days.

30. The meeting went ahead as planned. A note of the meeting was produced. The original version of the note (which reflects CP's recollection of the meeting) is at pp74-79 and a version with comments from the Claimant is at pp80-86:-

    a. CP asked the Claimant to talk him through the process of selling an upgrade which he did.

    b. CP then asked the Claimant to do the same with selling mobile broadband devices which he did.

    c. CP asked why the sales of mobile broadband devices were high at the Falkirk store and he explained that it was about getting to know customers and their needs.

    d. The Claimant was asked about the S2R promotion and the Claimant explained that moving a customer to a mobile broadband device would

be the best option for the customer where they want to move to a SIM only. He stated that this could be done if the customer was unhappy in order to retain their business.

e. There was a discussion of a particular transaction which CP asked the Claimant to talk him through. The Claimant explained that the customer wanted to move to SIM only but there was no option to do this through S2R. The Claimant stated that if that is what the customer wants then that is fair but there was no option for SIM only and the only option was S2R.

f. CP asked why a customer would upgrade to a dongle, not use it and then upgrade to SIM only half an hour later. The Claimant replied that he had spoken to the customer and identified that she would be able to use the dongle in the future.

g. The discussion of the particular transaction continued and the Claimant explained that S2R could only upgrade the customer to a device and the customer did not want to do so because the phones were too expensive. The dongle would suit her needs so they moved her to that device and then on to a SIM only after that.

h. CP then asked about another transaction where the customer upgraded to a dongle and then to SIM only shortly thereafter. The Claimant could not recall this. CP said that it was similar to the first customer as it involved S2R and an upgrade the same day. The Claimant replied it would be the same thought process that they had the dongle for use in the future and get the SIM only contract they wanted.

i. CP asked how many times the Claimant had carried out such transactions in the last couple of months and he suggested it would be twice. CP informed him that it was three times.

j. CP asked how long this type of transaction had been going on and the Claimant replied that he was not sure.

k. The Claimant was asked what the benefits were to him and the store from these transactions. The Claimant replied that business would be retained. CP asked if the Claimant would get an extra bonus to which he replied that it would be a miniscule number and that it was about keeping the customer happy.

l. CP pointed out that the customers had been put on the highest tariff for the dongle and asked how this would benefit them. The Claimant replied it would make no difference to them. Asked if it would make a difference to the business, the Claimant replied that it would impact on store figures.

m. The Claimant was asked what benefit the customer would get from upgrading twice in a short space of time and he replied that they would get on to SIM only.

n. CP asked if his leadership was aware of what he had been doing and he replied that it was of his own accord and was not aware if they knew.

o. The Claimant was also asked if he was aware of other sales advisers in the store doing the same thing. He replied that he did not know about that.

p. CP also asked how the Claimant learned about this process and whether he had been told to carry out sales in this way. He replied that no-one had told him and he figured it out for himself.

q. The interview continued with questions about the Claimant's awareness of Financial Conduct Authority (FCA) compliance.

31. After concluding the interviews with the Claimant and other staff, CP decided that they should be suspended while further investigations were carried out. The Claimant was advised of this by letter dated 30 July 2021 (p87). The letter states that the matter being investigated was suspected gross misconduct relating to a failure to follow correct process and procedure for

S2R upgrades resulting in financial loss to the company, sales manipulation and breach of trust.

32. The notes of the meeting held on 26 July were sent to the Claimant and he returned them with comments on 11 August 2021.

5 33. CP did carry out further investigations regarding whether there had been any usage of the dongles sold to customers by the Claimant in relation to the identified transactions. It was confirmed that there was no usage (p108).

34. An investigation report (pp109-123) was produced by CP dated 27 September 2021:-

10 a. The report sets out the allegations that had been investigated:-

i. Sales manipulation and fraudulent/dishonest behaviour in that the Claimant had used the S2R promotion to circumvent the customer paying the outstanding balance on their device contract by upgrading customers to a dongle and then
15 upgrading them to SIM only shortly thereafter.

ii. Sales manipulation and fraudulent/dishonest behaviour in that the Claimant had processed an upgrade to a dongle and then another adviser moved the customer to SIM only.

iii. Breach of FCA rules in that the Claimant had sold devices (that
20 is, dongles) to customers that they did not need.

b. The report then sets out background facts regarding how the issue came to light and the steps involved in the investigation. A table setting out a sequence of events is included. The various appendices to the report are then listed which included the different versions of the
25 fact finding interview notes.

c. The report summarises CP's findings as follows:-

i. The transactions in question appear to have been completed by the Claimant to circumnavigate the restrictions in the sales

system relating to S2R. In particular, S2R did not allow customers to move to a SIM only contract but this was what had been done. The way in which the transactions had been carried out resulted in the customers spending considerably less than would have been the case if the transactions had been carried out according to the S2R terms and conditions.

ii. As well as this loss to the company, there would have been an impact on store bonus as the sales in question would have contributed to the store targets. The sales of dongles were processed on the highest tariff which maximised the effect.

iii. The Claimant had sold devices to customers which they did not need given the lack of any usage on the dongle devices and the fact that they upgraded to a SIM only contract shortly after the dongle was sold to them. CP considered that this could breach FCA guidelines.

d. CP concluded by recommending that the case should proceed to a formal conduct hearing. This was because he only had the power to give an informal warning and a more serious sanction required a formal hearing.

35. AS was appointed to conduct the formal hearing. She is a store leader based in Belfast and had had no previous involvement in the case.

36. By email dated 7 October 2021 (pp125-126), the Claimant asked AS for further documents and information he considered he needed to be able to answer the allegations against him. AS replied to this email on 11 October 2021 (p125) attaching some documents and providing links to others for the Claimant to access online.

37. By letter dated 18 October 2021 (pp167-168), the Claimant was invited to a formal hearing on 25 October 2021. The letter sets out the allegations to be considered and states that the Claimant must be prepared to attend the

hearing to discuss these. The letter also confirms that a warning or other penalty, including dismissal, may be an outcome of the hearing.

38. The hearing proceeded on 25 October 2021 and the notes of the meeting appear at pp171-173:-

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a. AS started by reading out the allegations. The Claimant interrupts to say that he only carried out part of one of the transactions and AS explains he will have the opportunity to provide input on each sale.

b. AS continues to read out the allegations and asked the Claimant if he is happy to proceed. He states that he is and then asks what the right course of action should have been and what the correct process for each sale he should have followed.

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c. AS replies that it is her role to ask questions. The Claimant replies that she has to give him an answer.

d. Although not recorded in the notes, the Tribunal accepted the evidence given by AS at the hearing that she did not want to provide an answer to this question until she had heard the Claimant's response to the allegations. She felt that any answer she gave could influence the Claimant's response.

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e. The Claimant stated that he was innocent and that the process had been a witch hunt. AS explains that she is investigating the allegations and will give him time to explain events around each sale.

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f. AS asked the Claimant about the first transaction being looked into and he explained that the customer wanted to move to SIM only but had S2R on her account. He, therefore, moved the customer to the cheapest device which was a dongle from which she could then move to SIM only.

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g. The Claimant raised a query about some of the times for the transactions which did not correspond across different documents which AS said she had noticed as well and would look into.

h. The Claimant was asked about his understanding of S2R and he replied that it was put on the customer account with no opt out. He stated that it was not for him to decide what the customer wants and it is their decision. He did the right thing for the customer.

5 i. The Claimant was asked if he had anything to add regarding this transaction and he returned to his point about not having been informed what he should have done and seeking information about this. AS suggested a break which was then taken.

j. When the meeting resumed, the Claimant renewed his questions
10 about what he should have done and asking when AS could answer his questions. He stated that it was pointless to continue until AS answered his questions.

k. AS suggested that they agree to end the meeting at this point which is what happened.

15 39. After the meeting, AS consulted the Respondent's HR department who advised her that the meeting was the Claimant's opportunity to provide his input and that she should now proceed to issue her decision. She confirmed this to the Claimant by email dated 2 November 2021 in response to an email dated 1 November from the Claimant seeking an update (p178). The email
20 from AS also provided a response to the query regarding the timings of transactions.

40. AS provided her decision in a letter dated 12 November 2021 (pp182-184):-

a. She concluded that the Claimant had committed gross misconduct and was issuing him with a final written warning.

25 b. AS concluded that the Claimant had enabled the customer in the first transaction to find a way around the limitations of the S2R terms, specifically that it did not allow the customer to move to a SIM only contract. She concluded that he did this knowingly.

c. AS noted that the second transaction was not discussed because he did not want to proceed but that he had acknowledged during the fact finding interview that there had been multiple occasions when he had carried out similar transactions.

d. AS considered that the Claimant had demonstrated that he saw no issue with his actions because he was doing the right thing for the customers. Whilst she appreciated that his intentions may have been good, AS was of the view that he should not have taken it upon himself to find a loophole to get around the limitations of S2R.

e. The fact that each customer had been placed on an unlimited data package for the dongles sold to them was taken into account. AS considered that this would attract a high gross sales value and impact on store bonus.

f. AS took the view that the lack of usage on the dongle devices indicated that the customers did not need these devices. She considered that this was a breach of FCA rules.

g. The letter advised that the warning could mean that his pay review and quarterly bonus may be withheld.

h. The Claimant was also advised that the warning can be taken into account in determining any sanction if there are any further issues of conduct.

i. The letter concludes by advising the Claimant of his right of appeal.

41. The Claimant appealed this decision by email on or around 23 November 2021 (pp186-187). He set out what he described as key points; there was no financial loss to the company or profit to him; there was no valid policy or process which he had broken; he did not consider FCA rules had been broken; he alleged the process was disingenuous and that there had been a lack of care.

42. KMcL was appointed to hear the appeal and this was arranged for 22 December 2021.

43. In the meantime, the Claimant had returned to work. He found that he was being more closely supervised than before and required to get authority from store leadership to carry out certain transactions which he previously could carry out himself.

44. The appeal meeting took place between the Claimant and KMcL as planned on 22 December 2021 and a note of the meeting appears at pp192-194. At the hearing, the Claimant informed KMcL that he wanted her to look into two points; what was the correct process for the sales in question and what was the valid S2R policy that he had broken. The meeting was entirely focussed on these matters and KMcL concluded the meeting with the understanding that these were appeal points she was to consider.

45. KMcL issued her decision by letter dated 7 January 2022 (pp196-197). She clarified that S2R was a campaign targeting certain customers and such campaigns are run all the time. She explained that the Respondent does not change their processes or policies in such circumstances because they are time limited but communications with the terms of campaigns are issued when they are launched. The S2R terms were available on the intranet which explain that it cannot be used to move to SIM only contracts. There was no process as such but KMcL considered that the Claimant had demonstrated that he was aware of how to process a S2R upgrade.

46. In light of this, KMcL could not answer the question of what process had been broken. However, she did not consider that the outcome of the disciplinary hearing was based on the Claimant breaching any process. She did not uphold the appeal.

47. The Claimant resigned immediately on receiving this outcome by an email dated 7 January 2022 (p198). The email states that the Claimant considers his position untenable and his working conditions to be intolerable. He states that he is resigning in response to a repudiatory breach of contract but does not state what this is or how it arose.

48. The holiday year operated by the Respondent ran from 1 January to 31 December. The contract allowed for 30 hours untaken holiday to be carried over from one year to the next. At 31 December 2021, the Claimant had 44 hours untaken holidays. He received pay in lieu of untaken holidays in respect of 30 of these hours after the end of his employment.

Claimant's submissions

49. The Claimant handed in written submissions which he relied on and were read by the Tribunal.

50. The submissions began by setting out the Claimant's position in respect of the investigation by CP. He alleged that junior members of staff were treated badly and felt bullied making reference to the tone of the meeting. Reference was made to the resignation emails of other staff.

51. It was submitted that CP admitted to failing to follow proper procedure and agree the notes of the investigation meeting at the end of the meeting. It was submitted that unamended notes were circulated and used against the Claimant at the disciplinary meeting. Although a copy of the notes with the Claimant's amendments were added to the investigation report pack, the Claimant complained that the original notes were also included in the pack.

52. The Claimant submitted that there was an attempt to portray him as dishonest and made comments about the evidence given by CP about this which he said was not credible. Submissions were made about the evidence of financial gain and the probability of the Claimant being motivated by personal gain.

53. Turning to the disciplinary meeting, the Claimant made submissions about the fact that a second meeting was not convened and that the Claimant had not been warned that the meeting was his only chance to put his case to her. The written submissions sets out the Claimant's position on this and alleges that his right to a full meeting had been dispensed with by HR. It was submitted that he had lost the opportunity to fully explain his actions.

54. The Claimant then goes on to set out his position regarding the S2R terms and conditions and why he says they did not apply to the particular transactions under consideration.

55. It is submitted that the Claimant believes that he did nothing wrong and did not go against the interests of the customer or the company. He submitted that there was no credible motive and sets out his submissions on the various motives which had been arisen during the evidence.

56. The Claimant submits that the actions of the Respondent were directed at proving his guilt and that this had been pre-determined. He considered that it was unreasonable for those involved to conclude that he had been guilty of misconduct.

57. The written submissions then turn to the findings by AS in her outcome letter. The Claimant's submissions on these are based entirely on his assertion that the S2R terms and conditions did not apply to the customers in question.

58. The Claimant then sets out an argument that CP had not taken sufficient account of the fact that the staff at the Falkirk store were particularly loyal to store management and that this was why he took the position during the investigation meeting that store management had not been involved with the transactions and had devised to workaround to S2R himself. The Tribunal notes that the Claimant has not actually changed his position and now asserts that management was involved but rather that CP should have assumed that the Claimant's answer on this point was, in effect, untrue rather than take it at face value.

59. The written submissions conclude by setting out that Claimant's position that as well as the conduct of the investigation, he was effectively demoted when he returned to work. He submits that as well as individual matters which are capable of amounting to a repudiatory breach of contract, the whole of the Respondent's actions amount to such a breach.

60. In response to the Tribunal pointing out that no submissions had been made in respect of the holiday pay claim, the Claimant submitted he had not been able to take holidays when suspended.

Respondent's submissions

5 61. The Respondent's counsel made the following submissions.

62. The questions for the Tribunal were said to be whether the Respondent was in fundamental breach of contract and whether the Claimant resigned in response to that breach. It was accepted that the Claimant had resigned soon after the conclusion of his appeal although it was pointed out that the
10 resignation does not specify what the repudiatory breach was said to be.

63. The Respondent did not seek to argue that, if there was a dismissal, it was a fair dismissal; any findings that the Tribunal makes regarding a fundamental breach arising from the disciplinary process would likely render the dismissal unfair.

15 64. It was submitted that the Claimant does not point to a breach of an express term of the contract but, rather, relies on the implied term set out in Malik.

65. In relation to the evidence and the witnesses, it was submitted that they were all credible witnesses including the Claimant. The Claimant did jump to conclusions and gave evidence of what he thought the Respondent should
20 have done which was not relevant. Similarly, what happened in other cases was not relevant and the case had to be judged on its own facts.

66. It was submitted that the witnesses came from different parts of the Respondent's organisation and that there was no evidence of collusion between them during the disciplinary process.

25 67. Ms McColl then set out the findings in fact which she invited the Tribunal to make. For the sake of brevity, the Tribunal has not set out the detail of this but did note what was said.

68. Turning to the question of whether there had been a fundamental breach, it was submitted that there had not and that the issues identified by the Claimant

in the ET1 and in his submission did not destroy or seriously damage the employment relationship for the following reasons:-

a. There had been no breach in the timing of the Claimant's suspension and the need for this became apparent as the investigation progress.

b. There was no policy of agreeing notes at the end of meetings and both versions of the investigation notes were available to AS.

c. The Claimant's comments about motive misses the point that the Respondent is entitled to ensure that staff act in the interests of the company.

d. In relation to AS arranging a second meeting, it was submitted that the first meeting concluded in a stalemate as a result of the Claimant's position that it was pointless to continue. The Claimant's questions were not going to be answered until AS had heard his case and this would defeat a second meeting. In any event, the appeal process could have cured but the Claimant took the same approach of seeking answers to questions.

e. The issue of the S2R terms and conditions were a red herring. The important point was that the customers could not move to SIM only and that the evidence shows that this was well understood with the system guiding staff to that result.

f. There was no evidence led by the Claimant regarding his argument about CP considering the loyalty of staff to their managers.

g. Similarly, it was submitted that there was no evidence regarding the allegation of an effective demotion on the Claimant's return to work. In any event, the Respondent was entitled to keep a closer eye on the Claimant given the circumstances of the case.

69. In relation to the question of whether the Claimant resigned as a result of any breach, it was submitted that the resignation letter was more about the Claimant's dissatisfaction with the outcome and not any procedural issues.

70. There were submissions made about remedies which the Tribunal has not set out given its decision.

71. In terms of the holiday pay claim, there were 14 hours left in dispute which the Claimant says he could not take due to the investigation.

5 **Relevant Law**

72. Section 94 of the Employment Rights Act 1996 makes it unlawful for an employer to unfairly dismiss an employee.

73. Section 95(1) of the 1996 Act states that dismissal can arise where:-

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

74. The circumstances in which an employee is entitled to terminate their contract by reason of the employer’s conduct is set out in the case of *Western Excavating v Sharp* [1978] ICR 221. The Court of Appeal held that there
15 required to be more than simply unreasonable conduct by the employer and that had to be a repudiation of the contract by the employer. They laid down a three stage test:-

a. There must be a fundamental breach of contract by the employer

b. The employer’s breach caused the employee to resign

20 c. The employee did not delay too long before resigning thus affirming the contract

75. A breach of contract can arise from an express term of the contract or an implied term. For the purposes of this case, the relevant term was the implied term of mutual trust and confidence.

25 76. The test for a breach of the duty of trust and confidence has been set in a number of cases but the authoritative definition was given by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462 that an employer would not, without reasonable or 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.

77. The "last straw" principle has been set out in a range cases with perhaps the leading case being *Lewis v Motorworld Garages Ltd* [1985] IRLR 465. The principle is that the conduct which is said to breach trust and confidence may consist of a series of acts or incidents, even if those individual incidents are quite trivial, which taken together amount to a repudiatory breach of the implied term of trust and confidence.

78. The "last straw" itself had to contribute something to the breach even if that is relatively minor or insignificant (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833).

79. A serious breach of their own disciplinary procedures can amount to a breach of the duty of trust and confidence but that will depend on the facts of the individual case and it is not the case that every such breach will amount to a repudiatory breach of the duty of trust and confidence (Blackburn v Aldi Stores Ltd [2013] IRLR 846).

80. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

81. Regulations 13 and 13A of the Working Time Regulations make provision for workers to receive 5.6 weeks' paid holidays each year.

82. Where a worker leaves employment part way through the leave year then Regulation 14 of the 1998 Regulations provides for compensation to be paid to the worker in respect of untaken holidays in the following terms:-

(1) This regulation applies where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation

13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

(AxB)-C

where—

A is the period of leave to which the worker is entitled under [regulation 13] [and regulation 13A];

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

83. The WTR does not allow for holiday entitlement to be carried over from one holiday year to the next. However, where the reason why any holiday has not been taken during the relevant holiday year is that it was not possible for the worker to do so because of absence on sick leave, the prohibition on carrying forward the untaken leave contained in the WTR has been held to not be compatible with EU law (*NHS Leeds v Larner* [2012] IRLR 825). The same principle has been applied where the worker has not been allowed to take holidays by their employer or has been deterred from taking leave by the

actions of the employer (*King v The Sash Window Workshop* [2018] IRLR 142).

Decision – unfair dismissal

84. The claim for unfair dismissal turns on the question of whether or not the Claimant was dismissed as defined in s95(1)(c) ERA, the Respondent having not sought to argue that any dismissal was fair.

85. The Claimant argues that the actions of the Respondent breached the duty of trust and confidence and so the Tribunal has to apply the test set out in *Malik* (above). In this judgment, the Tribunal will use the phrase "destroy the employment relationship" as shorthand to describe the *Malik* test but it has borne in mind that there can be a breach where the employment relationship has been seriously damaged.

86. The Tribunal does bear in mind that it needs to look at matters as a whole in determining whether there has been a fundamental breach of contract but it is also conscious that the various matters relied on by the Claimant have different considerations to take into account in relation to each of the matters which the Claimant says give rise to a repudiatory breach of contract, either on their own or taken as a whole.

87. The first point which the Tribunal would make is that there was no evidence that the Respondent was seeking to destroy the employment relationship. There was certainly no express evidence of this nor was there any evidence from which the Tribunal could draw an inference of this. The Claimant has asserted during the course of proceedings that he believed that there was a "witch hunt" against him and others at his store but there was no evidence before the Tribunal that the Respondent and its officers were in any way motivated by any desire to be rid of the Claimant.

88. The Tribunal does not, therefore, find that the actions of the Respondent were "calculated" to destroy the employment relationship. If the Claimant is to succeed then he will have to establish the "likely" arm of the Malik test.

89. Before dealing with the specific issues in this case, the Tribunal will make a number of comments of general application.

90. First, it is almost inevitable that an employee subject to disciplinary proceedings will feel worried, upset and even angry as a result of such action being taken but that does not mean that the employer is acting in a manner likely to destroy the employment relationship. An employer has to be able to look into matters of potential misconduct, investigate those and take action where they conclude that the employee has done something wrong. The employee may feel their employer's actions are unfair and they may not agree with the decisions reached but, unless the test in Malik is met, this does not mean that there is a repudiatory breach of contract by the employer.

91. The Claimant relies heavily on the damage to his reputation and career prospects but these are almost inevitable consequences of a disciplinary process determining that there had been misconduct and, again, does not automatically mean that the Respondent had breached the contract.

92. Second, and related to the first, it does not matter that other employees who were subject to similar disciplinary action also concluded that they were being treated unfairly and resigned. Each case turns on its own facts. In this case, the Claimant produced resignation emails from other staff at the Falkirk store who had been subject to similar disciplinary action as he had been. However, the Tribunal heard no evidence about how the disciplinary process had been conducted in respect of these individuals, what stage it had reached or anything about their circumstances other than the resignation emails. The Tribunal considers that the fact that those employees had decided to resign has no relevance whatsoever to the determination of the Claimant's case and places no weight on the fact that these individuals had resigned.

93. Third, the Tribunal in hearing the case is not conducting a re-run of the disciplinary process. The Tribunal is not substituting its own decision as to whether it would have commenced disciplinary proceedings or concluded that the Claimant was guilty of misconduct. Rather, the Tribunal is considering

whether what was actually done by the Respondent amounts to repudiatory breach of contract in terms of the *Malik* test.

94. Fourth, and flowing from the third point, the Tribunal is assessing whether the *Malik* test is met based on the facts known at the time. This is important because the Claimant sought to raise matters in his cross-examination of the Respondent's witnesses which had not been raised during the disciplinary process. In particular, he sought to argue that the S2R terms should never have applied to the customers involved in the relevant transactions because they had originally been Carphone Warehouse customers. This had never been raised by the Claimant at any point during the investigation meeting with CP, the disciplinary meeting with AS or the appeal hearing with KMcL. It was not, therefore, something which was expressly before them. Neither was it something so obvious from the information available to them at the time that it can be said that any one of them should have realised that this was an issue.

95. Having made those preliminary comments, the Tribunal now turns to the particular circumstances of the case. The Tribunal will address the various specific complaints made by the Claimant but, conscious of the fact that the Claimant is a litigant in person, it will look at matters as a whole rather than just the issues raised by the Claimant.

96. One point to make clear from the outset is that the Respondent's disciplinary policy or procedure was not put before the Tribunal in evidence. It was not referenced by any of the witnesses and, importantly, the Claimant did not make reference to any specific term(s) of the policy or procedure that he said had been breached.

97. Working through the disciplinary process in chronological order, the Tribunal does consider that the Respondent had reasonable and proper cause for looking into the transactions at the Falkirk store; they had received a complaint that there were anomalous transactions, particularly relating to sales of mobile broadband devices, and so there was a proper basis for them to look into these. It is entirely reasonable for a business to want to look into such matters to check whether there was anything untoward in this data. In

particular, the Tribunal accepted the evidence from CN and other witnesses that it was unusual for customers to have multiple upgrades on the same number in a short period.

98. Similarly, the Tribunal considers that, CN having identified a pattern of transactions where customers were being upgraded to a mobile broadband device and then shortly thereafter to a SIM only contract by various staff in the Falkirk store, the Respondent had proper and reasonable cause to investigate further to identify what had happened and why such transactions were being carried out.

99. Moving on to the investigation by CP, the Claimant makes a number of complaints about this element of the process.

100. First, he suggests that the questions asked by CP at the investigation meeting were "leading" and an attempt to entrap him. The Claimant did not, however, lead any evidence as to which specific questions were said to be leading or an attempt at entrapment. Having been taken to the interview notes in evidence, and putting aside the fact that an employer conducting an internal investigation are not bound by the same rules which would apply in court proceedings regarding leading questions, the Tribunal does not consider that any of the questions asked by CP were leading questions. They were open questions which were clearly intended to elicit information about the transactions being looked into and the Claimant's understanding of the Respondent's system.

101. The Tribunal appreciates that, as set out above, the Claimant in common with most people in such circumstances would feel upset and anxious about being asked such questions but that does not mean that CP did not have a proper and reasonable cause for asking these questions; he clearly needed to ask questions of this nature to find out more information about the relevant transactions.

102. Similarly, the Tribunal considers that questions are not framed in such a way that would destroy the employment relationship; they are open questions giving the Claimant an opportunity to put his version of events.

103. Second, the Claimant complains that CP did not agree the notes of the meeting with him at the end of the meeting in terms of going through it line by line and, rather, a written copy of the notes were sent to him after the meeting for him to review and provide comments.

104. The Claimant suggests that this was a breach of the Respondent's disciplinary policy but, as noted above, the terms of the policy were not led in evidence and so the Tribunal has no evidential basis to reach such a conclusion. Further, there is nothing in the ACAS Code of Practice that suggests that meeting notes should be agreed verbally at the end of the meeting.

105. This complaint flows from the fact that AS went through the notes verbally with the Claimant at the end of the disciplinary meeting to agree them. However, in the Tribunal's experience, that is an unusual course of action and in the vast majority of cases written notes are sent to the employee after any meeting to be reviewed.

106. This is not a case where the Claimant had been denied the opportunity to comment on the notes. He has had such an opportunity and he took it. It is simply the case that CP gave the Claimant this opportunity in a different way from AS.

107. The actions of CP are not, therefore, ones which the Tribunal considers are a breach of any disciplinary process or good practice. This is certainly not something which the Tribunal considers is capable of destroying or seriously damaging the employment relationship.

108. Third, the Claimant complains about the fact that CP's investigatory report contained both the original version of the notes and his amended version. He argues, in effect, that as soon as he objects to the original version they should be deleted. However, this is to ignore the fact that there is clearly a different recollection between him and CP as to what had been said at the meeting. In such circumstances, there is a proper and reasonable cause for both versions being presented to AS; she should be made aware of the differing recollections and, if necessary, resolve that difference.

109. However, it was quite clear that AS did not need to resolve this difference as she did not rely on the disputed questions and answers in reaching her conclusions that the Claimant was guilty of gross misconduct. In these circumstances, the inclusion of both versions of the notes had no bearing on the rest of the disciplinary process.

110. Fourth, the Claimant, in his ET1, raises an issue about being suspended four days after the investigatory meeting. However, this was not something which he particularly advanced in the hearing; he did not cross-examine CP as to why there was a four day gap and he did not make any submissions on this point.

111. The Tribunal notes that an employer who rushes to suspend may be guilty of a repudiatory breach and so it is difficult to criticise the fact that CP took time before taking this step.

112. Beyond these specific complaints, there is nothing in the conduct of the investigation by CP which the Tribunal considers to be capable of amounting to a repudiatory breach of contract, either on its own or taking the whole of the investigation stage into consideration.

113. The Tribunal does consider that CP had reasonable and proper cause for his decision to refer the case for formal disciplinary action; the Claimant did not dispute that he had carried out the transactions that were being investigated; these transactions circumvented the Respondent's systems; the Claimant had not provided an explanation for his actions which had satisfied CP; there had been a potential loss to the company and a potential gain to the Claimant. In all these circumstances, it is difficult to identify any basis on which it could be said that CP did not have good reason to refer this for formal action.

114. Turning now to the disciplinary stage conducted by AS, the Tribunal considers that this would be an appropriate point to address the issue of whether the Claimant was made properly aware of the case he had to answer.

115. There was much said by the Claimant in the internal process and the Tribunal proceedings that he was not aware of what policy or process he had

breached. It was quite clear to the Tribunal that, even to the present day, the Claimant did not consider that he had done anything wrong and this has influenced his view of the information being provided to him.

116. He may well consider that the Respondent has not provided him with something that he considers amounts to some form of wrongdoing but the Tribunal does not consider that the Claimant can reasonably maintain the position that the Respondent has not informed him of what they consider he has done wrong; the investigation report by CP and the letter from AS inviting the Claimant to the disciplinary meeting very clearly and in some detail sets out what the Respondent considers to be the misconduct in question and why.

117. Turning now to the process followed by AS in conducting the disciplinary process, the Tribunal notes that she provided the Claimant with further information and documents that he requested to be able to prepare his response. She then met with him to give him the opportunity to respond to the various allegations against him. This meeting was re-scheduled to allow the Claimant time to digest the additional information he had requested.

118. The Claimant complains that AS did not convene a second meeting when the disciplinary meeting concluded without addressing all the allegations. However, the Tribunal considers that this has to be considered in the context of what happened at the meeting.

119. Although it is difficult to assess the tone of a meeting solely from written notes, the Tribunal does consider that the Claimant's approach to the meeting could best be described as "combative"; before AS has the opportunity to ask any questions, he immediately asked to be told what course of action he should have taken and what the correct process for each sale was said to be; even when AS explained that she was not there to answer questions he insisted that she had to answer his questions; he continued to ask for an answer to these questions and indicated that he considered it pointless to continue without these answers; although there was an agreement to end the meeting, this flowed from the Claimant's assertion that it was pointless to continue rather than being initiated by AS.

120. In these circumstances, this is not a case where AS had prevented the Claimant from engaging in the disciplinary meeting but rather his own approach to the meeting had led to it being ended. Neither it is a case where, for example, there was insufficient time to go through all the allegations where there would be an expectation that more time would be found. Rather, this is a case where the Claimant had the opportunity to answer the allegations but, as a result of how he approached the meeting, he did not take that opportunity.

121. The Tribunal does note that the letter inviting the Claimant to the meeting made it clear that he should attend the meeting prepared to discuss the allegations and that the meeting could result in disciplinary action. The Tribunal considers that the Claimant was well aware that this was his opportunity to answer the allegations against him.

122. The Tribunal also notes that the Claimant was made aware by AS on 2 November 2021 that she was proceeding to the next step of issuing an outcome. This outcome was issued on 12 November 2021. The Claimant did not, in the intervening period, seek a further hearing or indicate that he had further information he wished to present.

123. Finally, the Claimant was given the opportunity to appeal which could, potentially, have allowed him the chance to remedy this. However, he did not do so and was, again, focussed on seeking answers about what policy or process was said to apply to the transactions and how he had breached it.

124. Taking all of this into account, the Tribunal does not consider that the lack of a second meeting is sufficient to destroy the employment relationship; the Claimant had been given the opportunity to answer the allegations and he did not take it.

125. In terms of the decision reached by AS, the Tribunal considers that she had proper and reasonable cause to conclude that the Claimant had committed misconduct in light of the information available to her; the Claimant did not dispute carrying out the transactions in question; the transactions were done

in a way to circumvent the Respondent's system and achieve a benefit for customers to which they were not entitled.

126. Much of the Claimant's focus on AS's decision during the hearing related to the motive for his actions. He was very focussed on the potential cash gain to himself which he said was minimal and argued that he would not have risked his potential career with the Respondent for such small sums.

127. However, AS's decision set out in her outcome letter (p182-184) places very little focus on the Claimant's motive. Indeed, AS acknowledges that the Claimant may have had good intentions but goes on to say that it was not for him to take it on himself to circumvent the Respondent's system. The Tribunal considers that this clearly demonstrates that it was the Claimant's actions, in and of themselves, which are the important factor rather than his motive.

128. It is correct that AS notes that the transactions in question would increase sales and there is no disputing this given that it involved two upgrades rather than one. She goes on to note that this would result in a financial gain to the Claimant.

129. However, when the outcome letter is read as a whole, it is clear that motive has very little bearing on AS's decision. Rather, as noted above, it is the fact that the Claimant had carried out transactions with the intention of circumventing the Respondent's systems which is fundamental to the conclusions reached.

130. There was also an argument advanced by the Claimant at the hearing in response to AS's finding that he had breached FCA guidelines by selling customers mobile broadband devices that they did not need. He sought to argue that the customers needed the device in order to be able to circumvent the Respondent's systems and move to SIM only contracts.

131. The first point to make is that this is not something which was advanced by the Claimant during the internal process. The Tribunal repeats the point made above that it has to assess the Respondent's actions in the context of

the facts known at the time rather than matters which have occurred to the Claimant after the event.

132. In any event, this argument does not assist the Claimant. The argument clearly demonstrates that the Claimant was aware that he was not selling these devices for their intended purpose and, rather, he was doing so in order to circumvent the Respondent's system.

133. There was no evidence that the customers needed these devices for the purposes for which they are made and, indeed, the fact that they were not used at all demonstrates that there was no apparent need for these. In these circumstances, the Tribunal considers that the Respondent had reasonable and proper cause to conclude that the devices were not needed and so the sales were in breach of FCA guidelines.

134. The Claimant also challenges the decision by AS by arguing that the S2R terms should not have applied to the customers in question. The Tribunal has already set out about why it considers that this is not a relevant consideration.

135. The Tribunal notes that the Claimant did not, at any point during the disciplinary process, assert that he did not understand that the S2R promotion should not be used to move customers to a SIM only contract. Although comments were made about the promotion being first introduced before he commenced employment, he did not suggest that he did not understand the restrictions and that he had circumvented these in ignorance. Rather, it was clear that he did not agree with the terms of the promotion and that he acted as he did in the full knowledge that he was circumventing restrictions put in place by the Respondent.

136. As an aside, the Tribunal would comment that the mere fact that the terms of S2R had been in existence for some time does not, in and of itself, render them invalid or out of date as was suggested by the Claimant.

137. The Claimant does not raise any challenge to the sanction applied by AS and the Tribunal considers that she had proper and reasonable cause for applying

the sanction which she did; the Claimant had not disputed that he had carried out the misconduct in question; the Claimant had shown little or no insight into why the Respondent considered that he had been in the wrong; the Claimant's actions potentially breached FCA guidelines; there needed to be a sanction applied which would demonstrate how seriously the Respondent considered these matters to be. There is clearly proper and reasonable cause to impose a final written warning in these circumstances.

138. There is no specific issue raised by the Claimant in respect of the appeal element of the process and the Tribunal considers that there was nothing in how it was conducted that meets the Malik test; the Claimant was given an opportunity to appeal; a meeting was conducted to hear the grounds of appeal; the issues the Claimant wanted investigated were looked into and a response provided.

139. The Claimant also sought to rely on matters which occurred during his return to work; he alleges that he was effectively demoted, having certain supervisory or managerial duties removed, being required to seek permission for certain tasks and being more closely monitored than before.

140. The Tribunal notes that this is not pled in the ET1 as a matter giving rise to a repudiatory breach of contract (either on its own or as part of the whole) and so, strictly speaking, this does not form part of the Claimant's case.

141. However, the Tribunal will address this for the sake of completeness. The Tribunal considers that there is proper and reasonable cause for such actions on the Respondent's part; they have an employee on a final written warning; the warning arises from how he conducted certain sales transactions, the core purpose of his job; the employee in question has shown little or no insight or awareness into why the employer considered that his conduct had been wrong. In all these circumstances, the Tribunal considers that it is clear why an employer would wish to monitor such an employee and limit what he has the freedom to do in carrying out his duties for a period of time.

142. In his submissions, the Claimant raised an issue around the investigation by CP which had not been pled in the ET1. The argument is difficult to follow

but he, in effect, seeks to argue that CP should have taken more account of the fact that the staff at the Falkirk store were loyal to store management, ignored the fact that he said that store management had nothing to do with his actions and, instead, conclude that this was the fault of store management.

5 143. Again, this is not a matter which forms part of the Claimant's pled case and the Tribunal considers that it is a belated attempt by the Claimant to shift the blame to store management. This most likely arose because CP, in his evidence, said that he may have taken a different approach to recommending that the case proceed to formal disciplinary meeting if the Claimant had 10 indicated that he was acting on the instructions of store management.

144. Even if this had been part of the Claimant's pled case, there is the additional difficulty that this was not a matter which the Claimant raised during the internal process. He had ample opportunity to lay the blame at his managers' feet during the three meetings in the process including being expressly asked 15 about this by CP. He did not do so and expressly said that he was acting of his own accord. The Respondent was entitled to take this at face value and proceed accordingly.

145. For the reasons set out above, the Tribunal considers that there was nothing in the process which, in and of itself, amounts to a repudiatory breach of 20 contract in terms of the *Malik* test.

146. However, the Tribunal is conscious of the fact that it needs to look at the process as a whole to see whether there are any matters which do not individually amount to a repudiatory breach but when taken together do amount to a repudiatory breach.

25 147. The Tribunal does not consider that, when looked at as a whole, the disciplinary process meets the *Malik* test. The Respondent clearly had proper and reasonable cause for its actions and the process as a whole was not likely to destroy or seriously damage the employment relationship:-

a. It had identified anomalous sales transactions which required 30 investigation.

b. The investigation was properly conducted for reasons set out above and gave the Claimant the opportunity to explain the transactions.

c. There was no dispute by the Claimant that he carried out the transactions in question.

5 d. He also did not dispute that he did so to circumvent the restrictions in the Respondent's systems which prevented customers benefiting from S2R in paying off their current device contract and moving to a SIM only contract.

e. In these circumstances, there was cause for the case to proceed to
10 the disciplinary stage.

f. The Claimant was given the opportunity to answer the allegations at a disciplinary hearing.

g. The outcome of that hearing was one which the Respondent was entitled to reach for the reasons outline above as was the sanction
15 applied to the Claimant.

h. The Claimant was given an opportunity to appeal.

148. The Tribunal can find nothing in the process or its outcome to criticise when looked at as a whole.

149. It was quite clear that the Claimant continues to believe that he did nothing
20 wrong and he has viewed the Respondent's actions through this prism. He would be well advised to reflect on this.

150. In these circumstances, the Tribunal does not consider that any of the Respondent's actions, either individually or as a whole, amounts to the Respondent conducting themselves, without proper or reasonable conduct, in
25 a manner calculated or likely to destroy or seriously damage the employment relationship.

151. There is therefore no dismissal as defined in s95(1)(c) of the Employment Rights Act 1996. For that reason, the Claimant's claim of unfair dismissal is not well-founded and is hereby dismissed.

Decision – holiday pay

152. The claim for holiday arises from the fact that the Claimant did not take the whole of his holiday entitlement in 2021 (the holiday year preceding the holiday year in which he resigned, that is 2022). The Claimant received pay in lieu of untaken holidays when he left the Respondent based on his pro-rated entitlement for 2022. He subsequently received a payment for 30 hours untaken holidays from 2021 which he had a contractual entitlement to carry over from one year to the next.

153. The Claimant seeks a further payment for fourteen hours' untaken holidays from the previous holiday year.

154. There was very little evidence led by the Claimant regarding this claim and he made brief submissions on this only when prompted by the Tribunal, asserting that he was not able to take holidays when suspended and defending himself.

155. The Tribunal has no evidence before it that the Claimant had any contractual entitlement to carry over these holidays. The Tribunal was taken to an email at p203 where it was accepted by the Respondent that the Claimant had an entitlement to carry over a maximum of 30 hours and he did not dispute this.

156. The claim must, therefore, proceed on the basis of the entitlement under the Working Time Regulations. The starting point for the Regulations is that they do not allow for holidays to be carried over and so the question is whether there is any basis to apply the exceptions to the statutory position arising from cases such as *Larner* and *King* (above).

157. There was no evidence that the Claimant was prevented or deterred from taking annual leave. The fact he was suspended does not mean that he could not have taken holidays. He may not have wished to do so but that does not mean that the Respondent had prevented or deterred the Claimant taking his holidays.

158. On the basis of the limited evidence led by the Claimant, the Tribunal concludes that the reason why he did not take the whole of his annual leave entitlement in the 2021 holiday year is because he chose not to do so rather than being prevented or deterred from doing so by the Respondent. There is, therefore, no basis to set aside the provisions of the Working Time Regulations which do not allow for holidays to be carried over.

159. The claim for holiday pay is, therefore, not well-founded and is hereby dismissed.

Employment Judge: Peter O'Donnell
Date of Judgment: 11 November 2022
Entered in register: 15 November 2022
and copied to parties