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## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4109315/2021**

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**Hearing held in Glasgow by Cloud Video Platform (CVP) on 11 – 12 October  
2021**

**Deliberations: 13 October 2021**

**Employment Judge D Hoey**

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**Mr William Duncan**

**Claimant  
Represented by:  
Mr Paterson  
Solicitor**

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**John Clark Motor Ltd**

**Respondent  
Represented by:  
Mr McFarlane  
Consultant**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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- (1) The claims of holiday pay (and relating to holidays) and notice pay were withdrawn and are dismissed**
- (2) The claimant resigned and was not dismissed. His claim of unfair dismissal is ill founded and is dismissed.**
- (3) Each of the claims is therefore dismissed.**

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## REASONS

1. The claimant had raised a claim for unfair dismissal and other payments which  
5 was presented on 29 April 2021 with ACAS Early Conciliation beginning on 9  
March 2021 and ending on 6 April 2021.
2. The hearing was conducted remotely via Cloud Video Platform (CVP) with the  
claimant's agent and the respondent's agent attending the entire hearing, with  
witnesses attending as necessary, all being able to contribute to the hearing  
10 fairly. Breaks were taken during the evidence to ensure the parties were able  
to put all relevant questions to the witnesses. The Tribunal was satisfied that  
the hearing had been conducted in a fair and appropriate manner, with the  
practice direction on remote hearings being followed, such that a decision  
could be made on the basis of the evidence led.

### 15 **Case management**

3. The parties had worked together to focus the issues in dispute and during the  
hearing had provided a statement of agreed facts. We agreed a timetable for  
the hearing of evidence and the parties worked together to assist the Tribunal  
in achieving the overriding objective, in dealing with matters justly and fairly  
20 taking account of the issues, cost and proportionality.

### **Issues to be determined**

4. By the time the parties had closed their case, the claimant's agent had been  
able to confirm that the claim before the Tribunal had become clearly  
focussed. The only claim being advanced was in respect of the alleged failure  
25 of the respondent to comply with the contract with regard to holiday approval.  
It was alleged that the failure to respond to the claimant in accordance with  
the contract amounted to a constructive dismissal. That was the only basis on  
which it was alleged to amount to constructive dismissal and the other claims  
(which amounted to claims for holiday pay and notice pay) were withdrawn  
30 and were to be dismissed. The parties had reached agreement in respect of

holidays and notice and the claimant's agent confirmed he was content for the claims to be dismissed.

5. The issues to be determined were therefore as follows.

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a. Was there a breach of contract - The claimant relies upon his request for holiday being made mid October 2020 and a response not being forthcoming until 3 December 2020. Did that breach the claimant's contract given it was accepted the respondent was under a contractual obligation to respond to holiday requests "as soon as possible"?

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b. Was the breach a fundamental one?

c. Did the claimant resign in response to the breach?

d. Did the claimant affirm the contract before resigning?

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e. If the claimant was dismissed, what was the reason or principal reason for dismissal, and was it a potentially fair one?

f. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

g. What compensation should be awarded, if any.

### **Evidence**

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6. The parties had agreed productions amounting to 192 pages.

7. The Tribunal heard from the claimant and Mr Longmuir (the claimant's former line manager).

### **Facts**

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8. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. Where there was

a conflict in evidence, the conflict was resolved by considering the entire evidence. making a decision as to what was more likely than not. The Tribunal only makes findings that are relevant to the issues to be determined.

5 **Background**

9. The respondent is a family run and owned car franchise operating throughout Scotland. It employs over 1200 staff.

10. The claimant was employed as After Sales Manager from 27 March 2002 until 31 December 2020. The claimant's role was to manage staff and assist with internal invoicing (both in terms of year and quarter ends). The claimant had initially run the VW dealership and took control of a specific aftersales division at the request of the Chairman. He also assisted with other dealerships and following lockdown agreed to take control of another dealership and a Bodyshop. He had effectively become a divisional manager with particular focus on aftersales.

**Contractual issues**

11. The claimant agreed a contract of employment that set out the main terms of his employment. Under "holiday entitlement" the annual leave was set out. It also said: *"All holidays must have prior approval and authorisation and requests submitted in writing using the company holiday request form. Requests for holidays should be submitted at least one month prior to the start of the required holiday period. The Company will respond as soon as possible to your request for holiday. No responsibility will be accepted for monies lost as a consequence of your failure to comply with this procedure."*

12. As part of the claimant's terms and conditions, he was aware of a grievance policy, which sought to deal with any issues or concerns in connection with the employment relationship.

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**The team**

20. The claimant was a trusted member of the senior management team. He had a good working relationship with his line manager, Mr Longmuir, who had been his line manager since 2018. Mr Longmuir reported to Mr Inman, Franchise Director. The claimant had a “can do” attitude and believed in working hard.

21. When the pandemic hit, the respondent closed their business for a while. Staff were furloughed. The claimant was one of the early group of staff who returned to work with staff returning thereafter on a phased basis.

### **Claimant, workload and holidays**

22. The claimant had a heavy workload. He had been given an assistant from January 2020. The claimant had taken few holidays over the year. That was not uncommon. The claimant on occasion chose not to take his full annual entitlement and understood that he would lose such holiday entitlement that he did not take during the holiday year. When he took leave he would ordinarily go away from home.

23. The claimant had experience of the electronic holiday system having taken some holiday earlier in the year. He knew that requests for holidays were made electronically and generate an email being sent to Mr Longmuir with the approval or rejection being sent electronically when it was actioned.

### **Claimant’s workload challenging**

24. In the course of September 2020 the claimant met with Mr Longmuir and Mr Inman. The claimant had disclosed that his workload was challenging and he was finding it stressful. He was advised to delegate more, particularly to his assistant. The claimant did not raise the issue of stress further.

**All staff email – holidays to be taken**

5 25. On 2 October 2020 an email was sent to all staff from the Managing Director. This was a lengthy email emphasising how hard staff had worked and the positive results which had been received. The email noted the uncertainty going forward given the potential for further lockdowns at that time and the unknown consequences of Brexit upon the motor trade. The email asked staff  
10 to keep working hard as no one knew what the future held.

26. The email emphasised that everyone should take time out to reset and recharge. It emphasised that holiday requests should be submitted as soon as possible as each request would need to be reviewed and considered  
15 against bookings in the system. The email noted that more holidays could be carried forward into 2021 to make it easier for staff.

27. The email also noted that there would be a Christmas shut down from 24 December to 4 January. A skeleton team would be in on a rota basis but  
20 would give everyone well deserved time away from work. That had not happened in previous years.

**Claimant checks position of his staff and makes a holiday request**

25 28. In addition to an assistant, the claimant was also responsible for a number of service advisers/technicians, quality managers, warranty managers and front of house staff. The claimant wanted to ensure all his staff took holidays.

29. Having checked the holiday position of his staff, the claimant sent an electronic request for holidays to his line manager. He requested time off from  
30 14 to 23 December 2020 (8 days leave). The claimant knew that there would be a closure period from 24 December but thought that he would attend work during the closure period in any event. He did not discuss this or mention that with his manager.

30. Since around the start of 2020 the respondent set up an electronic holiday request system. All holidays were requested online and an alert would be sent to Mr Longmuir. He would then consider the request, speak to any line manager, and approve or reject the request. An email would be sent to the person once Mr Longmuir responded.

**Respondent declines to deal with request**

31. Mr Longmuir received the holiday request. He decided not to consider the request. He wanted the claimant to come and speak to him about it. He considered that all managers should speak to their line manager before making holiday requests at which point he would consider the request. Mr Longmuir dealt with other requests in the interim, approving and rejecting requests as the business needs demanded.

32. Although the claimant and Mr Longmuir met regularly, sometimes more than once a day, the claimant did not raise his holiday request with Mr Longmuir. Mr Longmuir did not raise the issue either.

33. Mr Longmuir was shocked that the claimant had sought holidays in December. There would require to be a final push to finalise matters at the end of the year and it was likely that the claimant would be needed on site to achieve this, particularly given the decision that year to have a closure period from 24 December, the day after the claimant returned from leave. Mr Longmuir had not decided at this time to refuse the request. He did not want to have a difficult conversation with the claimant and wanted instead the claimant to raise the matter with him. He decided to await the claimant raising the issue with him and he would talk it through.

**Claimant assumes holidays granted and books holidays**

34. The claimant had assumed his request had been granted, although he did not check the position. He knew that other managers' leave had been approved. Previous holidays that the claimant had requested had been approved earlier

in the year. He knew this one had not formally been approved and did not check the position with Mr Longmuir but assumed things would be positive.

35. Despite not having heard from Mr Longmuir the claimant booked flights to go to Tenerife on 25 November 2020.

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**Respondent awaits a discussion from claimant**

36. Mr Longmuir knew that the request was outstanding but did not want to initiate the discussion with the claimant and instead chose to wait for him to raise the issue. That did not happen during the month of November.

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**Discussion regarding holidays takes place: holidays declined**

37. Around the end of November 2020, Mr Longmuir learned from a colleague that the claimant had booked flights to Tenerife and was planning on going on holiday there. He was surprised.

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38. On 3 December 2020 Mr Longmuir and the claimant were meeting to discuss business issues. At the end of the meeting Mr Longmuir raised with the claimant that he understood the claimant was intending to travel to Tenerife. Before the meeting Mr Longmuir had not decided whether or not approve the holiday request and it was only during the meeting on 3 December 2020 that Mr Longmuir made a decision.

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39. Mr Longmuir decided during the meeting that the claimant's request would be refused. The area of the business in question was approaching target and needed a final push. Given the additional closure period (which would commence the day after the claimant returned) Mr Longmuir wanted his managers on site. The claimant was a senior manager and Mr Longmuir wanted him on site.

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40. The claimant said that if the holiday was to be refused, he would resign. He needed the break and would be going on the holiday. Mr Longmuir said that he had decided to refuse the holiday entitlement. He said it was he who decides upon holidays and on this occasion the claimant's request would be

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declined. The claimant asked for written reasons why his holiday was being refused given the time that had passed. During the meeting Mr Longmuir opened the holiday system and declined the holiday the claimant had requested, which generated an email that was sent to the claimant. He did not set out reasons for his refusal in writing.

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41. The reason why Mr Longmuir acted in the way he did (take around 7 weeks to determine the claimant's holiday request) was because he wanted to wait for the claimant to approach him and discuss the matter with him (despite there being no obligation requiring him to do so and despite Mr Longmuir not making it clear to the claimant that was what he wanted). Mr Longmuir knew that the conversation would be difficult and the request may need to be refused but he did not make his mind up until the matter was eventually discussed on 3 December 2020.

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42. There was no reason why a decision could not have been made within a week or so of the request being lodged. The respondent did not respond to the request as soon as possible as required by the contract.

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### **Claimant decides to resign**

43. Around half an hour or so following the meeting on 3 December, the claimant sent an email to Mr Longmuir which he copied to the managing director, the chairman and the Head of HR. He said

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*"Dear all*

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*Subject: resignation*

*It is with deep regret that I am resigning from the company from today. I won't go into details in an email regarding the circumstances that have left me with no option but to make this decision.*

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*To date this year I have had 9 days holiday 1 and 2 January and 7 days in August which leaves 19 days unused. I have a request for holiday 14 – 23 December which after weeks of requesting this today it has been rejected, the explanation given to me was I will decide when you go on holiday and you're not getting them.*

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*I will not be in the business on the dates I request with his in mind and the holidays still outstanding please advise when you would like me to finish my employment.*

5           Regards”

44.   The claimant had not considered resigning until the meeting of 3 December. He decided that the refusal to grant his holiday request against the backdrop of the stress he felt he had been under meant he could no longer remain in  
10       employment. The reason for his resignation was the refusal to grant his holiday request. The delay in making the decision was not part of the claimant’s decision to resign.

45.   The claimant had hoped that a member of the senior team would have a discussion with him about the situation. He believed that it was unfair to  
15       decline his holiday given the circumstances. He tried to speak to Mr Longmuir’s manager on 3 December but he was not available.

### **Resignation “accepted**

46.   Shortly following the resignation email (which was sent on 3 December 2020)  
20       a letter was sent to the claimant. Noone knew the date of this letter but it was sent shortly after the resignation, probably within a few days of it. This was headed “Acceptance of resignation” and noted the respondent’s disappointment in receiving the claimant’s resignation but confirmed it would be “accepted” and his last day would be 31 December 2020.

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### **Exit interview**

47.   On 9 December 2020 the claimant was called to attend an exit interview with  
30       Mr Longmuir. It was stated during this meeting that the breakdown of the relationship was not personal. The claimant said it was due to the refusal of his holidays and the absence as to clarity as to reasons for the refusal. He believed others had been allowed to go on holiday.

### **Employment ends**

48. The claimant's last day at work was around 12 December 2020. The claimant went on holiday and was told not to return to work.

49. The claimant knew of the grievance procedure but decided not to use it on this occasion. He did not see the point. He had no issue with the respondent as such. His issue was with his manager refusing his holidays.

### **Post employment issues**

50. The claimant sought alternative work and applied for different roles. He secured a role based in Perth. He discovered that it took over an hour to get to work each day. He also discovered that the cost in petrol was around £100 each week. He decided that he could not continue with that role given the commuting time and cost to get to and from work (in addition to the wear and tear on his vehicle). He left that role after around 2 days. He discovered that remote working had been trialled but refused as the business wanted staff in the office. He did not consider he could sustain the commute and costs of that role.

51. He secured statutory benefits (which are recoupable benefits).

52. He remained unemployed.

53. When working with the respondent he earned a gross weekly wage of £884.61 and a net weekly wage of £671.96. He was aged 61 on dismissal.

### **Observations on the evidence**

54. Both witnesses sought to provide evidence to the best of their abilities and were candid.

55. One of the key issues in this case was the reason for the claimant's resignation. The claimant's email had made it clear that he was unhappy with

the refusal to grant his holiday request, which he considered unreasonable given the little amount of holidays that he had taken.

56. The Tribunal considered whether or not the delay in granting the request was in any sense connected with the claimant's resignation. The Tribunal  
5 concluded that it did not. The claimant in his evidence before the Tribunal was clear that the reason for his resignation was the refusal to grant his holiday request against the backdrop of the stress he believed the challenging workload he had generated. At no stage during his evidence before the Tribunal did the claimant say that the time that it took for Mr Longmuir to make  
10 a decision was a reason for his decision.

57. This was supported by the exit interview meeting where it was clearly stated that the claimant's issue was his belief that he had been treated unfairly in being denied his holiday entitlement. He was unhappy with Mr Longmuir's decision to decline his holidays. There was no reference during that meeting,  
15 when the claimant had the opportunity to explain what his concerns were, to any issue with the time that was taken being a factor in his resignation.

58. Even the resignation email itself, which was sent shortly following the decision that was taken made it clear that the claimant was unhappy with the decision to refuse his leave. While the email refers to the weeks that had passed, the  
20 email did not fairly suggest the time taken was a reason for his resignation.

59. The claimant said in evidence that he had not decided to resign prior to the meeting on 3 December. In other words, had the decision been to approve his holidays (which is what he assumed the case had been) he would not have resigned and not have considered there to be any issue. It was only when he  
25 was told that his request was not approved that he decided to resign. On the facts before the Tribunal, the reason for his resignation was entirely unconnected to the time it had taken to confirm the decision.

60. There were no key factual disputes that required to be determined given how the case developed and the issues to be determined.

61. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) which provides  
5 that an employee is dismissed by his employer if: **“the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”**
62. The principles behind such a “constructive dismissal” were set out by the Court  
10 of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only 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  
15 intends to be bound by one or more of the essential terms of the contract.
63. An employee is entitled to rely upon an express or implied term in this regard. In this case the claimant relies only an express term and not on any implied terms nor on any course of conduct or last straw.
64. If there was a breach of contract, the breach requires to be of such a level so  
20 as to justify the claimant resigning.
65. The Court of Appeal made it clear in **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27** that it is not enough for the employee to leave merely because the employer has acted unreasonably; its conduct must amount to a breach of the contract of employment. When deciding whether there has been  
25 a breach of contract, the Tribunal must reach its own conclusion on this question. The test is not whether a reasonable employer might have concluded that there was no breach: it is whether on the evidence before it the Tribunal considers that there was.
66. The Tribunal must decide objectively whether there is repudiatory breach by  
30 considering its impact on the contractual relationship of the parties. The fact

that the employer may genuinely believe that the breach is not repudiatory is irrelevant: **Millbrook Furnishing Industries Ltd v McIntosh** [1981] IRLR 309. The Tribunal must decide objectively whether there is repudiatory breach by considering its impact on the contractual relationship of the parties.

5 67. In short, in order for the employee to be able to claim constructive dismissal, four conditions must be met:

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

67.2 That breach must be sufficiently important to justify the employee resigning, (or the last in a series of incidents which justify his leaving, the latter point not being argued in this case).

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67.3 He must leave in response to the breach and not for some other, unconnected reason. The breach should be a reason in the sense of played a part in the resignation (but does not need to be the principal cause – **Wright v North Ayrshire Council** [2014] IRLR 4).

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67.4 The claimant must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract, called affirmation.

20 68. If the employee leaves in circumstances where these conditions are not met, he will be held to have resigned and there will be no dismissal.

69. If the claimant proves that his resignation was in truth a dismissal, Section 98 governs the question of fairness. This means that a constructive dismissal is not necessarily unfair. The Tribunal should making explicit findings on the reason for the dismissal and whether the employer has acted reasonably in

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all the circumstances: **Savoia v Chiltern Herb Farms Ltd** [1982] IRLR 166. **In Berriman v Delabole Slate Ltd** [1985] IRLR 305, in which Browne-Wilkinson LJ, said: "...in our judgment, even in a case of constructive dismissal, [s 98(1) of the ERA 1996] imposes on the employer the burden of

5        *showing the reason for the dismissal, notwithstanding that it was the employee, not the employer, who actually decided to terminate the contract of employment. In our judgment, the only way in which the statutory requirements can be made to fit a case of constructive dismissal is to read section 98 as requiring the employer to show the reasons for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer."*

70. The Tribunal must therefore consider what the reason for the employer's actions were that led to the dismissal (which is an objective question) and then  
10        apply the statutory wording to determine whether the dismissal was fair in all the circumstances. See **Buckland v Bournemouth University** [2010] IRLR 445.

### 15        **Compensation**

71. Where an employee has been unfairly dismissed, compensation can be awarded which would comprise a basic award and a compensatory award.

### **Basic award**

72. This is calculated in a similar way to a redundancy payment, namely half a  
20        week's gross pay for each year of employment when the claimant was under 22 (section 119 of the Employment Rights Act 1996).

### **Compensatory award**

73. This must reflect the losses sustained by the claimant as a result of the dismissal. Section 123 of the Employment Rights Act 1996 states it shall be  
25        such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

74. No interest is awarded in respect of unfair dismissal compensation.

75. If a claimant has received certain benefits, including Job Seeker's Allowance, the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. This means that the respondent must retain a portion of the sum due until the relevant Government department has issued a notice setting out what the claimant is to be paid and what is to be refunded to the Government.

### **Submissions**

76. Both parties were given time to consider their submissions and both parties gave oral submissions. The respondent's agent had prepared written submissions which he had sent to the Tribunal and claimant's agent just before the oral submissions began. Both parties confirmed that they had sufficient time to consider the issues arising and that they were able to present to the Tribunal all the evidence and points they wished the Tribunal to consider. The Tribunal will deal with the submissions of the parties at the relevant points in considering the issues. The Tribunal addresses each issue in turn.

### **Discussion and decision**

#### **Breach of contract**

77. The first issue is whether there was a breach of contract. The respondent accepted that there was a contractual obligation upon the respondent to respond to the claimant's holiday request "as soon as possible".

78. The respondent's agent fairly conceded that the respondent had breached the claimant's contract. It was plainly possible for the respondent to have responded to the claimant's request by the end of October and by failing to do so without any justification, the respondent did not respond as soon as possible. The respondent breached the claimant's contract of employment.

**Was the breach fundamental (or repudiatory), ie so serious that the claimant was entitled to treat the contract as being at an end.**

79. This was a key issue in this case. The claimant argued that objectively viewed the respondent had acted in such a way so as to show, objectively, that it no longer intended to be bound by the contract. Holidays were an important term of the contract, second only to pay. The failure to approve the holidays in a reasonable time created significant issues for the claimant, who was under stress at the time. Had the request been made sooner, the claimant could have arranged alternative holidays but the delay meant that the claimant had limited time left for holidays. It was noted that the test is whether objectively viewed (from the perspective of the innocent party) the contract breaker had intended to abandon or refuse to perform the contract.
80. The respondent's agent argued that there was a "hierarchy of terms". Some terms, such as pay, are such that any breach could be fundamental. Other terms such as the mechanism for holidays, were different. It was submitted that any breach of such a non-fundamental term, however egregious, could not be repudiatory if the term was not itself a fundamental term..
81. It was submitted that the conduct complained of amounted to a breach of an express term of the contract, but not a breach of a fundamental term, going to the root of the contract. There is no express time within which a leave request must be granted.
82. The respondent's agent argued that the distinction between fundamental terms and ordinary terms is not founded in any systematic categorisation. Failure to pay salary is a fundamental breach of contract, but the nature of that obligation is that 'pay for work' is the fundamental bargain in the employment contract, and the fact that missing a pay day is going to leave an employee deprived of the essence of the contractual bargain. Whereas, the employer has the general right (and the contractual right in this case) to decline specific leave requests, without depriving the employee of the benefit of leave.
83. It was submitted that the term breached was not relating to the right to leave, but simply the mechanics of booking it. This puts it in the lower order of non-fundamental or 'ordinary' terms. The effect to the claimant of the refusal of his

requested leave was not to deprive him of his contractual entitlement to leave, it deprived him of an instance of leave at a time of his request, and of the benefit of his contractual right to a response as soon as possible. There is however no right to any specific occasion (as opposed to amount of) leave.

5 The claimant could still have requested that ungranted leave in another way even from 3 December to 31 December 2020. He did not do so. The claimant still had the leave outstanding to take in the leave year, and had been offered a carry-over of leave in 2021. This makes leave entitlement quite different from fundamental contractual rights such as salary paid when due.

10 84. The contract-breaker has not clearly shown an intention to abandon and altogether refuse to perform the contract. Leave was still open to the claimant to take, Mr Longmuir was seeking to achieve the business ends in a difficult year, which potentially would benefit the claimant in terms of his bonus

15 85. It was argued that the seriousness of the breach could not convert a minor term into a fundamental term. The mechanics cannot elevate the nature of the breach. This was a breach of a minor term and did not affect the claimant's entitlement to fundamental rights. It was unfortunate and unreasonable but not repudiatory conduct.

20 86. The respondent's agent noted that it was necessary to make a finding of fact as to when the claimant ought to have been told about his holiday request since that is the point the claim crystallises

25 **Decision on whether breach was sufficiently serious to justify claimant's resignation**

30 87. The Tribunal carefully considered this issue. In terms of **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27** the Court said that the statutory language incorporates the law of contract. This means that an employee is entitled to treat himself as constructively dismissed only 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. It is notable that the Court referred to “essential term”.

- 5 88. This is not a case dealing with breach of an implied term (nor a final straw case, where the final straw can amount to conduct falling short of a breach of contract). In this case the claimant relies on breach of a single term in his contract. That is a term, within the holiday section of his contract, to respond to a request as soon as possible.
- 10 89. There is no formal classification set out by the Court as to what an “essential term” of the contract is. Reference is often made to fundamental terms too. The Tribunal accepts that pay and holidays are fundamental terms.
- 15 90. In this case, however, the issue is not about removing pay or holidays but with regards to the mechanism in which holidays are to be approved. By breaking that term is the respondent showing it no longer intends to be bound by an essential term of the contract? In principle it could be the case that in not replying as soon as possible the employer is showing it no longer intends to be bound by an essential term, if, for example, the employer by breaching the term thereby prevented the employee from taking any holidays.
- 20 91. That is not, however, the situation in this case. In this case the respondent delayed dealing with the request for around 7 weeks. When the matter was determined, there was time for the claimant still to take his holidays (which could be carried forward as the managing director’s email said).
- 25 92. The second limb of the Court’s dictum has not been established – the respondent in this case on the facts did not show it no longer intended to be bound by an essential term.
- 30 93. The first limb – where the employer is guilty of conduct which is a significant breach going to the root of the contract of employment – is more akin to reliance upon an implied term (such as trust and confidence) but the Tribunal considered whether the breach of the clause in question in this case amounted to conduct which was a significant breach going to the root of the contract. The Tribunal did not consider the respondent’s breach on the facts to satisfy

5 this test. While the respondent acted unreasonably, the conduct did not go to the root of the contract given the context. There was no other conduct relied upon other than the delay in dealing with a holiday request. That by itself in the context in which it occurred on the facts did not amount to a repudiatory breach of contract.

94. On that basis the claim is ill founded.

**Resignation in response to the breach?**

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15 95. Even if the Tribunal was wrong in its classification of the breach, the reason why the claimant chose to resign was entirely unconnected to the specific breach relied upon in this case. The clear reason the claimant resigned (and only reason) was the refusal of his leave. The delay in dealing with his request was not a factor or part of the claimant's decision to resign.

20 96. The fact the claimant confirmed he had not decided to resign until the meeting of 3 December 2020 supported the facts that the length of time was not a reason for his decision. He only decided to resign as soon as he was told his holiday was not being approved. Looking at the evidence before the Tribunal the reason why the claimant resigned was not connected to the breach that has been established. His claim is ill founded.

**Affirmation**

25 97. Had the Tribunal been required to consider matters further, the Tribunal would not have found that the claimant had affirmed the contract by remaining in post for the time he did. He remained in post for a short period and he wanted to assist the respondent, despite believing that he could not work with Mr Longmuir due to his decision on his holiday request. He did not thereby affirm  
30 the contract.

**Was the reason for dismissal a potentially fair reason**

98. For completeness the Tribunal considered this issue. The respondent argued that had the claimant been dismissed, the reason for the dismissal, the reason for the respondent delaying to deal with his holiday request, was a potentially fair reason, namely some other substantial reason justifying dismissal.

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99. In the paper apart to the ET3 at paragraph 21 it was stated that the reason was “the need to manage the workforce in the light of the business situation that it faced at the time or in the alternative its response to the claimant’s conduct in booking a holiday overseas and his avowed intent to take that leave regardless of the respondent’s approval”.

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100. Neither of these reasons were in fact the reason why Mr Longmuir did not deal with the claimant’s request as soon as possible after it was received. The only reason he did not deal with it was because he wanted the claimant to come and speak to him. That was not a potentially fair reason on the facts.

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101. The Tribunal has considerable sympathy for the claimant and the way he was treated with regard to this issue. The claimant had not been told by Mr Longmuir that he should have a discussion about holidays. The whole point of the electronic system was to allow matters to be dealt with electronically. It was the responsibility of the line manager to deal with holidays, and contractually they should be dealt with as soon as possible.

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102. Had there been a dismissal, the Tribunal would not have hesitated in finding that the reason for the dismissal was not a potentially fair one. There was no justification for the decision of Mr Longmuir to avoid dealing with the claimant’s request. He ought to have dealt with it when he received it and it was unfair and unreasonable not to have done so.

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103. It is important in dealing with workplace matters to have open and honest discussions at the earliest opportunity. Staff are entitled to expect that from their managers. They may not like the discussion, but being part of management requires difficult and challenging decisions to take place.

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104. While the claimant could (and ought) to have raised the matter with his line manager, it was his manager's contractual duty to deal with the matter as soon as possible. It is regrettable that this was not done

5 **Summary**

105. Given the breach of contract was not fundamental or repudiatory and given the claimant did not resign in response to that breach, the claim is ill founded and it is not necessary to consider the other issues.

10 106. The claimant was not dismissed. He resigned. His claim of unfair dismissal is dismissed.

**Closing observations**

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107. The Tribunal reiterates its sympathy for the claimant who understandably felt let down by the respondent. It was unfair to delay a decision upon a holiday request for 7 weeks when the parties were seeing each other on a daily basis. The claimant must accept some responsibility given he did not raise matters with his manager but his manager ought to have raised matters sooner and had the discussion in an open and meaningful way.

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108. It was unfortunate that the claimant chose to resign rather than seek to resolve the matter in a more conciliatory fashion. The claimant was a hard worker and was well regarded and regrettably his decision resulted in the loss of his role, which he clearly cherished. The respondent did not dispute that the claimant was a hard worker and was competent in his role.

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109. It is only to be hoped that the claimant secures alternative employment in the near future.

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110. Finally the Tribunal wishes to express its thanks for the professionalism shown by the agents, in focusing the issues in dispute and ensuring the Tribunal had all the information before it in order to fairly determine each of the issues that were outstanding.

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Employment Judge: David Hoey

Date of Judgment: 15 October 2021

Entered in register: 18 October 2021

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