EMPLOYMENT TRIBUNALS

Claimant: Mr J Stone

Respondent: 4th Dimension Innovation Ltd (Group)

Heard at: **Reading Employment Tribunal**

On: 25 - 26 September 2023

Before: Employment Judge Annand

Representation

Claimant: Mr Stone
Respondent: Mr Roddy, Employment Consultant

RESERVED JUDGMENT

1. The Claimant's claim for constructive unfair dismissal is not well-founded and is dismissed.

REASONS

1. A final hearing was listed between 25-27 September 2023 to hear the Claimant's claim for constructive unfair dismissal. I was provided with a joint bundle of 236 pages, and five witness statements. On the first day of the hearing, I heard evidence from the Claimant, and from three of the Respondent's witnesses, Mr Molloy, Ms Barker, and Mr Oldfield. I was provided with a witness statement from the Respondent's Ms Thomas, but as she did not attend the Tribunal to give evidence in person, I did not place any weight on it. It had been my intention to give an oral judgment within the time allocated for the hearing. Unfortunately, this was not possible, and I reserved my judgment.

Findings of fact

2. The Claimant was initially employed by the Respondent as an Engineer. His employment commenced on 7 May 2004. He was employed to work 42.5 hours per week. His initial salary was £24,000 per year. Once the Claimant completed his probation period, his salary was increased to £25,000 per year. There was no reference to a bonus scheme in the Claimant's original contract of employment.

3. The Claimant's contract of employment contained a mobility clause which stated "Your normal place of work is specified on the Schedule of Information. However, you are offered and accept employment on the basis that as and when necessary, you shall be fully mobile for the purpose of your work operations i.e. you will undertake to work in any department, or any site, or at any location which is owned by us, or which has commercial business associations with us, for an unspecified period, in accordance with Company requirements, as may be determined from time to time. The Company's enactment of this clause would obviously be subject to prior consultation." (p55)

4. On 10 August 2016, the Claimant's contract was amended to reflect the fact that his role had changed to Salvage Buyer. A bonus scheme was introduced, and the agreement between the parties noted the scheme would remain in place for the remainder of the financial year. It was agreed that the Claimant would be paid £20 for each salvage motorcycle which he bought and sold in excess of 30 per calendar month. The bonus was to be paid quarterly (p66-67). At that time, the scheme was not referred to as 'discretionary'. The agreement between the parties noted that at the end of the financial year for 2016/2017, the Respondent would review the structure of the bonus scheme with a view to establishing a longer-term arrangement. The changes to the Claimant's contract were set out in a 'Change to terms record' which was signed by both the Claimant and the Operations Director for the Respondent, Mr Moore.

5. In May 2017, the bonus agreement was reviewed, and the agreement was changed. The Claimant was given two options. He chose to receive £20 for each salvage motorcycle which he bought and sold in excess of 45 per calendar month. The Claimant confirmed his agreement to this arrangement by email (p68), but there was no 'Change to terms record' in the bundle of documents provided to the Tribunal.

6. In March 2019, the bonus scheme was reviewed again. The Claimant was sent a letter on 8 March 2019 which set out the proposed changes to the 'discretionary' bonus structure. The Claimant was to be paid £20 for each third-party salvage purchased and sold over 250 units per quarter. The letter noted the changes to the Claimant's discretionary structure would be effective

from 1 June 2019. The letter, which set out the proposed amendments, was signed by both parties.

7. Prior to the Covid 19 pandemic, the Claimant was happy with his salary, and the bonus scheme in place, as his income was £41,039 for the financial year ending April 2018, £43,079 for the financial year ending April 2019, and £43,859 for the financial year ending April 2020.

8. The Claimant gave evidence that he was hard working and diligent. This was accepted by the Respondent, who said that he was a valued member of staff, who was very knowledgeable.

9. In March 2020, the Covid 19 pandemic began. The Respondent's Commercial Director, Mr Oldfield, gave evidence to the Tribunal about the financial impact of the pandemic on the company. The Respondent initially planned to retain all its staff (approximately 300) and incurred considerable debts in trying to do so. 50% of the workforce was furloughed. Mr Oldfield's evidence was that the Claimant's ability to purchase motorbikes at that time was impacted because business levels dropped below 20% of normal operating volume. The Claimant disputed that the figure decreased to that extent. In any event, the Claimant was asked to move to cover the work of the Respondent's retail motorcycle dealership, Ride Nation. Three members of the Ride Nation sales team were furloughed. Mr Oldfield's evidence, which I accepted, was that they were furloughed, and the Claimant was asked to cover their roles, because the Claimant was sufficiently skilled to do this. No one of the three people who were furloughed was able to cover all three roles, but Mr Oldfield considered that the Claimant was. The Claimant agreed to this move, which took place in May or June 2020. The Claimant said in his evidence that he preferred this to being furloughed. It was agreed that as the Claimant would no longer be purchasing and selling salvage units, the Claimant would be offered a fixed bonus structure.

10. Mr Oldfield said that he had been involved in coming up with the terms of the new bonus scheme. He could not recall the exact details but said that they took an average of the Claimant's bonus payments over the previous 18 months or 24 months, and then fixed the bonus rate at a percentage of that amount. He thought the percentage was either 70% or 80%, based on the fact that furloughed employees were being paid 80% of their salary.

11. There was no written evidence provided by either party from May or June 2020 about what was agreed between the Claimant and the Respondent at that time.

12. The Claimant's evidence to the Tribunal was that while it was agreed he would be provided with a fixed bonus, he was not provided in advance with figures which indicated how much he would be paid. The Claimant was paid

a fixed bonus of £3500 per quarter. The Claimant said he only realised when he received his P60 in around April 2021 that for the financial year ending April 2021 his annual income had reduced to £37,528.

13. The Claimant's evidence in his witness statement was that he spoke to the Respondent's other Director, Neil Foster, by telephone in the summer of 2021. He said in the phone call he mentioned the lower than expected salary he had received. The Claimant said Neil Foster indicated he was very happy with the Claimant's sales and that he would pay whatever needed to be paid if he continued delivering sales. The Claimant was hoping to be made the Dealership Principal and was disappointed when he was informed in October 2021 that the Ride Nation Dealership was to be shut down instead. The three members of staff who had been furloughed were made redundant and the Claimant was transferred back to the Salvage Department.

14. The role the Claimant moved back into in the Salvage Department was not identical to the role he had been doing before he transferred in May or June 2020 to manage the dealership, as part of the salvage buying role had become semi-automated.

15. When the Claimant returned to the Salvage Department in around October 2021, his previous bonus scheme was not reinstated, and he remained on the fixed bonus scheme. For the financial year ending April 2022, the Claimant's income was £39,099.

16. In around spring of 2022, the Claimant was informed in a brief morning meeting in the canteen that the Salvage Department team would be moving from Egham to a new unit purchased in Yateley. It was planned that the new site would become the new salvage site for the business. Whereas the Claimant had a commute of 7 miles each way to Egham, his commute to Yateley would be 30 miles each way.

17. In March 2022, Mr Kevin Molloy started working for the Respondent. He became the Claimant's Line Manager.

18. The Claimant had a one-to-one meeting with Mr Molloy in which the move to Yateley was discussed. Mr Molloy said the move was likely to take place towards the end of 2022. The Claimant's evidence in his witness statement was that he said to Mr Molloy that he could not see why he could not continue to work from Egham and that if the move went ahead, he would need to consider changing departments. He said he wished to remain working a reasonable distance from home and his travel costs would increase significantly as he would no longer be able to cycle a push bike to work on the days when the weather permitted. He said in his witness statement that he was not offered any additional financial assistance for the additional travel costs in that meeting.

19. Originally the Respondent employed all its employees on contracts which required them to work 42.5 hours per week. Mr Oldfield's evidence to the Tribunal was that he was aware that this was unpopular with some of the employees and was aware it caused issues with recruitment. As a result, the Respondent had taken steps to move some departments to contracts which required that they work 37.5 hours per week instead. Prior to the summer of 2022, this had been put into effect for some departments. Those employees whose contracts were changed to 37.5 hours per week did not have their salaries reduced. Mr Oldfield's evidence to the Tribunal was that it was the company's aspiration to move all employees on to contracts for 37.5 hours per week but that this could not be done all at once. Each department had to be reviewed to see if it was possible in terms of resources, finances, and to assess what the impact would be on meeting customer demands. Mr Oldfield's evidence, which I accepted, was the Claimant's department had been considered to see if it was possible to move the staff onto 37.5 hours per week contracts but at that time it had been decided it was not viable. This was due to the fact that it was a very busy department. It was described as a department which was very busy but not overwhelmed. It was not considered necessary to recruit further staff at that time because while it was busy, the department was coping with the demands. Further, the Respondent was also still recovering from the very significant financial damage that was caused to the business due to the Covid 19 pandemic.

20. The Claimant's evidence to the Tribunal was that the Respondent continued to secure additional contracts which increased his workload without recruiting additional staff to support the salvage purchasing team. By the summer of 2022, the Claimant felt his workload had begun to take a toll on him and he wanted a better work life balance.

21. Whilst on annual leave, on 19 June 2022, the Claimant sent an email to Mr Molloy. In the email he wrote, "As discussed when you started in our brief 1-2-1 I would like to start the ball rolling on working a four day week. I don't need confirmation whilst I'm away but if you could review a plan and discuss the details with HR for when I return that would be much appreciated." (p73).

22. By the time the Claimant returned to work on Monday 27 June 2022, he had not received a response to his email. The Claimant's evidence was that during the morning of his first day back at work, he asked to speak to Mr Molloy about his request. They later had a meeting and Mr Molloy told him that it would not be possible to reduce his hours from 5 days per week down to 4 days per week. The Claimant's evidence in his witness statement was that he was not given a reason why. Mr Molloy's evidence in his witness statement was that he said to the Claimant that the daily task list was colossal and if anything, they needed more staff. He said he explained to the Claimant that the business would struggle to manage a reduction in the Claimant's

working hours. In cross examination, the Claimant said he honestly could not recall if Mr Molloy had said the task list was colossal. The Claimant described the meeting as "blunt", and Mr Molloy said the meeting lasted only 5 minutes. I found that Mr Molloy did indicate to the Claimant the reason for the rejection of his request to move to a four-day working week was due to the high work load, but that the explanation was not more detailed than that, and that the discussion was very brief.

23. The Claimant's evidence, which I accepted, was that he asked Mr Molloy if the only option to reduce his working week from 5 days to 4 days would be to quit his job, and Mr Molloy replied "yes" without further comment. However, I also accepted Mr Molloy's evidence that he did not say this to encourage the Claimant to resign but that he was simply giving a factual answer to the question.

24. The Respondent had a Flexible Working Policy. It required that requests for flexible working should be made on the form contained in Appendix 1 of the Policy. The Policy states that in an application, the employee should confirm that it is a request for flexible working, confirm the change required, give a proposed date for the change, set out what the effect of the proposed change was likely to be on the Company and make suggestions as to how the Company might accommodate the change. This is in line with the requirements for a flexible working request that are set out in Section 80F of the Employment Rights Act.

25. The Claimant's evidence to the Tribunal was that he was not aware of the Respondent's Flexible Working Policy until after he resigned. When I asked Mr Molloy if he was aware of the Respondent's Flexible Working Policy, his response was that he thought all companies had one. When asked if he was familiar with the policy, he said not the minutia of the policy. He said he had not dealt with any other requests for flexible working when working at the Respondent or with any previous employer. Ms Barker explained the policy should have been on the Respondent's intranet, Bamboo, but she was not certain that it was on that site at the relevant time. She said after the issue arose with the Claimant, they introduced an employee relations presentation for all new managers who were recruited, which covered flexible working. Based on the evidence I heard, I concluded that when Mr Molloy received the email from the Claimant on 19 June 2022, he was not aware of the Respondent's Flexible Working Policy.

26. On the evening of 27 June 2022, the Claimant looked online and saw advice on a government website about constructive dismissal. The advice referred to resigning immediately so as not to accept the conduct or treatment which the employee objected to. At 7.37pm, the Claimant sent an email to Mr Molloy in which he resigned. He wrote, "Following on from today's meeting where the option to work 4 days per week was declined please accept this email as

notice of my resignation. I would like a response as to why the reduced hours requested has been officially declined given the amount of staff allowed to work reduced hours/days at 4th dimension."

27. The next morning, Mr Molloy forwarded the email to Ms Barker in HR. Ms Barker responded noting that she was concerned about the Claimant's reason for his resignation. She noted that asking to work a four-day week is a flexible working request and HR should have been informed of it and should have been party to the decision to accept or reject. She set out the seven potentially valid reasons for rejecting a request. She noted that they could be in hot water as the Claimant could believe his flexible working request had not been handled in an appropriate manner and this could be considered constructive dismissal. She noted it was imperative that she speak to the Claimant. She noted this did not mean that they would automatically grant his request but noted that this request needed to be managed appropriately.

28. On 28 June 2022, Ms Barker and the Claimant arranged to meet the next day to discuss his flexible working request and his resignation. It was agreed that Suzan Faiq would be permitted to sit in the meeting to gain experience.

29. On 29 June 2022, Ms Barker met with the Claimant. Suzan Faiq was asked to take notes. Ms Barker's evidence was that Ms Faiq got caught up listening to the discussion and failed to take notes.

30. The Claimant recorded the meeting he had with Ms Barker. He did not ask for her permission to record the meeting. His explanation for doing so was that he has dyslexia and would not be able to take notes whilst speaking, although that does not explain why he could not have asked for Ms Barker's permission to record the meeting. The Claimant subsequently recorded two further meetings he had with Ms Barker.

31. In the final hearing bundle, there was not a copy of the transcript of the meeting. The Claimant had sent the Respondent the recordings from the meeting. The Respondent had objected to those recordings being used as Ms Barker had not consented to the recordings being made.

32. The Claimant, who represented himself throughout the proceedings, made reference to the fact he had made recordings in his Claim Form. He also quoted parts of the recordings in his witness statement, despite the recordings not being a part of the evidence that the parties had agreed would be before the Tribunal. At the start of the hearing, I asked Mr Roddy how he wished to deal with the fact that the Claimant had quoted parts of the recording in his witness statement. After a break, Mr Roddy confirmed that he was content for the parts of the recordings that were set out in the Claimant's witness statement to remain in evidence.

33. As it transpired, there was not a great deal of dispute about what was said in the meetings between the Claimant and Ms Barker. There was only one point of dispute, regarding whether the Claimant said that he would be willing to stay working 5 days a week for an increased salary, or whether this was a proposal raised by Ms Barker. During cross examination, Ms Barker conceded that it could have been her who raised this point. She said she could not recall, but she accepted that it may have been her and said if she did raise the suggestion herself, it was in response to the Claimant making it clear he was dissatisfied with the income he received in light of the number of hours he worked. She also said she wanted to retain talented staff. The Claimant was knowledgeable and therefore of value to the Respondent. I accepted the Claimant's evidence that he did not say to Ms Barker that he would be willing to stay working 5 days per week if he were paid more money, and I accept that this was a proposal that was raised in the discussion by Ms Barker. As there were no other disputes about what was said in the recorded meetings, at no point in the hearing did it become necessary that I decide if the recordings should be admitted in evidence.

34. The Claimant and Ms Barker had two meetings on 29 June 2022. In the first meeting, Ms Barker confirmed that she had only become aware of the Claimant's request for flexible working when she was sent his email of resignation. She apologised for the fact that the request had not been handled as it should have been.

35. In the second meeting, Ms Barker explained that after speaking to the Claimant, she had spoken to the head of department, Aaron Tasker, and Mr Molloy. She told the Claimant that they had declined the Claimant's request to reduce his hours to four days per week due to the current workload.

36. In the meetings on 29 June 2022, the Claimant also raised his concern about the fact that some employees had their contracted hours reduced from 42.5 hours to 37.5 hours. He noted that this had started for some employees in December 2021, but that his contract had not been reduced. Nor had the contracts of his colleagues in his department. He said he had raised this with Mr Tasker, but his response had been that the decision had been taken by someone above him. The Claimant said he had also raised the issue in the employee survey. In the meeting, the Claimant was told by Ms Barker that a senior management team member had decided that the Claimant's team would not be included in those who would be offered reduced hours contracts.

37. On 29 June 2022, Ms Barker emailed the Claimant informing him that his contractual notice period was for 1 month, and therefore his final day would be 26 July 2022. The Claimant responded offering to work until Friday 29 July 2022, so as to finish at the end of the week, but the Respondent later confirmed his last day would be 26 July 2022.

38. On 1 July 2022, the Claimant met with Ms Barker again. In this meeting, the fact that the Respondent had reduced some employees' contracted hours to 37.5 hours was discussed again. Ms Barker indicated in the meeting that the decision not to bring about the change to all employees was not one that HR agreed with but that it was not a decision that she was able to make.

39. In his evidence, Mr Oldfield said that when making the decision about which departments could be moved to 37.5 hour per week contracts, he took advice from Ms Barker and Ms Thomas. He confirmed that they were in favour of moving all staff to 37.5 hours contracts, but that he had to make the decision based on a range of factors, not all of which the HR team would be aware of, such as financial viability. He said he did not expect his HR staff to always agree with his decisions, and he accepted that they would continue to advise him to try to move all staff to 37.5 hour contracts. He said that since the Claimant had left, they had been able to move his department on to contracts which were for 37.5 hours per week. He said he believed his happened around 8 months after the Claimant had left.

40. In the meeting on 1 July 2022, the Claimant also raised his concerns about being informed that his department was moving to the site at Yateley. Ms Barker said that all employees should have been consulted regarding the move. She said across the company that there was some concern about the location, given it was in a different county.

41. Mr Oldfield's evidence to the Tribunal, which I accepted, was that the individual consultations regarding the move had not taken place by June 2022 as the move was not planned until the end of the year. He said the fact that the consultations were ongoing could be demonstrated by the fact he had a spreadsheet which showed the distance from all employees' home addresses to the new site, the fact that later on in the process discussions around financial compensation for those who had to commute further did take place, and that in fact in the end, the Claimant's department had not relocated to Yateley and had remained at Egham.

42. On 1 July 2022, the Claimant was informed by Ms Barker that she had spoken to Mr Oldfield, and it had been agreed that the Claimant would be paid his bonus payment of £1250 per month for June and July. In the terms of the bonus scheme, agreed in March 2019, it stated that the bonus would only be paid if the Claimant had not handed in his resignation. However, the Respondent decided to make the bonus payments for June and July in any event.

43. On 5 July 2022, the Claimant was sent a letter by Ms Thomas, which had been drafted by Ms Barker. The letter formally accepted the Claimant's resignation and stated his final day of work would be 26 July 2022. The letter

noted the Claimant would still receive the bonus payments of £1178.75 for June and July 2022.

44. The letter also set out a formal response to the Claimant's request for flexible working (p89). The letter set out the chronology of events and then the reasons why the Claimant's application to reduce his hours to a four day week had been rejected. The reasons were:

"Due to customer-demand and workload, the role must remain at full-time (5 days per week). If we were to reduce your working hours as per your request the demand is such that we would need to reassign the work on the day that you were off, to another colleague or attempt to recruit an employee for one day per week which would be wholly impractical.
Importantly we would not be able to support our customers and clients appropriately if you were only working 4 days per week.
In addition, during this meeting you informed Miss Barker that you found your salary to be unsatisfactory compared to the volume of work you have and the quality of work that you produce. You informed Miss Barker you would potentially rescind your resignation and continue to work 5 days a week if the Company could provide a satisfactory salary uplift.
Furthermore, as you are aware the department is moving to Yateley, Hampshire and the team is under additional pressures and time-constraints which bolsters the need for your role to remain at 5 days per week. These additional constraints are further reasons to refuse your request for a reduction in your working week. Additionally, you have previously expressed that you would not be participating in the move and would instead remain in Egham, Surrey, which we accepted."

45. The letter noted that after consulting with Mr Molloy and Mr Tasker, the decision was made that the Claimant's salary would remain unchanged, and the Claimant had proceeded to confirm he wished to resign. The Claimant was informed of his right to appeal.

46. On 6 July 2022, the Claimant asked Ms Barker to find the details of the changes made to his bonus structure in 2020. She responded stating that this was being looked for by Mr Tasker as it pre-dated her arrival with the company. That day, Mr Tasker emailed Ms Barker attaching some emails relating to the change to the bonus structure. The emails which were attached to Mr Tasker's email of 7 July 2022 were not in the bundle of documents provided to the Tribunal.

47. On 11 July 2022, the Claimant raised a grievance. He complained about the fact his request for flexible working was declined, the fact some employees had their contracts reduced from 42.5 hours per week to 37.5 hours per week but that his had not been reduced, the fact that the fixed bonus scheme had resulted in a lower rate of pay than he had earned pre-covid, and the move

to Yateley. He also pointed out that Ms Thomas' letter of 5 July 2022 contained an error when it said that it had been agreed he would remain at Egham.

48. On 19 July 2022, the Claimant attended a grievance meeting that was held by Ms Thomas.

49. On 25 July 2022, the Claimant was sent a grievance outcome letter. In the letter Ms Thomas said that Mr Molloy had understood the meeting on 27 June 2022 had been an informal meeting to discuss his request to move to four days and he had not realised he needed to inform HR prior to the meeting. Mr Molloy had said he and the Claimant had previously had a number of discussions about the team's high workload and the fact that the team was understaffed. Ms Thomas found that the Claimant's request for flexible working could have been handled better but noted that a formal application had not been in made in line with the Respondent's policy. She noted that although there was no formal application, a process was then followed once HR was aware of the request.

50. In her letter, Ms Thomas noted that she had seen an email from Mr Tasker to Mr Foster stating that Mr Tasker had communicated the revised bonus structure to the Claimant on the morning of 9 June 2020. She noted that they did not however have a 'Change of Terms' letter on file. She noted that at this time, the company was furloughing employees on an almost daily basis and the pressure on the business was immense and so she genuinely believed this was an oversight on the part of the HR team.

51. Regarding the move to Yateley she apologised that the information in the letter of 5 July 2022 was in fact wrong and that it had not previously been accepted that the Claimant could remain at Egham. She also stated that the move to Yateley required further consideration for all employees concerned before any final decisions were made. The Claimant was informed of his right to appeal.

52. On 25 July 2022, the Claimant indicated he intended to appeal the outcome of his grievance.

53. On 26 July 2022, the Claimant's employment with the Respondent came to an end.

54. On 1 August 2022, the Claimant set out his appeal in writing (p117). In his appeal, he set out that he recorded the meetings he had with Ms Barker. In his appeal letter, the Claimant pointed out that Mizbah Zaidi and David Palmer who were working in the Salvage Department were working 37.5 hours per week. The Claimant also asked why he had not been moved back

to his previous bonus scheme when he moved back to working in his pre-covid role.

55. The evidence given to the Tribunal by Mr Oldfield was that Mizbah Zaidi and David Palmer were not recruited to work in the Claimant's department. David Palmer was recruited to work on a different team and, a few months before the Claimant left, was moved temporarily to work in the Claimant's department due to the high workload. The Claimant accepted in cross examination that Mizbah Zaidi had been recruited as an administrator. Mr Oldfield's evidence was that she had been recruited as an administrator in a different department and then was moved to work in the Claimant's department due to the high workload.

56. On 3 August 2022, Mr Oldfield asked the Claimant to forward him the recordings he made of the meetings with Ms Barker. The Claimant responded stating he would prepare the relevant sections of the recordings. The following day, Mr Oldfield emailed the Claimant again to say that Ms Barker had been informed about the recordings and she had not consented to them being made or shared. He asked the Claimant to not send him the recordings. By the time the Claimant received the email, he had already sent the recordings. Mr Oldfield responded stating he had deleted the email which contained the recordings.

57. On 4 August 2022, the Claimant sent Mr Oldfield some further comments but without the recordings attached. On the same day, he sought Ms Barker's permission to send the recordings to Mr Oldfield. Ms Barker declined to give her permission.

58. On 8 August 2022, the Claimant attended an appeal meeting with Mr Oldfield. Both parties recorded the meeting. In the meeting, the Claimant made it clear that in his meeting with Mr Molloy on 27 June 2022 he had expected there would be a discussion about his options, but instead he had received a flat out "no". When asked what options he had expected to be discussed, the Claimant said he had been hoping for a trial period, which would allow him to do 4 days a week for 3 or 4 weeks, and which could then be reviewed at the end of that period. He said another option would have been if the Respondent had said that while they could not agree to it now, they would look to recruit additional staff, and then reconsider the position a month later. Mr Oldfield stressed that they had difficulty recruiting. The Claimant stated it had always been difficult to recruit employees for his department, but that was the manager's responsibility.

59. In the appeal meeting, the Claimant and Mr Oldfield also discussed whether the Claimant objected to the process that was followed regarding his request to work four days or the fact that the decision was declined. Initially the Claimant was clear it was the process, but after some discussion, he said it

was both the process and the outcome. When asked by Mr Oldfield why he did not carry on working after his conversation with Mr Molloy on 27 June 2022, the Claimant responded, "Because I felt pushed into a corner with it. I wanted 4-days a week." Later in the conversation, when asked what he wanted out of the appeal, he said he no longer wanted to return. He said, "Well, ultimately now, I don't want to come back. The way I have been treated and things have been lied. At one stage, if you had come back to me and said 'James, let's look at it next month, or month after, we understand it is something you want, you have been here a long time…,' I honestly we would be having a different conversation. And I would have stayed and been happier, but now with the main it has been twisted and turned back and made to feel like the person who has done the wrong here." When the Claimant was later asked if the process had been done properly but the request would have been declined, whether he would have resigned, the Claimant said, "I honestly can't answer that Matt, because if I was in the management position I would of recruited a team to make sure that my staff are happy, I wouldn't have just said no."

60. In respect of the move to Yateley, the Claimant confirmed he had been told than the Respondent would look to amend their working hours to take account of the longer commute, but he said he was not told what the changes would be. He said he was not told he would be compensated for additional travel expenses. Mr Oldfield's position is that those matters would be discussed and taken into account. The Claimant's point was that he had not been advised of those details when told the move was happening.

61. On the same day, Mr Oldfield wrote the Claimant a letter regarding the outcome of his grievance appeal. He noted that Mr Molloy was not expecting a formal discussion about the Claimant's request when they spoke on 29 June 2022. Mr Oldfield agreed with the Claimant that the team was under pressure in terms of its workload, and it would ideally have additional staff. He noted that he did not believe the Claimant's resignation was based on the way his request had been handled but was based instead on the fact that he had not been permitted to reduce his hours to four days. He noted that they accepted the request could have been handled better but that on 29 June 2022 Mr Molloy had not thought he was having a formal meeting, it was not a meeting he had called, and he was not prepared for it.

62. With regards to the change to some departments working hours, he noted that it was aspirational for the company to move teams to reduced hours but that it was not always possible due to operational requirements of the business. It was noted that the Claimant's department continued to have a heavy workload.

63. On the issue of the bonus he noted, "You agreed during the appeal that at the start of the Covid pandemic your ability to purchase bikes was impacted

when business levels dropped below 20% of normal operating volume. This unprecedented decrease led us to agree a "fixed" bonus value for you rather than a variable one based on 75% of the average bonus you had been earning in the previous year. In fact this decision by the Business protected your income during the 2 years of Covid at a time of great financial stress for the business, and given it was a discretionary bonus scheme I believe we have exceeded our requirement. I further note that we asked you to do various roles during the Covid period to help support the business and as per your contract (Paragraph 11 - Flexibility) this was a requirement you agreed to accept in your role."

64. In respect of the move to Yateley, in the letter, Mr Oldfield referred to the fact that the business had started conversations regarding amendments to hours and additional payments for expenses for the affected staff.

65. On 14 July 2022, the Claimant contacted ACAS for early conciliation purposes. The EC certificate was issued on 25 August 2022.

66. On 16 September 2022, the Claimant submitted a claim for constructive unfair dismissal. In box 8.2 the Claimant noted, "The claim was originally raised due to my flexible working request not being reviewed or correctly processed by my employer…" He describes the email to Mr Molloy on 19 June 2022 and the meeting on 27 June 2022. He noted that evening he looked on the government website and then resigned. He noted, "The following week after submitting my resignation it allowed me to take a step back and review how I had been treated in the past year of employment by 4th dimension and as detailed in my grievance submitted to 4th dimension on the 11/07/2022 regarding other concerns such as not being included in the working hours automatically rolled out for certain employees but not myself, issues surrounding my current contract, the bonus structure being fixed on a lower bracket even with an increased workload over previous years and finally being told that my job role would now require me to work at their new site in Yateley increasing my daily commute from 7 miles to 30 miles without any discussions surrounding the commuting expense and time impacts this would have on myself as a result of the move." (p11).

The issues for the Tribunal to decide

67. The Claimant alleged the Respondent had acted in breach of contract entitling him to resign when:
    a) On 27 June 2022, Mr Molloy refused the Claimant's flexible working request without further discussion.
    b) The fact that the fixed bonus scheme had resulted in a lower rate of pay than the Claimant had earned pre-covid.

c) Some of the Respondent's employees had their contracts reduced from 42.5 hours per week to 37.5 hours per week, but the Claimant's contract was not changed.
d) The fact that the Claimant was advised his department would move to Yateley.

68. Did the Respondent's actions breach an express term of the Claimant's contract?

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

70. Did the Respondent's actions breach the implied term of trust and confidence? The Tribunal will need to decide a) whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent and b) whether it had reasonable and proper cause for doing so.

71. Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

72. Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that he chose to keep the contract alive even after the breach.

The relevant law

73. 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.

74. An employee is entitled to terminate his or her contract without notice where the employer is in repudiatory breach of contract, that is a breach going to the root of the contract. In other words, a breach of a fundamental term of the contract. In *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, CA, the Court of Appeal held that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. Lord Denning MR stated, *'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.'

75. In order to claim constructive dismissal, an employee must establish that, there was a fundamental breach of contract on the part of the employer, the employer's breach caused the employee to resign, and that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

76. A fundamental breach of contract by the employer may be an actual or an anticipatory breach. An anticipatory breach arises when, before performance is due, the employer intimates to the employee, by words or conduct, that he does not intend to honour an essential term or terms of the contract when the time for performance arrives. Vague or conditional proposals of a change in terms, conditions or working practices will not amount to an anticipatory breach and will not therefore justify an employee's resigning and claiming constructive dismissal (*Sangarapillai v Scottish Homes EAT 420/91*).

Breach of contract

77. An employee can resign in response to a breach of an express term of the contract or an implied term of the contract, including the implied term of trust and confidence.

78. The relationship of employer and employee is regarded as one based on a mutual trust and confidence between the parties. In *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84, EAT, the EAT held that it was a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner 'calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties'. In *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)* [1997] ICR 606, HL, the House of Lords confirmed that the duty is that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

79. Consequently, there are two questions to be asked when determining whether the implied term of trust and confidence term has been breached: Was there 'reasonable and proper cause' for the conduct? Was the conduct 'calculated or likely to destroy or seriously damage trust and confidence'?

80. The burden of proving the absence of reasonable and proper cause lies on the party seeking to rely on its absence (*RDF Media Group plc and anor v Clements* [2008] IRLR 207, QBD).

81. In *Morrow v Safeway Stores plc* [2002] IRLR 9, EAT, the EAT held that if the employer is found to have been guilty of conduct that seriously undermines trust and confidence, that is something that goes to the root of the contract and amounts to a repudiatory breach entitling the employee to resign and claim constructive dismissal. Whether such conduct exists in any particular case will always be a matter for the tribunal to determine after hearing the evidence and considering all the circumstances.

82. In *Sharfudeen v TJ Morris Ltd t/a Home Bargains* EAT 0272/16, the EAT confirmed that, even if the employee's trust and confidence in the employer is in fact undermined, there may be no breach if, viewed objectively, the employer's conduct had reasonable and proper cause.

83. A breach of this fundamental term will not occur simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely that view is held. The legal test entails looking at the circumstances objectively i.e., from the perspective of a reasonable person in the claimant's position (*Tullett Prebon plc and ors v BGC Brokers LP and ors* [2011] IRLR 420, CA).

84. Terms relating to pay and benefits are generally covered by express terms. However, there is a specific implied term that employers will not treat employees arbitrarily, capriciously, or inequitably in matters of remuneration (*FC Gardner Ltd v Beresford* [1978] IRLR 63, EAT).

85. In *Transco plc v O'Brien* [2002] ICR 721, CA, the Court of Appeal held that the implied term of trust and confidence can also be breached if the employer refuses to offer an employee a variation of his or her existing contract or even a new contract of employment. In that case there was a breach because enhanced terms were offered to employees who satisfied certain criteria (namely completion of three months' service and having permanent status) but not to the claimant, even though he met the relevant criteria. The failure to offer the same terms to the claimant had been capricious and constituted a clear breach of the implied term of trust and confidence.

86. In *WA Goold (Pearmak) Ltd v McConnell and anor* [1995] IRLR 516, EAT, the Employment Appeal Tribunal upheld an employment tribunal's decision that an employer is under an implied duty to 'reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'. The *McConnell* case was concerned with a wholesale failure to conduct a grievance procedure.

87. In *Blackburn v Aldi Stores Ltd* [2013] ICR D37, EAT, the Employment Appeal Tribunal confirmed that a failure to adhere to a proper procedure is capable of amounting, or contributing, to a breach of the implied term of trust and confidence. It made clear that it is for the employment tribunal to assess in

each particular case whether what occurred was sufficiently serious as to amount to a breach of the implied term, since a failure to comply with a grievance procedure may take different forms and thus have different consequences. For example, the EAT considered that a failure to stick to a short timetable would not necessarily contribute to a breach of the implied term, whereas a wholesale failure to respond to a grievance could amount, or contribute, to such a breach.

Delay, affirmation, and the final straw

88. Lord Denning MR noted in *Western Excavating (ECC) Ltd v Sharp*, the employee "*must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged*".

89. In *WE Cox Toner (International) Ltd v Crook* [1981] ICR 823, the Employment Appeal Tribunal held that while mere delay by itself does not constitute an affirmation of the contract, if the delay went on for too long it could be very persuasive evidence of an affirmation.

90. In *Chindove v William Morrison Supermarkets plc* EAT 0201/13, Mr Justice Langstaff concluded the issue of affirmation is essentially one of conduct, not just passage of time. What matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign.

91. In *Fereday v South Staffordshire NHS Primary Care Trust* EAT 0513/10 the EAT has said that although affirmation is needed, it can be implied by prolonged delay and/or if the innocent party calls on the guilty party for further performance of the contract by, for example, claiming sick pay.

92. The Court of Appeal in *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481, CA, confirmed that, to constitute a breach of trust and confidence based on a series of acts (or omissions), the act constituting the last straw does not have to be of the same character as the earlier acts, and nor does it necessarily have to constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his or her trust and confidence in the employer. As always, the test of whether the employee's trust and confidence has been undermined in this context is an objective one.

93. Where the act that tips the employee into resigning is entirely innocuous, a constructive dismissal claim can succeed provided that there was earlier

conduct amounting to a fundamental breach, that breach must not have been affirmed, and the employee resigned at least partly in response to it – *Williams v Governing Body of Alderman Davies Church in Wales Primary School* EAT 0108/19. The EAT considered that in such a case the final act is 'not a last straw in the legal sense at all'.

94. The Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* [2019] ICR 1, CA, offered guidance to tribunals in last straw cases, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed: (i) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? (ii) Has he or she affirmed the contract since that act? (iii) If not, was that act (or omission) by itself a repudiatory breach of contract? (iv) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? (v) Did the employee resign in response (or partly in response) to that breach?

The Tribunal's findings

The Claimant's request to work four days per week

95. On 19 June 2022, the Claimant emailed Mr Molloy to get the "ball rolling" on working a four day week. He asked Mr Molloy to review a plan and discuss the details with HR for when he returned from holiday. This was not a formal Flexible Working Request, in the sense that it did not meet the statutory requirements for a Flexible Working Request as set out in Section 80F of the Employment Rights Act. It also did not follow the criteria stipulated in the Respondent's Flexible Working Policy. It did not meet the criteria because the Claimant was not aware of the Respondent's policy.

96. By the time the Claimant returned from holiday, he had not had a response from Mr Molloy and so on the morning of his first day back, he asked to meet with Mr Molloy. In a meeting held later that day the request was discussed very briefly. Mr Molloy had not spoken to HR at this point, but he made it clear the request to work four days a week was declined. As set out above, I found that although the discussion was very brief it was communicated to the Claimant that this was because of the department's workload.

97. The Claimant says that this series of events amounted to a breach of contract. The Claimant did not have an express contractual entitlement to work less than 42.5 hours per week and there were no express terms in his contract regarding how a request of this nature would be dealt with. There was no indication that the Flexible Working Policy had been incorporated into the Claimant's contract, and in any event, the Claimant's request was not made in line with the policy. The rejection of the Claimant's request to work

four days a week, and the manner in which it was handled, was not therefore a breach of an express term of the Claimant's contract of employment.

98. As to whether it amounted to a breach of the implied term of trust and confidence, the Respondent's position is that while the request could have been handled better, the rejection of the request, and the manner in which it was rejected, did not amount to conduct that was calculated or likely to destroy or seriously damage trust and confidence, and there was reasonable and proper cause for the conduct.

99. I have not been persuaded that the refusal to agree to the Claimant's request to work four days per week amounted to a breach of the implied term of trust and confidence. The Claimant worked hard for the Respondent and his preference was to move to four days a week. However, the Respondent provided evidence to the Tribunal that it had a valid and reasonable explanation for why the request was refused. In other words, there was 'reasonable and proper' cause for the refusal. It was not disputed that the Claimant's department was very busy and would have benefitted from additional staff. It did not have the resources in place to agree to the Claimant's request at that time. The Claimant made it clear in his grievance appeal meeting that he felt the managers should have managed the situation better by recruiting more staff earlier. While that may well be a reasonably held opinion, I accepted Mr Oldfield's evidence that there was difficulty recruiting into the department, and that there were other factors which were relevant to resourcing decisions, which the Claimant was not aware of. As I found the Respondent had reasonable and proper cause for refusing the Claimant's request to work four days per week, I did not find the refusal was a breach of the implied term of trust and confidence.

100. Further I was not persuaded that the manner in which the request to work four days per week was rejected amounted to a breach of the implied term of trust and confidence. The Respondent accepts that it would have been preferable for Mr Molloy to have sought HR advice and then proceeded to deal with the application as if it were a formal Flexible Working Request under the policy but argues the failure to do so does not amount to a breach of the implied term of trust and confidence. I agree with that argument. It would have been preferable if the Claimant's request had been referred to HR and dealt with under the policy. It would have been preferable for the Claimant to have been invited to a formal meeting to discuss his request, for a more full discussion to have taken place, and for the Claimant to have been provided with a more detailed explanation as to why it was being refused. However, I accepted Mr Molloy's evidence that he treated the Claimant's request as an informal request, given the manner in which the email was written. I also accept that Mr Molloy was not prepared for the meeting on 27 June 2022. It was not a planned meeting. He did not arrange it. He believed they were having an informal discussion about the Claimant's email.

101. Mr Molloy was already aware that the request would not be agreed to, for the reasons given above relating to the department's workload, and so conveyed that decision.

102. After the meeting, the Claimant resigned immediately. Once he resigned his email was forwarded to HR, and Ms Barker immediately took steps to have the application considered properly. While the decision regarding the request remained the same, Ms Barker clearly took steps to treat the application as it would have been treated under the policy.

103. While the Claimant places significant emphasis on the fact that Ms Barker said to him in their meeting of 29 June 2022 that the application had not been handled correctly, the test that I have to apply is whether the conduct breached the implied term of trust and confidence. I did not find that what occurred was sufficiently serious as to amount to a breach of the implied term of trust and confidence. As the Claimant asked to move to working four days per week in an email in an informal manner, it is understandable why Mr Molloy responded in an informal way. While the request could have been handled better, there was not a wholesale failure to deal with the Claimant's request. I do not find that the manner in which the Respondent dealt with the Claimant's request reached the threshold of being conduct that was calculated or likely to destroy or seriously damage trust and confidence.

104. Overall, I did not find that the refusal of the Claimant's request to work four days per week, or the manner in which the request was refused, breached the implied term of trust and confidence.

<u>The change to the Claimant's bonus structure</u>

105. The parties agree that in May or June 2020 they agreed to vary the Claimant's bonus structure. This was a mutually agreed verbal variation to the Claimant's contract. However, what was agreed was not recorded in a Change to Terms Record, and therefore the precise details of the variation are not clear.

106. I accepted the Respondent's evidence that the most likely explanation for why a Change to Terms record was not completed at that time was due to the significant strain that the company, and HR, were placed under, furloughing employees, and attempting to continue to run a business during the Covid 19 pandemic. I also accepted Mr Oldfield's evidence that the Claimant was the only employee in the company who received a bonus throughout the pandemic, and that it was agreed he would move to a fixed bonus scheme to reward him for taking on additional roles during the pandemic and to continue to incentivise him to work hard.

107. The Claimant agrees that once the pandemic started, he agreed to move role to cover the Ride Nation dealership. This meant he was no longer buying and

selling salvage items and therefore his old bonus structure was no longer applicable. He accepts that it was agreed that he would move to a fixed bonus structure. It is apparent that he was paid a bonus of £3500 every three months. The Claimant said that he was not told the overall salary that this would amount to each year, and he was not given a breakdown of the figures. The Claimant said he did not realise the fixed bonus structure would result in him receiving a lower overall annual income until he received his P60 in around April 2021. It would however have been apparent to the Claimant that he was receiving approximately £3500 every three months between June 2020 and April 2021.

108. The burden of proof lies on the Claimant to show that there was a fundamental breach of his contract of employment. I am unable to conclude that there was a fundamental breach of an express term of the Claimant's contract as I have not heard sufficient evidence about the specific details of the variation that was agreed.

109. Even if there were to have been a breach of an express term of the Claimant's contract, the Claimant became aware of the breach by April 2021, if not before. He did not resign in response to that breach. While delay alone is not sufficient to show affirmation, the delay of over a year in this case is a strong indication of affirmation. In addition, the Claimant's conduct demonstrated that he wished for the contract of employment to continue. Until around October 2021, it was the Claimant's hope that he would be made Dealership Principle for Ride Nation, and he was disappointed when this did not happen.

110. I have considered if the manner in which the Claimant's bonus structure was changed in May or June 2020 amounted to a breach of the implied term of trust and confidence. I am not persuaded that it did. I accept that under the previous bonus structure the Claimant was paid a higher gross annual salary and that after the new bonus structure was introduced this reduced. I have not been provided with sufficient details about what was agreed between the parties to determine exactly what the Claimant was told in May or June 2020. While I accept the Claimant attempted to obtain details of this from the Respondent and was unable to do so, I have not been provided with sufficient evidence from the Claimant about what exactly he says he was told about the fixed bonus structure.

111. The fact that the Claimant did not realise until April 2021 that he would be paid a lower annual salary does not mean that he was given insufficient information at the time of the agreed variation. As noted above, it would have been apparent to the Claimant from his pay slips that he was being paid £3500 per quarter. I was not presented with evidence from which I was able to conclude that the manner in which the bonus structure was changed breached the implied term of trust and confidence. In any event, for the reasons given above, the Claimant's conduct indicated that even after he was

aware of the drop in his annual salary that he wished to remain working for the Respondent, and therefore he affirmed any breach with did occur.

112. Overall, I did not find that the fact that the Claimant's overall income reduced when he moved to a fixed bonus structure breached either an express or implied term of the Claimant's contract, but even if it did, the Claimant affirmed that breach as he made it clear through his words and conduct that he wished for the employment relationship to continue after April 2021.

Reduction from 42.5 hours per week to 37.5 hours per week

113. The parties were agreed that the Respondent had moved some employees from contracts that required them to work 42.5 hours per week to contracts that required them to work 37.5 hours per week. As set out above, this was primarily in relation to employees who worked in different departments to the Claimant. There were two employees who worked in the Salvage Department who worked on 37.5 hours per week contracts, but this was because they had been recruited into other departments and then moved to the Salvage Department to assist with the high workload.

114. The Claimant is not alleging that the failure to change his contractual hours from 42.5 hours per week to 37.5 hours per week was a breach of an express term of his contract, and there are no express terms that could apply as his contract of employment required that he work 42.5 hours per week. Therefore, I have considered if this was a breach of the implied term that employers will not treat employees arbitrarily, capriciously, or inequitably in matters of remuneration or the implied term of trust and confidence.

115. I did not find that the failure to change the Claimant's contract to reduce his hours from 42.5 per week to 37.5 per week amounted to a breach of the implied term that employers will not treat employees arbitrarily, capriciously, or inequitably in matters of remuneration. I accept that from the Claimant's perspective it would have felt unfair that some departments were moved to the new contracts, and he was not, particularly as the salaries of those whose hours were reduced remained the same. However, I accepted the Respondent's evidence that the company was aspiring to change the contracts of all its employees but had to do this incrementally for reasons related to logistics, finances and to ensure they still could meet customer demand. This is evidenced by the fact that the Claimant's department did move to the new 37.5 hours per week contracts after he left. I was not persuaded that the Respondent's actions could be described as arbitrary, capricious, or inequitable with regard to renumeration, particularly as different employees will have received different rates of pay. I was aware that the Claimant was the only employee in the company who received a bonus throughout the Covid pandemic, but I did not hear any evidence about the amount of his salary compared to other employees.

116. Furthermore, I did not find that the failure to change the Claimant's contract to reduce his hours from 42.5 per week to 37.5 per week amounted to a breach of the implied term of trust and confidence. Even if the Claimant considered that the Respondent had behaved in a way that seriously damaged the trust and confidence between them, I found that the Respondent had reasonable and proper cause for their actions. The business suffered financially as a result of the pandemic. It was reasonable that the roll out of changes to the employees' contracts did not happen all at once but incrementally taking into account the cost of the changes, as well as the practical implications for each department.

117. Consequently, I did not find that the failure to move the Claimant from a contract requiring that he work 42.5 hours a week to 37.5 hours per week amounted to a breach of the implied term that employers will not treat employees arbitrarily, capriciously, or inequitably in matters of remuneration or the implied term of trust and confidence.

Move to Yateley

118. In around spring of 2022, the Claimant was informed in a brief morning meeting in the canteen that the Salvage Department team would be moving from Egham to a new unit purchased in Yateley. The Claimant was not pleased with this news as he had a commute of 7 miles each way to Egham, which he could cycle, and the commute to Yateley would be 30 miles each way. The Claimant contended that in rush hour, this could take as long as an hour and a half by car.

119. The parties were agreed that the Claimant had a one-to-one meeting with Mr Molloy in which the move to Yateley was discussed. Mr Molloy said the move was likely to take place towards the end of 2022. The Claimant was told in the meeting that the company would be looking to review the hours of those who had to move to take into account the longer commute to work. But he was aggrieved that he was not told the details of what was on offer, and he was not offered any additional financial assistance for the additional travel costs in that meeting. The Claimant was also aggrieved as he had raised the suggestion that he could continue to work at Egham, perhaps in a different department, and no one had got back to him about that suggestion.

120. The Respondent's position was that while they had announced the move it was intended that there would be further Individual consultation with those affected in due course. Mr Oldfield said that this was evidenced by the fact that, after further consultation, Mr Molloy had been offered financial assistance to cover the additional expense of the further travel, and that in fact, after further consultation, the Claimant's department had not moved to Yateley after all.

121. The Claimant had a mobility clause in his contract which allowed the Respondent to require the Claimant to work at an alternative location. The relevant term states, “The Company’s enactment of this clause would obviously be subject to prior consultation” (p55).

122. I found that the Respondent did not breach this express term of the Claimant’s contract. He was informed about the move in the spring of 2022, but it was not imminent. It was planned for the end of the year. He was told that there would be a discussion regarding his hours, and although he had not been offered any concrete proposals regarding his hours, this indicated further consultation was likely to occur. Further the Claimant had raised that he may prefer to move to a different department rather than move to Yateley, and he had not been told he could not change department. He just had not received a response to that suggestion. While I accept the discussions with the Claimant could have been handled better, I did not conclude that the Claimant was informed that a final decision had been made that he would move and that this had been a breach of his contract because it was a decision that was reached without any consultation. I accepted that further consultation on this issue was pending, but the Claimant resigned before those discussions took place.

123. I also did not find that the Respondent’s actions regarding the move to Yateley breached the implied term of trust and confidence. As noted above, I accepted that the Respondent’s communication on this issue with the Claimant could have been better. He would have preferred to have received a clearer indication of what consultation would take place and when. However, I did not find that the Respondent behaved in a way that was likely to destroy or seriously damage the trust and confidence between the parties. The fact that the Claimant had been told that the hours of those who were to move would be reviewed must have indicated to him that there would be further details provided later. As noted above, the move was not planned until the end of the year, so it was not surprising that by June 2022, the Respondent had not provided all the details of what was proposed.

124. While the Claimant would have preferred to have been provided with the details of what was on offer in terms of hours and financial compensation when he was informed that the move was planned, I did not find that the failure to provide this information at that time was sufficiently serious to amount to a breach of the implied term of trust and confidence entitling the Claimant to resign immediately. I concluded that the Respondent had reasonable and proper cause for the manner in which it dealt with the move because I accepted that further consultation would have occurred if the Claimant had remained in work and the move had gone ahead for his department.

<u>The final straw</u>

125. I have considered if the various matters about which the Claimant complained could cumulatively have amounted to a breach of the implied term of trust and confidence, and in so doing, I followed the Court of Appeal's guidance as set out in *Kaur v Leeds Teaching Hospitals NHS Trust.*

126. The most recent act on the part of the Respondent which the Claimant says caused or triggered his resignation was Mr Molloy's refusal of his request to work 4 days a week. He did not affirm the contract after that act, as he resigned immediately thereafter. For the reasons given above, I did not find that act by itself was a repudiatory breach of contract. Therefore, I considered if it was nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence. In respect of each of the matters about which the Claimant has complained I have set out above why I did not consider that they individually breached the implied term of trust and confidence, but I considered carefully if those acts taken together could cumulatively breach the term. I concluded that they did not. I have no doubt that the Claimant had an understandable sense of frustration about the failure to move him to 37.5 hour contract, the impact of the change to his bonus scheme on his overall salary, the news of the move to Yateley and the fact that his request to work four days per week day was rejected with little discussion. However, I did not find this conduct, even when viewed as a whole, amounted to conduct likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent.

127. The Claimant was aware that the department was very busy, and while it would have been preferable if more staff could have been hired, the Respondent were moving in staff from other departments to offer support. The move to Yateley was not imminent and I concluded it would have been clear to the Claimant that there would have been more discussions about what the Respondent would be able to offer him nearer the time if the move went ahead. It is entirely understandable that the Claimant wished to have his hours reduced to 37.5 hours, and to work 4 days per week, but the failure on the Respondent's part to implement or agree to those changes does not amount to behaviour that is likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent. It is very common for employees to request a change of hours, and very common for employers to refuse those requests. The manner in which the request to work four days was turned down, without a detailed discussion, was regrettable but was not so serious as to destroy or seriously damage the trust and confidence between the parties.

128. Further, for the reasons set out above, I concluded that the Respondent's conduct did not lack reasonable and proper cause. The Respondent put in place a fixed bonus structure for the Claimant given he was no longer buying

and selling salvage items. The Respondent wanted to reward him for taking on other roles during Covid and motivate him to work hard. Although this resulted in a lower annual income for the Claimant overall, he was the only employee in the company who was receiving a bonus, and it was a time of very significant financial difficulty for the Respondent. The Claimant agreed to move to a fixed term bonus structure, and it would have been apparent to him that he was receiving £3500 per quarter. The Respondent aspired to change all employees on to 37.5 hour contracts, but they had reasonable and proper cause for rolling that out sequentially, rather than making those changes all at once. I accepted that they needed to consider the financial ramifications, meeting customer demand, and the practical implications of changing the contracts for all the staff in each department. The Respondent had reasonable and proper cause for moving some of its operations to Yateley. That is a business decision that they were best placed to assess based on their knowledge of the company's business needs. As noted above, further individual consultations were planned. The Respondent had reasonable and proper cause for rejecting the Claimant's request to work four days a week. The department was very busy, and they did not have sufficient staff at that time to absorb the additional work that would have arisen from the Claimant working one fewer day per week.

129. For the reasons set out above, I did not uphold the Claimant's claim of constructive unfair dismissal. I did not find that the matters about which he complained individually or cumulatively amounted to a breach of the implied term of trust and confidence, and I did not find that the Respondent acted in breach of an express term of his contract which entitled the Claimant to resign.

_____

Employment Judge Annand

Date: 7 November 2023

JUDGMENT SENT TO THE PARTIES ON
28 November 2023

FOR THE TRIBUNAL OFFICE

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