



# EMPLOYMENT TRIBUNALS

**Claimant:** Cherri Aldridge-Todman

**Respondent:** Paul Jones

**Heard at:** London South – by CVP

**On:** 27 & 28 February 2023

**Before:** Employment Judge Hamour (sitting alone)

## **Representation**

**Claimant:** Mr E Howell, lay representative

**Respondent:** Miss A Jervis, Solicitor, Peninsula

# RESERVED JUDGMENT

The Claimant's claim for unlawful deduction from wages is dismissed upon withdrawal.

The Claimant's claim of constructive unfair dismissal, and for notice pay, fail and are dismissed.

The Claimant's claim for holiday pay fails and is dismissed.

# REASONS

## The Parties

1. The Respondent is a private individual, who has significant disabilities. He lives in his own home, with the assistance of carers.
2. The Claimant was employed by the Respondent as a carer. There is some dispute between the parties as to the dates of employment. The Claimant contends that she was employed from 20 January 2018 to 28 December 2020, and the Respondent contends that she commenced employment on 30 February 2018 (as stated in her employment contract) to 28 December

2020. Both parties agree her effective date of termination was 28 December 2020. The variation in start dates does not affect the Claimant's qualifying period in respect of unfair dismissal, and therefore nothing turns on this differential.

3. The Claimant's claims are for constructive unfair dismissal, notice pay, wages and holiday pay.

#### Vulnerable Witness

4. The Respondent is a vulnerable witness, due to his physical disability. I enquired of him, and his representative, of any adjustments he may require. We would ordinarily aim for a 5-minute screen break each hour, but agreed that I would allow for longer breaks if needed by the Respondent, and/or more frequent breaks. The Respondent was to alert the Tribunal if he required a break at any time. The Respondent's carer, Miss Briggs, was present with him during the hearing, including to assist him in electronically accessing the necessary documents whilst giving his evidence. The Respondent confirmed that no other adjustments were required.

#### The Issues

5. The relevant issues on liability had been agreed at the preliminary hearing of 12 December 2022 to be as follows, (using the numbering from the list of issues):

#### **Unfair dismissal (constructive – s.95(1)(c) ERA 1996)**

##### 1.1.1 Did the Respondent:

- 1.1.1.1 In May 2020, fail to pay the Claimant SSP when she broke her leg and force her to take annual leave without the required notice?
- 1.1.1.2 Advise the Claimant to attend work on 24 December 2020 against government guidance, after she informed him that she had been in close contact to someone with COVID-19?
- 1.1.1.3 Pay the Claimant SSP instead of furlough whilst she was self-isolating?
- 1.1.1.4 Advise the Claimant that after isolating for 10 days, she would need to do another COVID-19 test and wait another 4 days before returning to work, thereby refusing to allow the Claimant to work after Christmas following? The Claimant relies on this act as the last straw.

##### 1.1.2 Did the Respondent breach the implied term of trust and confidence? The Tribunal will need to decide:

- 1.1.2.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust

and confidence between the Claimant and the Respondent;  
and

- 1.1.2.2 Whether it had reasonable and proper cause for doing so.
- 1.1.3 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.
- 1.1.4 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether any such established breach of contract was a reason for the Claimant's resignation.
- 1.1.5 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.
- 1.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal? The Respondent says that if the Claimant was dismissed, it was for conduct or alternatively SOSR due to a complete breakdown in trust and confidence between the parties.
- 1.3 Was it a potentially fair reason?
- 1.4 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?
- 1.5 Was dismissal within the range of reasonable responses?

### **Holiday Pay**

- 3.1 What was the Claimant's leave year?
- 3.2 How much of the leave year had passed when the Claimant's employment ended?
- 3.3 How much of the leave had accrued for the year by that date?
- 3.4 How much paid leave had the Claimant taken in the year?
- 3.5 Were any days carried over from previous holiday years?
- 3.6 How much entitlement remains unpaid?
- 3.7 What is the relevant rate of pay?
- 3.8 What remains owing?

### **Wrongful dismissal**

- 4.1 What was the claimant's notice period?

- 4.2 Was the claimant paid for that notice period?
- 4.3 If not, was the claimant guilty of gross misconduct? Or did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Clarifications and withdrawals

**Holiday Pay**

6. The Claimant confirmed that her claim in respect of holiday pay was for 4 days' accrued on termination. She also confirmed that the figure of 4 days' was premised upon information provided to her by the Respondent, and not on any calculations made by the Claimant herself.

**Wages**

7. The Claimant confirmed that her allegations in respect of unpaid SSP in May 2020 were only put forward as part of the factual matrix of her other claims, and did not constitute claims of unlawful deductions in themselves.
8. During the hearing, the Claimant withdrew her claims for unlawful deductions of wages for December in respect of £301.00 and in respect of outstanding wages totalling £451.50. As these sums reflected the totality of the Claimant's claims in respect of wages, the wages claim was therefore dismissed upon withdrawal.

The Evidence

9. The Tribunal had been provided with a hearing bundle, but both parties provided additional documents which were received on the morning of the hearing. An updated hearing bundle was provided to the Tribunal accordingly, and was accepted.
10. After the first day of the hearing, further documents were provided to the Tribunal, being WhatsApp messages between the parties, and timesheets in respect of the Claimant for the period from 21 November 2020 onwards. There was no objection from either party, and these documents were accepted and added to the bundle.
11. I was also provided with witness statements of the Claimant, the Respondent, and of Danielle Hughes, witness for the Claimant. I heard evidence from all the witnesses. I also heard oral evidence only from Miss Briggs, the Respondent's carer, on the issue of who was present with the Respondent on Christmas Day.
12. Both parties provided written submissions which were sent some time following the end of the hearing.

## Background

13. The Claimant resigned from her employment at a time when Covid restrictions were in place. There was some dispute between the parties as to the Claimant's potential exposure to a covid contact, and the Respondent contends that the Claimant then resigned. The Claimant was in covid isolation at the time when she submitted her resignation. The Claimant contends that her resignation was a constructive dismissal due to the Respondent's behaviour in relation to her potential covid exposure, and due to the Respondent's non-payment, or intended non-payment, to her of sums due in respect of this isolation period.
14. The Claimant went to her father's house on Christmas Day. She contends that she dropped off presents, but did not enter the house. The Respondent contends that the Claimant spent Christmas Day at her father's house. The Respondent relies on that allegation as evidence of the Claimant's unreasonable conduct, in the event that the Respondent is found to have dismissed the Claimant. The Respondent also avers that, if the Claimant had been present at her father's house on Christmas day, then due to the presence of a covid-positive contact there, it would have been in accordance with the then government guidelines for the Claimant to self-isolate for 10 days thereafter.

## Findings of Fact

15. The essential facts, being those relevant only to the identified issues (as further clarified by the parties in paras 6-8), are as follows:

### **Unfair dismissal**

16. In May 2020, the Claimant broke her leg and was absent from work for approximately 5 weeks. She provided the Respondent with a sick note. The Respondent informed the Claimant that he would rely upon his accountant to process this so that the Claimant could be paid statutory sick pay (SSP). He gave the Claimant the choice to use holiday as an alternative to SSP. The Claimant initially asserted that she was told it would take three weeks to process SSP, so she was effectively forced to take holiday instead of SSP. The Respondent denied that timescale was mentioned, and said that the Claimant was simply offered a choice. In cross-examination, the Claimant stated that she could not afford to be without income, and so agreed to be paid holiday pay instead of SSP but maintained that this was due to the expected timescale for SSP payments. The Claimant's evidence as to the chronology of her conversations with the Respondent on this was inconsistent, but she accepted in evidence that she did not raise a formal grievance, or any informal correspondence or complaint at the time about preferring SSP to holiday pay. I preferred the evidence of the Respondent on this point, which was consistent as to the choice offered to the Claimant, and that he relied upon his accountant to process payments, so there was no reason for there to be a three-week wait, or for him to mention one. I find that the Claimant was not forced to take holiday pay instead of SSP in the Spring of 2020.

17. In the period leading to the Claimant's termination, the Claimant claimed to be in a covid "bubble" with her father, who had had a stroke. The Claimant's father lived with the Claimant's brother. Shortly before Christmas 2020, the girlfriend of the Claimant's brother tested positive for covid. The Claimant's brother then booked a covid test for himself.
18. On 24 December, the Respondent asked the Claimant to work. The Claimant contends in her claim form that she was asked to do so against government guidelines in place at the time, as she was self-isolating due to a covid-contact relative. However, in evidence, the Claimant insisted that she had not been in contact with her brother, and that she told this to the Respondent at the time. On that basis, it would not have been against government guidelines for the Respondent to ask the Claimant to work, and the Claimant accepted in evidence that there was no wrongdoing by the Respondent in asking her to work on this day.
19. The Claimant's brother received a positive covid test result on either Christmas Day or 26th December. The Claimant's evidence was inconsistent on this point.
20. The Claimant took a covid test on 26 December. She informed the Respondent that she had done so. The Respondent asked the Claimant to inform him of the results of her test.
21. The Claimant asked the Respondent to put her on furlough. In her evidence, the Claimant contended that she was also a vulnerable person, but nothing turned on this as it was not something raised with the Respondent at the time, and no evidence was adduced in this regard.
22. The Claimant accepted in her evidence that she made the decision that she would not return to work for the Respondent until she had received her covid test results, and had told him so on 26 December 2020.
23. The Respondent was extremely vulnerable, due to his disability, and needed to avoid exposure to covid. Rather than put the Claimant on furlough, the Claimant was instructed by the Respondent to stay away for 10 days, then take a covid test and stay away for a further 4 days thereafter.
24. The Claimant stated that being told not to return to work for this 14-day period was her 'final straw'. She contended that the Respondent was mixing with other households at Christmas, and she was therefore angry at his response to her.
25. The Claimant, in particular, alleged that Miss Briggs, her brother his two children and her mother all spent Christmas Day 2020 with the Respondent. The Respondent denied this, and Miss Briggs was called to give brief evidence on this point, and no objection to Miss Briggs giving evidence was made for the Claimant.
26. Miss Briggs is one of the Claimant's carers, and gave evidence that she was not with him on Christmas Day. She stated that her brother and his daughters were with her mother for Christmas, and Miss Briggs was with

her own family on Christmas Day, being her two sons, her husband, his son and partner (who lives with them). The two households communicated with each by Zoom only on Christmas Day. I preferred the evidence of Miss Briggs, as it was consistent with the evidence given by the Respondent that she and her family were not with him on Christmas Day. The Claimant's contrary evidence regarding the Respondent's Christmas arrangements was uncorroborated, and the Claimant accepted that she was not present herself, and therefore had no direct knowledge to support her contention as to the Respondent's arrangements for Christmas Day.

27. The Claimant's witness statement also included brief reference to inappropriate conduct towards her by the Respondent and it was suggested by her representative that this was part of the conduct which led to the Claimant's alleged constructive dismissal. However, in her evidence, the Claimant did not seek to rely or expand upon this limited evidence, nor to suggest that it had any bearing on her decision to resign.
28. The Claimant's covid test, or results, were misplaced, and she took a further test on 31 December. She eventually tested positive for covid from the test taken on 31 December.
29. Due to the Christmas period, the Respondent did not have access to advice in respect of the Claimant's potential exposure, and he stated to the Claimant in WhatsApp messages between them that he had checked the position online, and also called 111 for advice, who he said had told him that the Claimant should self-isolate.
30. On 27 December 2020, the Respondent stated that he could not put the Claimant on furlough, on the basis that the Claimant's job was still open and required. It was an ongoing source of contention between the parties that the Claimant felt she should have been furloughed, and was unhappy that the Respondent did not agree.
31. The Respondent chased the Claimant for any update on her test results, which the Claimant did not yet have. The Respondent informed the Claimant that he believed she would be entitled to SSP, but he would need to confirm the position with his accountant, once the accountant returned to work on 4 January 2021. The Respondent also said that he expected he would require sickness certificates from the Claimant.
32. Despite referring to the Respondent's request that she stay away for 14 days as a 'final straw', in evidence the Claimant accepted that the Respondent was protecting his health by asking her to isolate, and also stated in evidence that if she had received SSP then it "would have been ok". However, the Claimant's resignation took place before the Respondent was able to speak with his accountant to confirm SSP.
33. There was an exchange of messages between the Claimant and the Respondent. The Respondent referred to the Claimant being in her father's house at Christmas, which she did not deny in her messages. Even when expressly asked by the Respondent whether she had been in her father's house, she did not expressly deny it, but referred only to "not being near

him". In her oral evidence, the Claimant said that this meant that her father "did not come down". It was put to her that if she had not been in her father's house, she should have been keen to correct that point when asked by the Respondent. Whilst I cannot determine whether or not she was present in her father's house at Christmas, I find that, in light of her failure to respond to the Respondent's direct questions on this, and her failure to state that she was not there, it was reasonable for the Respondent to presume that she had been present at her father's house at Christmas, and therefore that she had been exposed to a covid-contact.

34. On 27 December 2020, the Claimant sent a message to the Respondent saying "I'm done...Find someone else to work. I'm leaving". This was followed by a series of messages between the parties, including the Respondent asking "why" and saying he thought "the Claimant [was] going down the wrong road". The Respondent went on to say that if the Claimant was leaving, then she needed to put it in writing to him. The Claimant repeated that she "[was] done".
35. On 28 December 2022, the Claimant emailed the Respondent and said that he "[has] my resignation from today".
36. The Respondent replied to her message the same evening and acknowledged her resignation.
37. The Respondent's email also referred to monies owed to him by the Claimant, and to the return of his keys. Both parties gave evidence that there was a subsequent dispute regarding these matters, which resulted in attendance of police, but as that post-dated the Claimant's resignation, these do not fall to be considered as part of the Claimant's claim of constructive dismissal. However, the messages between the parties also included swearing by the Claimant to the Respondent, which the Respondent relies upon, together with the dispute regarding return of property, as inappropriate conduct by the Claimant which may have justified the Claimant's dismissal had she not already resigned.
38. The Respondent then sent a further email referring to the Claimant's contractual notice period of four weeks, and that as that had not been given, the termination date would be 28 December 2020. The Claimant responded to the email but did not say that she intended to work her notice period, or offer to do so. She did not correct the Respondent's understanding that she had resigned without notice.
39. On 30 December 2020, the Respondent wrote further to the Claimant and suggested she may have resigned in the heat of the moment, and asked if she wished to reconsider. He also offered her use of the grievance procedure. The Claimant did not take up this option and responded that the Respondent should "go away".
40. The Claimant was paid salary in December 2020, which included payment for 103 worked hours and 37 hours of holiday pay. She then received a final payslip in January 2021. As there is no longer a claim for unpaid wages,



these payslips will be addressed below in the findings in respect of holiday pay.

### Holiday Pay

41. The Claimant had time off in May 2020 after she broke her leg. The Respondent paid her holiday pay instead of SSP during that absence. As set out in para 7, the Claimant is not pursuing a claim in respect of the SSP for that period. However, the fact that the Claimant was paid holiday pay during that absence had the effect of reducing the amount of holiday left for the Claimant during that holiday year.
42. Sometime after the Claimant broke her leg, the Respondent informed her that she was due four days holiday. The Claimant's holiday pay claim rests entirely on this information provided by the Respondent.
43. It is not in dispute between the parties that the Claimant's holiday year runs from 1 April – 31 March, and that 272 days of the leave year had passed when the Claimant's employment ended.
44. It is also not in dispute between the parties that the Claimant's contract contained an express right to make deductions from the Claimant's pay, and it is was accepted by the Claimant in her evidence that she had consented to such deductions being made.
45. The Respondent's position is that the holiday pay calculated by the Respondent presumed that the Claimant would complete the full holiday year, which commenced on 1 April. This did not occur, due to the Claimant's absence and then resignation. The Claimant's actual untaken holiday accrual was therefore less than the Respondent had originally anticipated.
46. As to how much leave the Claimant had accrued by the termination date, the Claimant was unable to specify as she relied upon the Respondent to make calculations. The Claimant was a zero hours worker, so her accrued holiday depended on days and hours worked. The Respondent would fill in timesheets on behalf of the Claimant, showing the hours and days worked by her. He, or his accountant/payroll team, would then calculate how much holiday was due to her.
47. The Respondent provided timesheets and calculations to show the following:
  - a. By the termination date, the Claimant had accrued 9 hours untaken holiday, not 37 hours, which was the amount she had been paid in in the December payroll.
  - b. The Claimant had worked for 131 hours, not 103 hours, which was the amount she had been paid in the December payroll.
  - c. 131 hours work, plus 9 hours holiday equals a total of 140 hours. 103 hours paid, plus 37 hours paid also equals a total of 140 hours.
  - d. The Claimant had therefore been paid the correct sums in the December payroll, but 28 hours (37-9) of the hours worked payments had been mis-categorised as holiday payments.

48. By letter of 5 January 2021, the Respondent's payroll team wrote to the Claimant, and provided an updated calculation in respect of her final pay. The letter explained that she had erroneously been overpaid for holiday pay, as she had been paid for 28 hours which had not been accrued, as she had accrued only 9 hours of holiday, rather than 37 hours. This payment had therefore been 're-categorised' in her January payslip, and set against the balance of the 28 hours of wages due to her.
49. The Claimant accepted in evidence that she had not been owed 37 hours of holiday pay for December. However, she struggled to follow the corrections and re-categorisations set out by the Respondent's payroll team, as referred to in para 48 above. It was clear to me that the Claimant was confused on this point, and took the re-categorisation to mean that a deduction had been made from her pay, whereas in fact the correct sums had been paid on time, but had been incorrectly labelled.
50. The Respondent's explanations and submissions on this point were clear, and were consistent with the timesheets and breakdowns provided. Given the lack of any specific evidence from the Claimant to the contrary, and as she accepted that she relied upon the Respondent's calculations of her hours, I accept the Respondent's position as to the Claimant's holiday pay, and that she has been paid for all accrued but untaken holiday as at the date of termination.

## **Analysis and Conclusions**

### **Unfair Dismissal**

#### The Law

51. Section 95 of the Employment Rights Act 1996 ("ERA") provides so far as relevant:

#### **Circumstances in which an employee is dismissed.**

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

52. Section 98 of the Employment Rights Act 1996 ("ERA") provides so far as relevant:

- “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

...

(b) relates to the conduct of the employee ...

...

(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

1. In **Orr v Milton Keynes Council** [2011] ICR 704 at [78] Aikens LJ summarised the correct approach to the application of section 98 in misconduct cases (a summary which incorporates the well-known test described in **British Homes Stores Ltd v Burchell** [1978] IRLR 379):

“(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.

(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the “real reason” for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.

(3) Once the employer has established before an employment tribunal that the “real reason” for dismissing the employee is one within what is now section 98(1)(b), ie that it was a “valid reason”, the tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).

(4) In applying that subsection, the employment tribunal must decide on the reasonableness of the employer's decision to dismiss for the ‘real reason’. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief.

If the answer to each of those questions is 'yes', the employment tribunal must then decide on the reasonableness of the response of the employer.

(5) In doing the exercise set out at (4), the employment tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.

(6) The employment tribunal must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.

(7) A particular application of (5) and (6) is that an employment tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.

(8) An employment tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice."

2. In **Turner v East Midlands Trains Ltd** [2013] ICR 525, Elias LJ at [16]-[17] added:

"The band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111."

### **Conclusions on unfair dismissal**

53. I now apply the relevant law as I have set it out to my findings of fact.

54. In respect of the issues as set out in para 5 (and utilising that numbering):

1.1.1.1 I have found in para 16 above that in May 2020 the Claimant was offered a choice by the Respondent of whether to be paid SSP or to take holiday, and she was therefore not forced to accept holiday pay, There was no failure by the Respondent to pay SSP to the Claimant, and she was not forced to take annual leave, whether without the required notice, or at all.

1.1.1.2 The Respondent did ask the Claimant to work on 24 December, but the request was not against government guidance as the Claimant had not at that time informed the Respondent that she had been in close contact to someone with Covid-19.

1.1.1.3 The Respondent did pay the Claimant SSP instead of furlough whilst she was self-isolating. The Claimant was not on furlough, and therefore not entitled to furlough payments. It was a decision for the Respondent as to whether or not the Claimant would be furloughed.

1.1.1.4 The Respondent did advise the Claimant that after isolating for 10 days, she would need to do another covid test and wait another 4 days before returning to work.

1.1.2 :

1.1.2.1 Based on her evidence, the acts relied upon by the Claimant are:

*a. the Respondent's request that she self-isolate for 10 days followed by a further 4 days;*

This was a reasonable request by the Respondent due to the Claimant's disclosure of her brother's covid-positive status, particularly taking account of the fact that her brother lived with her father, with whom she was in a bubble; the Respondent's reasonable belief that the Claimant had been in contact with her brother on Christmas Day (as I have found in para 33 above); the Respondent's particular physical vulnerability; the Claimant's acknowledgement in evidence of the reasonableness of the Respondent's position in this regard. As the Respondent's behaviour was reasonable, it was neither calculated nor likely to destroy or seriously damage trust and confidence between the parties.

*b. the offer of SSP instead of furlough;*

The Claimant took exception to the refusal of furlough, but also admitted that she would have accepted this if she had received SSP for her absence. The Respondent's refusal of furlough was based on the enquiries and/or research he had made, and the fact that there was an open position available for the Claimant. His refusal was not therefore calculated or likely to destroy or seriously damage trust and confidence between the parties. The Claimant's reaction to the Respondent's decision indicated damage to the trust and confidence and between the parties, but her reaction after the event cannot affect the finding of the likelihood at the time the decision was made and communicated. Further, the Claimant's admission that the furlough would be fine as long as she received SSP, supports a finding that it was the issue of payment, rather than the issue of furlough, which she found to be more serious.

*c. the statement that the Respondent would check the SSP position with his accountant in the New Year, and may require sick notes or certificates;*

Having said he would not furlough the Claimant, the Respondent offered SSP, subject to confirming the position with his accountant. The Respondent gave clear evidence that he relied upon advice to ensure that he dealt with his financial and employee matters properly, and it was reasonable that he would seek professional guidance. This

was neither calculated to nor likely to destroy or seriously damage the relationship between the parties.

*d. the Respondent's previous alleged requirement that the Claimant take holiday instead of SSP in May 2020.*

I have found, in para 16 above, that the Respondent did not require the Claimant to take holiday rather than SSP. Rather, the Respondent gave the Claimant a choice. The Claimant did not express any dissatisfaction with the payment of holiday pay to her in May 2020, and the effect was that she received a higher rate of pay than if she had been on SSP. The giving of an option by the Respondent was not conduct calculated or likely to destroy or seriously damage trust and confidence between the parties.

- 1.1.2.2 As I have found that the acts relied upon by the Claimant were not calculated or likely to destroy or seriously damage the trust and confidence between the parties, the question of whether the Respondent had reasonable and proper cause for those actions does not arise. However, I have noted in my findings above that the Respondent did have reasonable and proper cause for his actions.
- 1.1.3 I have found that the Respondent's actions were neither calculated nor likely to destroy or seriously damage trust and confidence. As there was no breach of trust and confidence, the issue of whether any breach was fundamental does not arise.
- 1.1.4 As there was no breach of trust and confidence, the Claimant's resignation cannot have been in response to such a breach. Accordingly, there was no breach of contract which was the reason for the Claimant's resignation.
- 1.1.5 As there was no breach of the Claimant's contract, the issue of the Claimant's affirmation of the contract does not arise.
- 1.2 As I have found that there was no breach of contract, and therefore no constructive dismissal, the issue of the principal reason for any dismissal, or whether it was fair, does not arise.

## Summary

55. For these reasons I find that the termination of the Claimant's employment was not a constructive dismissal within the meaning of S.95. The Claimant's employment terminated only by reason of her resignation. The Claimant terminated her employment with immediate effect, and did not work her notice, and therefore is not entitled to payment in lieu of notice. The Claimant's claim of constructive unfair dismissal, and her claim for notice pay, therefore fail.

## Remedy

56. The question of remedy in respect of unfair dismissal does not therefore arise.

## Holiday Pay

### The Law

57. Regulation 13 of the Working Time Regulations 1998 (“WTR”) provides, as far as is relevant:

- (1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.
  
- (3) A worker's leave year, for the purposes of this regulation, begins—
  - (a) on such date during the calendar year as may be provided for in a relevant agreement; or
  - (b) ...
  
- (5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (1) equal to the proportion of that leave year remaining on the date on which his employment begins.
  
- (9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—
  - (a) ... it may only be taken in the leave year in respect of which it is due, and
  - (b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

#### 13A.— Entitlement to additional annual leave

- (1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).
  
- (2) The period of additional leave to which a worker is entitled under paragraph (1) is—
  - (e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.
  
- (3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

58. Regulation 14 WTR— Compensation related to entitlement to leave, provides, so far as is relevant:

- (1) [Paragraphs (1) to (4) of this regulation apply where
  - (a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13]2[ and regulation 13A]3 differs from the proportion of the leave year which has expired.

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

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

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

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

$(A \times B) - C$

where—

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

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

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

### **Conclusions on holiday pay**

59. The calculation of the Claimant’s holiday accrual is not straightforward, as her hours of work varied, and her hourly rate of pay also varied. The Respondent provided detailed timesheets and calculations, and information from his payroll team with details of how this had been calculated for the purpose of processing the Claimant’s final pay. As the Claimant accepted that it was her practice to rely upon the Respondent’s calculations, I have used the figures provided by the Respondent.

60. The Respondent provided the following information:

Total leave paid at EDT: £1,968.88

Average weekly pay of £396.33 (calculated as £20,609.30 / 52)

1 April 2020 – 28 December 2020 = 272 days.

$272/365 = 0.745$  (the relevant multiplier)

$0.745 \times 5.6 \text{ weeks} = 4.17 \text{ weeks}$

$4.17 \text{ weeks} \times £396.33 = £1,652.70$

Total accrued leave at EDT: £1,652.70

At EDT- accrued leave overpaid. None outstanding.

The overpayment was then re-categorised as wages in January 2021, as set out in para 48 above



**Summary**

61. For the reasons given above, I have accepted the Respondent's evidence, and the documentation provided by his payroll team, as to the calculation of the Claimant's pay and holiday entitlements. The calculations show that the Claimant was paid the holiday to which she was due, and in fact was overpaid. The overpayment was later corrected and re-categorised in respect of wages, but no holiday pay was outstanding. The Claimant received all holiday pay to which she was entitled.

**Conclusion**

62. The Claimant's claims of constructive unfair dismissal, and for notice pay and holiday pay, fail and are dismissed.
63. The Claimant's claim for unpaid wages is dismissed upon withdrawal by the Claimant.

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**Employment Judge Hamour**  
Date **12 June 2023**