EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4120787/2018

Held in Glasgow on 4 and 5 March 2019 (Final Hearing) and 11 and 13 March 2019 (Written Representations)

Employment Judge: Ian McPherson

Miss Amy Rose Farrell	**Claimant** **In Person**
24.7 Property Letting Largs Ltd	**Respondents** **Represented by:** **Mr David Wright - Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that: -

(1) The claimant's complaints of unfair constructive dismissal, and unlawful deduction from wages, both succeed, but her claim for redundancy pay fails, and that part of her claim against the respondents is dismissed by the Tribunal.

(2) In respect of her unfair constructive dismissal by the respondents, contrary to **Sections 94 to 98 of the Employment Rights Act 1996**, the Tribunal finds that the effective date of termination of her employment was 10 October 2018, when she tendered her immediate resignation, without giving notice, by letter of that date delivered to the respondents' director, David Wright, and for that unfair constructive dismissal, the Tribunal awards her a monetary award of compensation for unfair dismissal in the sum of **TWO THOUSAND, ONE HUNDRED AND FIFTY TWO POUNDS, SEVENTY ONE PENCE (£2,152.71),** which sum the respondents are **ordered** to pay to her.

The **Employment Protection (Recoupment of Benefits) Regulations 1996** do not apply to this monetary award, as the claimant advised the Tribunal that she was not in receipt of any State benefits after her employment with the respondents ended.

(3) Further, in respect of wages unpaid and outstanding to the claimant as at the effective date of termination of her employment with the respondents, the Tribunal finds that the claimant suffered an unlawful deduction from wages, contrary to **Sections 13 to 23 of the Employment Rights Act 1996,** in the period from 1 August 2018 to 10 October 2018**,** and the respondents are **ordered** to pay to her the further sum of **TWO THOUSAND, ONE HUNDRED AND TWENTY THREE POUNDS, SIXTY THREE PENCE (£2,123.63),** together with an additional amount, awarded in terms of the Tribunal's powers under **Section 24(2) of the Employment Rights Act 1996**, of **TWENTY SIX POUNDS, SEVENTY NINE PENCE (£26.79)** in respect of financial loss attributable to that unlawful deduction from wages, namely bank charges incurred by the claimant.

(4) In respect of the respondents' failure to provide the claimant with an itemised pay statement for September and October 2018, contrary to **Section 8 of the Employment Rights Act 1996**, the Tribunal. in terms of the its powers under **Sections 11 and 12 of the Employment Rights Act 1996**, makes a declaration to that effect, but there is no further monetary award made, as the Tribunal has already ordered the respondents to pay to her the total amount of unlawful deductions from her wages.

(5) Finally, in terms of **Section 38 of the Employment Act 2002**, the Tribunal also awards the claimant a further sum of **SEVEN HUNDRED AND TWENTY POUNDS (£720.00)**, and the respondents are also **ordered** to pay to her that further sum, being two weeks' gross pay, in light of the fact that when these Tribunal proceedings began, the respondents were in breach of their statutory duty as an employer to provide to the claimant a written statement of employment particulars, in terms of **Section 1 of the Employment Rights Act 1996**.

REASONS

Introduction

1. This case called before me, as an Employment Judge sitting alone, on Monday, 4 March 2019, for a two-day Final Hearing for its full disposal, including remedy if appropriate, further to Notice of Final Hearing issued by the Tribunal to both parties under cover of a letter from the Tribunal dated 24 December 2018.

Claim and Response

2. Following ACAS early conciliation between 6 and 18 September 2018, on 27 September 2018, the claimant, acting on her own behalf, lodged her ET1 claim form against the respondents, 24.7 Property Letting Largs Limited, of 36 Boyd Street, Largs, indicating that she believed she was being dismissed, and complaining about unpaid wages.

3. In her ET1 claim form, where the claimant indicated that there was a continuing employment relationship, where she was employed as a letting agent by the respondents, she further indicated that, in the event her claim was successful, she was seeking an award of compensation from the respondents.

4. On 28 September 2018, her ET1 claim form was accepted by the Tribunal, and a copy served on the respondents, requiring them to lodge an ET3 response form by 26 October 2018 at latest. On 25 October 2018, Mr David Wright, a director of the respondents, lodged an ET3 response on their behalf. On 8 November 2018, that response was accepted by the Tribunal, and a copy sent to the claimant, and to ACAS.

Initial Consideration, and Correspondence with the Tribunal

5. On 13 November 2018, following initial consideration of the claim and response by Employment Judge Jane Garvie, she ordered that the claim proceed, and that the claimant should provide comments on statements made in the respondents' ET3 paper apart at paragraphs 3, 6 and 7 regarding

money owed to her, and the possibility of settlement, and that the claimant should provide these comments by 20 November 2018.

6. On 20 November 2018, the claimant replied to the Tribunal stating that she had received no salary from the respondents since July 2018, and also having had no payslip for September 2018, or any prospect of it, she had handed in her resignation on the basis that she had been constructively dismissed on 10 October 2018.

7. On referral to Employment Judge Jane Garvie, on 21 November 2018, a copy of the claimant's correspondence of 20 November 2018 was sent to Mr Wright, the respondents' representative, as the claimant had not given him **Rule 92** intimation when she had written to the Tribunal. Mr Wright was ordered to reply to the Tribunal office, and to the claimant, by 29 November 2018, with his comments on the claimant's correspondence.

8. On 26 November 2018, Mr Wright duly replied, by email, to the Tribunal, with copy sent at the same time to the claimant, but not addressing the points raised in her correspondence of 20 November 2018, but merely copying and pasting a further copy of the paper apart to the ET3 response, entitled "***Amy Rose Employment History".***

9. Mr Wright's correspondence of 26 November 2018, having been referred to me, by letter from the Tribunal, to both parties, on 30 November 2018, parties were advised that, given the disputed issues, I had directed that the case be listed for a two-day Final Hearing, and Case Management Orders were issued for compliance by both parties.

10. Further, date listing stencils were issued to allow the Final Hearing to be fixed in February/March/April 2019. In returning her date listing stencil, the claimant stated that there would be one witness on her behalf, being Brian Farrell, whereas Mr Wright, on behalf of the respondents, stated that he expected to call three witnesses on their behalf, whom he identified as Edith Clarke (previous Office Manager), Tomasz Dziedzic (previous Director); and Melanie O'Boyle (previous Manager).

Quantification of the Claim against the Respondents

11. In terms of standard Case Management Orders, dated 13 November 2018, issued by Employment Judge Shona MacLean, the claimant was required to send to the respondents, copied to the Tribunal, within the following 21 days, a written statement, with supporting documentation, setting out what she sought by way of remedy, if her claim succeeded and, where she sought the remedy of compensation, she was ordered to set out how much was sought in respect of each complaint, with a detailed explanation of how each sum was calculated.

12. In reply to that standard Case Management Order, the claimant emailed Mr Wright, for the respondents, and the Tribunal office, on 19 December 2018 stating that, if her claim succeeded, she sought the following:

    (i) The sum of £1,425.31, being her net salary for the month of August 2018, as shown on her payslip from that time;

    (ii) A copy of her September 2018 payslip, plus all salary and Statutory Sick Pay due for the month of September 2018;

    (iii) A calculation of any and all monies due in respect of outstanding salary / SSP post September 2018, outstanding holiday entitlement, payment in lieu of notice and statutory redundancy and, subsequently, payment of the overall calculated amount; and

    (iv) A copy of her P45 certificate which she stated she had still to receive from the respondents.

13. Further, and by way of explanation of the total amount of compensation sought by her from the respondents, with a grand total of **£4,031.31**, the claimant stated as follows:

    (i) £1,425.31 (as per payslip) for August 2018;

    (ii) £72.00 (holiday pay @ 8 hrs x £9.00 per hour for September 2018);

(iii) £288.00 (wages @ 4 days @ 8 hrs @ £9.00 per hour) for September 2018;

(iv) £267.60 (SSP for 3 weeks 10/9 to 28/9, 3 x £89.20) for September 2018;

(v) £178.40 (SSP for 2 weeks 1/10 to 12/10, 2 x £89.20) for October 2018;

(vi) £720.00 (lieu of notice, 2 weeks basic salary as per Contract of Employment dated 20/09/2015);

(vii) £1,080.00 (Statutory Redundancy Payment, 1 week per year for each year, total 3 years);

(viii) Outstanding holiday entitlement at time of leaving – unknown.

14. On 27 February 2019, Mr Wright emailed the Glasgow Tribunal office, with copy to the claimant, stating that he had "***summoned***" Melanie O'Boyle and Tomasz Dziedzic, through Sheriff Officers, and he was also asking Edith Clarke, to attend.

15. He further asked the Tribunal to note that he would be in attendance at the Final Hearing, on 4 and 5 March 2019, "***however the Company is in the process of being closed and has not traded for 5 months. There are significant debts totalling over £45,000. Relevant parties have been informed and a liquidator will be appointed. Any claim should be made with the liquidator."***

16. Prior to the start of the Final Hearing on Monday, 4 March 2019, the Tribunal made an online search on the Companies House website, against the respondent company (company number **SC401525**) showing the company's status as "***Active***", and with no information as regards any insolvency proceedings relating to the company.

17. Mr David Wright was shown as a director of the company, and the person with significant control, while Tomasz Dziedzic and Melanie O'Boyle were shown

as former directors, having resigned on 24 July 2018, the date Mr Wright was appointed as director of the respondents.

Final Hearing before this Tribunal

18. When the case called before me, on Monday, 4 March 2019, the claimant was in attendance, unrepresented, but accompanied by her parents, for moral support, but not as witnesses.

19. Mr Wright attended on behalf of the respondents. He described himself as an ex-director of the respondents, notwithstanding the public record, from the online Companies House search, showed otherwise. He stated that, in addition to evidence from himself, he would be leading evidence from Edith Clarke, whom he described as being Area Manager.

20. While Mr Wright had had both Melanie Boyle, and Tomasz Dziedzic, cited to attend as a witness for the respondent company, and he produced to me signed certificates of citation of witnesses, dated 28 February, and 1 March, 2019, by Adam Armstrong, Sheriff Officer with Scott & Co, Glasgow, neither Melanie O'Boyle, nor Tomasz Dziedzic, were in attendance as witnesses, or at all.

21. Indeed, I pause to note and record that, in the forms of certificate of citation of witnesses, provided to me by Mr Wright, from the Sheriff Officer, reference is made to those potential witnesses for the respondents being called as "***witness for the pursuer in the action at the instance of 247 Property Letting Largs Limited v Ms A.R. Farrell".*** That, of course, is incorrect, because as I understood it from Mr Wright, he had had them cited as witnesses for the respondents in these Tribunal proceedings, brought against the respondents by the claimant.

22. While Mr Wright had instructed Sheriff Officers, and they had served certificates of citation, I also pause to note and record, as I advised him at the Final Hearing, that Sheriff Officers have no powers to lawfully cite witnesses in Tribunal proceedings, and that the power of citation of witnesses in Employment Tribunal proceedings rests upon a judicial decision made by an

Employment Judge. Under **Rule 32,** any person in Great Britain may be ordered to attend a Hearing to give evidence, produce documents or produce information.

23. Accordingly, the purported citation issued by the Sheriff Officer was not an Order of the Employment Tribunal and, indeed, there had been no application by either party in these Tribunal proceedings for a Witness Order to be issued against anybody, including Melanie O'Boyle, and / or Tomasz Dziedzic.

24. As emerged at the Final Hearing, Ms O'Boyle had emailed the Glasgow Tribunal office, at 23.50 hours, on Sunday, 3 March 2019, stating that she had been "***called as a witness by 24.7 Property Lettings Largs Limited, however, I am unable to attend due to a family emergency. I have arranged for 3 copies of the attached statement and supplementary appendices to be hand delivered to the Tribunal tomorrow morning prior to the 10:00am start. My apologies again for being unable to attend."***

25. Ms O'Boyle's email, and attachments, included three separate appendices. Notwithstanding the "***family emergency***", referred to by Ms O'Boyle, in her email to the Tribunal, in addition to the three appendices, she had also prepared, and submitted, a two-page, typewritten letter, dated 3 March 2019. She had stated there that ownership of 24.7 Property Letting Largs Ltd changed on 26 July 2018 with David Wright becoming sole director and shareholder of the business, and that her last day with the company was 14 August 2018, when her letter stated there was £7,171.49 in the company bank accounts, and sufficient funds to cover staff wages and upcoming expenditure at that point.

26. In accordance with the guidance given to both parties, in the Notice of Final Hearing, issued by the Tribunal, on 24 December 2018, both parties were advised that as the claim was to be heard by an Employment Judge sitting alone, and, as is standard practice, they should bring three copies, together with the originals (i.e. 4 sets of documents in total) of any document which they considered relevant to their case and which they wished the Employment Judge to take into account.

27. The claimant attended, and produced a bound, and inventoried, Bundle of Documents, extending to 45 pages.

28. While the standard Case Management Orders, issued by Employment Judge MacLean, on 30 November 2018, had provided that each party should prepare a set of documents, in chronological order and with numbered pages, incorporating all documentary productions intended to be referred to at the Final Hearing, and shall provide the Tribunal with the required number of copies as indicated in the Notice of Hearing, no Bundle was submitted by Mr Wright, on behalf of the respondents, and parties had not cooperated to prepare a Joint Bundle of Documents containing both parties' documents with a single index.

29. Following discussion with Mr Wright, and ascertaining that he had some documents which he wished the Tribunal to take into account, and after an adjournment to collate papers, and for the clerk to the Tribunal to make sufficient sets for the claimant, Mr Wright, myself, and the witness table, a small Bundle of Documents for the respondents was added to those used at this Final Hearing.

30. I note and record here that the respondents' small Bundle included the claimant's resignation letter of 10 October 2018, as produced by Mr Wright. The claimant explained to me that she had not produced a copy, as she had handed the original into the respondents' office on 10 October 2018 for Mr Wright, which is why a copy was not included in the claimant's own Bundle for the Tribunal.

31. Further, the claimant having already intimated her Schedule of Loss, as per her email of 19 December 2018, as already detailed earlier in these Reasons, at paragraphs 12 and 13 above, but as she not produced any mitigation evidence, as required by the standard Case Management Orders issued by Employment Judge MacLean, a supplementary Bundle was lodged by the claimant, on Tuesday, 5 March 2018, duly indexed, and running from pages A1 to A28.

32. Given both the claimant, and Mr Wright, were not legally represented, and they were, in effect, each representing themselves, it was agreed that, when it came to taking their evidence, they would each be asked a series of structured and focused questions by myself as the presiding Employment Judge, and then open to cross examination by the other party, but, when Mr Wright then came to examining his own witness, Edith Clarke, he would ask her questions by way of evidence in chief, she would be open to cross examination by the claimant, in the usual way, and any questions of clarification from myself as the Judge.

Clarification of Issues before the Tribunal

33. Further, arising from discussion with both the claimant, and Mr Wright, as regards the sums sought by the claimant from the respondents, as per her Schedule of Loss, the claimant stated that she had not been getting wages from the respondents from 27 July 2018, and she had resigned on 10 October 2018, which she regarded as being the effective date of termination of her employment.

34. Mr Wright, on behalf of the respondents, stated that, as per his email of 19 December 2018, commenting on the claimant's Schedule of Loss, his position was that the claimant was not made redundant, but that she left and that is why she was not given notice by the company, and while he accepted that she was due her unpaid wages from August 2018, in the net sum of **£1,425.31**, as per her payslip for that month, he was unsure about the other amounts claimed by her, and so he disputed them for that reason.

35. Further, Mr Wright stated that her claim for redundancy was disputed, and he did not accept that 10 October 2018 was the effective date of termination of the claimant's employment with the respondents. While he could not dispute the claimant's assertion that she had received no P45 from the respondents, Mr Wright stated that he had instructed the company accountant to send the claimant her P45, and he thought he did so before 10 October 2018, although he also stated that he did not recall giving the accountant any leaving date for the claimant.

36. Indeed, somewhat curiously, Mr Wright then stated that the accountant may well not have issued the claimant with any P45, as instructed, as the accountant, whom he identified as William Duncan, was not being paid by the respondents for his professional accountancy services at that time.

37. Arising from further discussion with both parties, I sought to clarify the issues before the Tribunal, as they were emerging from the clarifications provided by both the claimant, and Mr Wright. Mr Wright stated that he saw 14 August 2018, which is the date he says the claimant said she was not coming back, as being the effective date of termination of her employment, rather than her resignation on 10 October 2018.

38. Mr Wright further advised that there had been no actual dismissal of the claimant by the respondents, and no letter sent to her in reply to her resignation letter of 10 October 2018, nor was any P45 issued to her. Further, added Mr Wright, he would argue that the claimant had wanted to leave, and she had left the respondents' employment due to what he referred to as "***significant financial irregularities in the company at over £45,000***", and he alleged that the claimant was party to those financial irregularities, and he would try and prove that at this Hearing.

39. As a shareholder, and director of the respondent company, Mr Wright further stated that after Melanie O'Boyle went on maternity leave, and Mr Dziedzic returned to Poland, he believed that the claimant had been, in effect, running the business, and he had become concerned about the bank accounts being frozen by Melanie O'Boyle, and "***asset stripping from the company***", and while he was not suggesting that the claimant was directly implicated, he believed that she was aware of what was going on, and that "***the rats were deserting a sinking ship".***

40. When I enquired directly of Mr Wright, whether he was making an allegation of criminality on the part of the claimant, he stated that he was seeking to find out who was responsible for the financial "***misdemeanours***", as he then referred to them, stating that they "***blackened the name of the company***", and that he was trying to be responsible, and clearing up the company's

affairs, as he had become the person with significant control in order to get access to the company's bank accounts. Mr Wright further advised that he had not reported any alleged criminality to Police Scotland, for criminal investigation, and that he was here, at this Final Hearing, trying to resolve the claim brought against the company by the claimant.

Evidence led at the Final Hearing

41. On account of the clarification of issues, in the morning session, on Monday, 4 March 2019, as also the need for further adjournments, for parties to read Melanie O'Boyle's email, and letter with enclosures, and discuss matters between themselves, evidence did not start until 2.05pm that first day afternoon, when I heard the claimant's sworn evidence in chief, elicited by me, as agreed with her and Mr Wright, by a series of structured and focused questions direct to the claimant.

42. The claimant's evidence in chief, which lasted about an hour and a half, was followed by cross examination by Mr Wright, commencing at 3.34pm that same afternoon, concluding at 4.00pm, when proceedings were adjourned to start the following morning, Tuesday 5 March 2019, at 10.00am, when further evidence in chief would be taken from the claimant, in respect of the mitigation evidence, which she stated she would gather, and provide for the following morning's sitting, following which Mr Wright proposed to lead evidence first from Edith Clarke, and then from himself.

43. On Tuesday, 5 March 2019, further evidence in chief was taken from the claimant starting at 10.13am, when she spoke to the further productions, produced in her supplementary Bundle A1 to A28, with her further cross examination, by Mr Wright, between 10.38am and 11.02am, when Mr Wright then led evidence from Ms Edith Clarke, Area Manager.

44. Ms Clarke's evidence in chief, which Mr Wright elicited, by a series of questions to her, was followed by cross examination by the claimant herself, from 11.36am until 11.42am, when I then took evidence in chief from Mr Wright, as agreed with both parties, by way of a series of structured and focused questions to him. His evidence in chief lasted over an hour, and it

was followed by cross examination by the claimant, commencing at 12:41pm until 12:59pm, when I asked him some questions by way of clarification, his evidence concluding at 1.13pm, when the Tribunal adjourned for lunch, with a view to resuming at 2.15pm, for closing submissions from both parties.

Findings in Fact

45. I have not sought to set out every detail of the evidence which I heard, nor to resolve every difference between the parties, but only those which appear to me to be material. My material findings, relevant to the issues before me for judicial determination, based on the balance of probability, are set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

46. On the basis of the sworn evidence heard from the three witnesses led before me over the course of this two-day Final Hearing, and the various documents included in the various Bundles provided to me, I have found the following essential facts established: -

(i) The claimant was formerly employed by the respondents as a letting agent at their then premises at 36 Boyd Street, Largs.

(ii) Her employment by the respondents commenced on 1 October 2015, as per a contract of employment issued to her by the respondents, and signed by her, and Melanie O'Boyle, managing director of the respondents, on 29 September 2015, as per the copy contract of employment produced to the Tribunal, at pages 1 to 3 of the claimant's Bundle.

(iii) In terms of that contract of employment, it was provided that the claimant would be paid on the last Friday of every month, by internet transfer into her nominated bank or building society account, and she was contracted to work a minimum of 30 hours per week, with her daily hours of work being Monday to Friday from 9am to 5pm, and Saturdays 10am to 2pm.

(iv) If, for whatever reason, the claimant was going to be absent from work, her contract of employment provided that a telephone call must be made to her line manager at least an hour before she was due to commence her daily duties, and the same rules applied for timekeeping, and if she felt she was going to be late, she must notify her line manager of this lateness.

(v) Further, by way of holiday entitlement, the contract of employment provided that the annual (full time) leave entitlement is 28 days per year and the holiday year extends from 1 January to 31 December. 8 days of the claimant's entitlement were stated to be public holidays. As regards period of notice required to terminate her employment, it was provided that notice from the employer to the employee (which must be received in writing) was two weeks, and notice from the employee to the employer (which must similarly be received in writing) was also two weeks.

(vi) Finally, details of the discipline/grievance procedures were not provided, as it was stated that they were "***currently under review***", but that a copy of those processes would be cascaded to all employees on completion. Thereafter, the claimant never received from the respondents any formal written statement of employment terms and particulars, nor any discipline/grievance procedure applicable to her employment with the respondents.

(vii) In her ET1 claim form, at section 5.1, the claimant had stated that her employment with the respondents started on "***01/06/1915***" but, in her evidence at this Final Hearing, she clarified that that should have read 1 June 2015. Notwithstanding the signed contract of employment, referring to the start date of her employment as 1 October 2015, the claimant stated that she had in fact started earlier, namely on 1 June 2015.

(viii) Further, at section 6 of her ET1 claim form, the claimant had stated that, on average, she worked 41 hours per week, for the respondents,

for which she was paid, monthly, at the rate of £1629 gross pay before tax, producing £1355 net normal take home pay. She also stated that she was in her employer's pension scheme, but no further detail was there provided.

(ix) There was produced to the Tribunal, at page 4 of the claimant's Bundle, her August 2018 payslip, and at page 32, copy of a letter to the claimant, dated 15 January 2019, from NEST (National Employment Savings Trust) advising that NEST had reported the respondents to the Pensions Regulator because, after several reminders to them, they either had not paid contributions to NEST on time, or they failed to notify NEST that contributions were not due to be paid, and thus they had breached their legal duty as an employer.

(x) In the claimant's August 2018 payslip, as produced to this Tribunal, her gross wages, holiday pay, and mileage, less deductions for PAYE tax and national insurance, employer and employee pensions, and student loans, produced a net sum payable to the claimant of £1425.31.

(xi) The net sum payable shown in that payslip, dated 31 August 2018, was not paid into the claimant's bank account, as per her contractual entitlement to wages for work performed for the respondents and, as at the date of this Final Hearing, that sum remained unpaid to the claimant by the respondents.

(xii) In the claimant's supplementary Bundle of Documents at pages A1-A2, A3 and A5 to A7, she produced payslips from the respondents, starting 30 June 2015, at an hourly rate of £7.50 gross, increasing, from March-April 2016, to £8.50 gross per hour and, as from April 2018, at the rate of £9.00 gross per hour.

(xiii) On the balance of probability, and on the evidence available to the Tribunal, the Tribunal finds that the start date of the claimant's continuous employment with the respondents was 1 June 2015, as stated by her in her ET1 claim form.

(xiv) Further, at page A4 of her supplementary Bundle, the claimant produced a computer printout, from Gov.UK, calculating her statutory holiday entitlement for the leave year starting 1 January 2018, and her employment end date of 10 October 2018, calculated on the basis of five-days work per week, giving her a statutory holiday entitlement of 21.8 days holiday.

(xv) In the copy payslips from the respondents produced by the claimant from January-August 2018, at pages A5 to A7 of her supplementary Bundle, holiday pay was shown on each monthly payslip, totalling, across those eight monthly payslips, total holiday pay for 200 hours.

(xvi) In the narrative of her claim, included as a paper apart to her ET1 claim form, presented to the Tribunal on 27 September 2018, the claimant stated as follows: -

"David Wright recently took over as the director of 24.7 Property Letting Largs Ltd. Due to the change I was concerned I wouldn't be paid (likewise has happened to previous ex employees at other branches) so I asked David to confirm I would be getting paid the last Friday of the month. I have an email from him on 9th August instructing the woman who deals with the finances to pay me on the last Friday of the month.

I worked the full month of August including annual leave from 20th Aug – 3rd Sept and was due to get paid on 31/08/18. When I didn't get paid that Friday I emailed David asking where my wages were the next day. He replied the following day and said he did not have access to the business bank account. I emailed back the following day stating I needed my salary paid and expected my wage slip.

I returned to work on Tuesday 4th September and my wage slip was waiting for me stating I was due £1425.31. That morning David called me in the office and explained there was no money to pay my wages from the company. At this news I left the office

very distress and went straight to the doctors where I explained the situation and informed them I had been feeling stressed for sometime by the changes in the company which has led to be developing alophica areata on my scalp. The doctors at this stage signed me off work for 2 weeks with work related stress.

On 5th September once David received my sick line he emailed me saying he was not in a position to pay anything as he did not have access to the banking. However in another email that day he stated that he had paid £1800 towards Largs deposits.

I then applied to ACAS on 6th September to start early conciliation and there were a few calls between the Acas officer but David ended up advising her the business was closing on 18th September therefore she said we could go no further with conciliation and issued me with my early conciliation certificate. He had offered previously to this that he would pay my wages for August that I am due in return for my employment coming to an end.

After having attended the doctors on Monday 17th September they issues me with another 2 week sick line which I emailed to David that day. He responded with an email stating he was closing the business.

After seeking advice I contacted the accountant and asked for my P45. David then emailed me stating that he still didn't have access to the bank so a final decision on the company could not be made but it was likely that it would be closing and that he had handed notice in with the landlord of the shop. He would also not answer my email when I inquired to why contractors were getting paid from the Glasgow branch. Also prior to my holiday David instructed me to call round the tenants and get them to pay their rents into the Kilmarnock bank account. That was over a

month ago so all the commissions should be there that are used to pay my wages usually.

I believe I am being dismissed as I was employed by the previous directors who I have reason to believe David got removed illegally and is currently having a dispute with them. Therefore I don't believe David doesn't trust me even although I have continued to do my job as I always have and helped him with the change over of management. I have done so until it has pushed me to a point that my health is suffering as a result of this financial and mental pressure. Previously I have never had issues like this within my job and my wages have always been paid in full on time. I believe he has moved all the properties to the Kilmarnock branch to make it look like Largs isn't doing well hence why he will need to shut it down, which leaves me out of a job."

(xvii) In giving her evidence in chief to the Tribunal, and in cross examination, the claimant spoke to the terms of this narrative of her claim, and she did so, where appropriate, under cross reference to the relevant documents in the Bundle.

(xviii) The respondents are a property letting company, established as a private limited company, incorporated on 10 June 2011, and with a registered office address at 4d Auchingramont Road, Hamilton, ML3 6JT. As at the date of the Final Hearing, as per the online search from Companies House, the company was showing as "***Active***", and no insolvency proceedings.

(xix) Further, and as vouched by the documents produced by the claimant, at pages 33 to 45 of her Bundle, David Wright, a director of the company, is the individual person with significant control of the company and, as of 12 December 2018, the respondents moved office from 36 Boyd Street, Largs to 99a Main Street, Largs where, as at the date of this Final Hearing, they continued to operate and trade from that new business address.

(xx) The sums sought by the claimant, by way of compensation from the respondents, were set forth by the claimant in her email of 19 December 2018 to the Glasgow Employment Tribunal, copied to Mr Wright, and a copy of which was produced by the claimant at pages 30 and 31 of her Bundle. Those sums, and the claimant's method of calculation, are set forth earlier in the Reasons to this Judgment, at paragraphs 12 and 13 above.

(xxi) Further, in that Schedule of Loss for the claimant, she stated that she had received no State benefits of any kind since, she believed, her sickness statements provided to the respondents were not responded to by them, neither did the respondents provide her with an SSP1 form to allow her to claim for herself.

(xxii) Further, and as explained by the claimant, in her email of 19 December 2018, she applied for a temporary position in October 2018, where she was successful, and she commenced work on 18 October 2018 and, as at the date of that email, she was still employed in that position, which, according to production A24 was a temporary post assigned to Cigna at 35 hours per week @ £9.34 per hour, being **£326.90** per week gross.

(xxiii) At this Final Hearing, the claimant produced, in her supplementary Bundle at pages A15 to A25, relevant documents, which comprised jobs applications made in October 2018, a bank statement, showing temporary work payment in November 2018, interview confirmation and contract assignment with Cigna, and sample payslips, from the recruitment agency, HRL2 Limited (Change Recruitment), dated 2 and 9 November 2018, and 22 February 2019.

(xxiv) Further, and again as per her Schedule of Loss, intimated on 19 December 2018, the claimant advised the Tribunal that to enable her to meet her commitments during the time she was unpaid by the respondents, she was forced to increase her overdraft limit at her bank, and she also had to borrow a substantial amount from her

parents to see her through until she regained employment, and this paid off her overdraft and she has yet to pay back to her parents.

(xxv) In the claimant's supplementary Bundle, at pages A8 to A14, she produced evidence of overdraft approvals in September/October 2018, overdraft charges in September/November 2018, and bank statements showing payments by her parents in October 2018, in the amount of £2,500. The overdraft charges, levied to her bank account, in September / November 2018, totalled **£26.79**, as per copy statements produced at pages A10 to A12.

(xxvi) The payments received by the claimant, by way of wages in November 2018, from HRL2 Limited, were supplemented by copies of the claimant's last twelve weeks payslips from HRL2 Limited, as provided by her to the Glasgow Employment Tribunal, with copy to Mr Wright, by emails of 11 and 13 March 2019 vouching, in total, gross pay received by the claimant over that period in the sum of **£6,835.70** to 15 March 2019.

(xxvii) The net pay received, in that new employment, varied from week to week, on account of the number of hours worked each week by the claimant. As the payslips provided to the Tribunal, after the close of the Final Hearing, did not include week 48/2018, it was not possible for the Tribunal to see what the claimant's total net earnings from that new employment were to date of this Final Hearing.

(xxviii) Included as part of the claimant's Bundle, lodged at this Final Hearing, there were three copy statements of fitness for work (form Med3) dated 4 and 17 September 2018, and 1 October 2018, as per the copy documentation produced at pages 6 to 8 of the claimant's Bundle.

(xxix) On 4 September 2018, the claimant's GP, at the Largs Medical Group, having assessed the claimant, advised that she was not fit for work because of "***work related stress***", and that that would be the case from 4 to 18 September 2018.

(xxx) Thereafter, on 17 September 2018, the claimant's GP issued a further, and extended statement of unfitness for work, for the same reason, for the period to 1 October 2018.

(xxxi) Finally, on 1 October 2018, the claimant's GP issued a further certificate stating that the claimant was not fit for work, again on account of "***work related stress***" for the period from 1 to 15 October 2018.

(xxxii) The claimant handed in each of these three Med3 certificates to the respondents' office, and they are referred to in the email exchange between the claimant, and David Wright, as produced to the Tribunal at pages 14 to 25 of her Bundle.

(xxxiii) The respondents made no payments to the claimant by way of statutory sick pay for any of the dates covered in the period from 4 September to 10 October 2018, when she resigned, and during which period the claimant was off work sick with work related stress as certified by her GP.

(xxxiv) In her evidence to this Tribunal, the claimant accepted that her claim, on 19 December 2018, for SSP for 2 weeks to 12 October 2018 was stated in error, and it should only be for the period to 10 October 2018, i.e. **£142.72**, and not £178.40 as stated at her item (v).

(xxxv) As the claimant had not received any statutory written particulars of employment from the respondents, she was not clear what her contractual entitlement (if any) was to sick pay. At this Final Hearing, she stated that she assumed she was only entitled to statutory sick pay, and so she limited her claim to statutory sick pay, and not the full daily wage rate payable under her contract of employment with the respondents.

(xxxvi) On 19 December 2018, after the claimant had intimated her Schedule of Loss to the Tribunal, with copy sent to Mr Wright, Mr Wright emailed

her, copy produced to the Tribunal at page 31 of her Bundle, stating as follows: -

"I can pay the month's salary from my own money as a gesture of goodwill. I may have to close 247 Largs. If I do and I go to court I will have no obligation to pay you. You are due a month's pay. That is what you worked. You said you were leaving. I think this is fair so the sickness thing is neither here nor there. The company was ran into the ground. Not your fault but not mine either. You could not disagree with that. I would like to draw a line under this and move on."

(xxxvii) Notwithstanding Mr Wright's acknowledgement of the sum owed to the claimant, for her August 2018 wages, in the amount of **£1,425.31**, as shown in the copy payslip, produced at page 4 of the claimant's Bundle, that sum was not paid to the claimant at any point, and it still remained outstanding to her as at the date of this Final Hearing.

(xxxviii) On 10 October 2018, the claimant submitted a typed resignation letter to David Wright, a copy of which was produced in the respondents' Bundle at this Final Hearing, reading as follows: -

"***Dear Mr Wright,***

I would like to inform you that I am resigning from my role of Letting Agent with immediate effect. I consider my resignation as constructive dismissal given that I have received no payment from the company for either salary or statutory sick pay for the last 2 months.

I expect my P45 to be sent to me by the end of this week along with my payslips for September and October.

I also anticipate you will now make arrangements to pay my arrears of salary for August and my September and October statutory sick pay as quickly as possible.

Regards,

Amy Rose Farrell"

(xxxix) In the documents lodged by the respondents' representative, Mr Wright, for use at this Final Hearing, he produced various letters from the Bank of Scotland to the Secretary, 24.7 Property Letting Largs Limited, dated September and October 2018, referring to the respondents' business banking account, and it being overdrawn, in varying amounts, between £6,039.33 overdrawn, and £8,040.30 overdrawn.

(xl) The Tribunal was satisfied that, by reason of securing new employment, with effect from 18 October 2018, the claimant has taken reasonable steps to mitigate her losses.

(xli) In an email to the Tribunal, on 27 February 2019, the respondents' Mr Wright stated that:" ... ***however the Company is in the process of being closed and has not traded for 5 months. There are significant debts totalling over £45,000. Relevant parties have been informed and a liquidator will be appointed. Any claim should be made with the liquidator."***

(xlii) As at the date of this Final Hearing, no liquidator had been appointed to the respondent company, and the Companies House online website search conducted by the Tribunal showed it as "***Active***" with no insolvency proceedings noted.

(xliii) While Mr Wright's email referred to the company not having traded for 5 months, on the evidence before this Tribunal, the Largs office continued to trade, after the claimant's employment ended, and indeed it relocated office, but still within Largs, and it operated as a separate business from the associated company of 24.7 Property Letting Kilmarnock Ltd.

(xliv) On the evidence before the Tribunal, the Tribunal finds that the claimant's constructive dismissal, on 10 October 2018, was unfair, and

that her dismissal was not to any extent caused or contributed to by any action of the claimant, whereby the Tribunal considers it just and equitable that it should reduce, on account of any contributory conduct by the claimant, the amount of the basic or compensatory award otherwise payable to the claimant.

Tribunal's Assessment of the Evidence

47. In considering the evidence led before the Tribunal, I have had to carefully assess the whole evidence heard from the various witnesses led before me and to consider the many documents produced to the Tribunal, in the separate Bundles of Documents lodged and used at this Final Hearing, which evidence and my assessment I now set out in the following sub-paragraphs:

(i) Miss Amy Rose Farrell: Claimant

(a) The first witness heard by the Tribunal was the claimant herself who, as agreed with both parties, gave her evidence in chief through a series of structured and focused questions asked by me as the presiding Employment Judge. Her evidence, on the afternoon of the first day, Monday, 4 March 2019, was continued to the morning of the second day.

(b) The claimant, aged 26 at the date of this Final Hearing, was previously employed by the respondents at their Largs office. She gave her evidence clearly, and confidently, referring, when appropriate, to various documents in her Bundles, or the respondents' Bundle.

(c) When she came to be cross examined, by Mr Wright, acting as the respondent's representative, the claimant's answers to his questions did not undermine her evidence in chief, where her position remained consistent, under cross-examination, with the narrative of her claim as set forth in her ET1 claim form, and her own evidence in chief at this Hearing.

(d) Overall, the claimant came across to the Tribunal as a credible and reliable witness and, where there was a dispute as between her evidence, and that of either Ms Clarke, or Mr Wright, I preferred the claimant's evidence, which had the ring of truth to it, and it was always consistent with the contemporary documents lodged by her and spoken to by her in her evidence at this Hearing.

(e) She came across as an honest, and accurate historian of the various events which had taken place in the period from summer 2018 to date of this Final Hearing, and I found her evidence both compelling, and convincing.

(ii) <u>Ms Edith Clarke: Respondents' Area Manager</u>

(a) The respondents' first witness was Ms Clark, their Area Manager, who stated that she is employed by 24.7 Property Letting Kilmarnock Limited. Aged 41, she advised that she works between the Largs and Kilmarnock "***branches***", and that she has been employed by the Kilmarnock company since April 2018.

(b) Ms Clarke spoke to having attended at the Largs office, after Melanie O'Boyle had resigned in August 2018, and before the claimant went off on her annual leave in August 2018. Her evidence, which was elicited by questions asked by Mr Wright, was often subject to him asking her leading questions, rather than open questions, despite guidance given by me as the presiding Judge. As such, I felt that her evidence which, at best, was often vague and confused was not necessarily credible or reliable.

(c) I was conscious that Ms Clarke was giving evidence in front of, and indeed being asked questions directly by, her line manager, Mr Wright, as a director of the Kilmarnock company, and I took that into account, in assessing her evidence but, overall, I did

not find her to be a convincing, or confident witness. Where her evidence was at odds with that of the claimant, I preferred the claimant's recall of events.

(d) Ms Clarke spoke of the Largs office being "***intended as a satellite***" of the Kilmarnock company, and she stated that she understood, going forward, the two businesses would be operated as one company from Kilmarnock.

(e) On the evidence led at this Final Hearing, whatever the future may hold, it was clear to me that after the claimant's employment ended in October 2018, the respondents relocated office, in December 2018, but still within Largs, and it operated as a separate business from the associated company of 24.7 Property Letting Kilmarnock Ltd.

(iii) <u>Mr David Wright: Respondents' Director</u>

(a) Mr Wright's evidence, elicited by me as presiding Employment Judge, on the morning of day two, Tuesday, 5 March 2019, allowed me to ask him a series of questions, under oath, on the terms of the grounds of resistance, set forth in the ET3 response, which he had submitted on their behalf, and its paper apart.

(b) So too it provided an opportunity for me to address with him, as the respondents' representative and principal witness, the various points raised in subsequent documentation before the Tribunal, either in correspondence to the Tribunal, from him, or in the productions lodged by parties in the various Bundles used at this Final Hearing.

(c) Aged 47, Mr Wright explained that he is a shareholder of the respondent company, but he denied being a current director, stating that he had resigned approximately two weeks prior to

the date of this Final Hearing. He insisted on that point, notwithstanding the online Companies House search printout suggested otherwise as a matter of public record. In reply, he just explained the circumstances arising which had led to him becoming the person registered, on Companies House, as the person with significant control of the respondent company, as from 17 November 2018.

(d) In giving his evidence to this Tribunal, Mr Wright frequently made reference back to difficulties with the former directors of the company, Mr Dziedzic, and Ms O'Boyle, and difficulties with getting access to its bank accounts, and financial affairs, and he explained that, to do that, he had had to register with Companies House as the person with significant control, and that he had resigned as a director of the respondent company on 16 February 2019.

(e) When it was pointed out to him that that was not consistent with the public record, he stated that he had requested the company's accountant to do that, but he did not know whether that had happened, but he understood that the company accountant, William Duncan, had done so, as he had called all the company's directors to his premises and, as far as he was aware, the respondents are now a company without any director in post.

(f) Mr Wright further explained in his evidence that Melanie O'Boyle, and Tomasz Dziedzic were both directors of the company, when he was only a shareholder, and that he had been a shareholder for some three to four years, only becoming a company director on 24 July 2018.

(g) He also explained that he had been the only company director in the period between 24 July and 10 October 2018, when the claimant had resigned, and he confirmed that he had received

her letter, which was addressed to him, and he acknowledged that he had given her no written acknowledgement back, explaining that he did not know the affairs of the company, as he had no access to any information, at that time.

(h) By way of further clarification, Mr Wright stated that he thought he was dealing with a fraud, by the former company directors. He added that he recalled telling the claimant to contact the company's accountant direct for her P45, and payslips for September and October 2018.

(i) As he stated that he had resigned as a director of the respondent company on 16 February 2019, Mr Wright further advised that Mr Duncan was no longer acting as the accountant for the Largs company, and he had not checked matters with him prior to coming to give his own evidence to this Tribunal.

(j) Further, he advised me that as the accountants did the payroll for the Largs employees, he did not have any payroll records, and accordingly he could not speak to what the claimant was paid, and/or was due, by the respondents.

(k) As regards the claimant's claim for unlawful deduction of wages, for her August 2018 wages, in the sum of £1425.31, Mr Wright confirmed that the claimant had not been paid then, nor to date, the sum of £1425.31 which she should have been paid for her August 2018 wages.

(l) He explained that as a director he then had no access to the company's bank accounts, until about a month ago, but that the letters from the Bank of Scotland, produced in his Bundle of documents, showed that there were no funds to pay her. That said, Mr Wright clarified that he was not disputing that the sum of £1425.31 is due by the respondents to the claimant but, as he understood she had received extra holidays, he could not

consent to her being entitled to a Judgment in her favour for the full sum of £1425.31.

(m) Mr Wright further stated that he believed that the claimant had been overpaid 4.2 days holiday pay, and the amount for that should be deducted from whatever she is owed. As regards payslips for September and October 2018, Mr Wright stated, candidly, that he had no idea whether payslips were prepared for the claimant for these months, nor if a P45 was issued by the company accountant, and as such he had no documents to produce to this Tribunal in that regard.

(n) Further, as he was not a director at the relevant time, Mr Wright stated that while he understood that the respondent company had used the Ramsay Partnership, an employment law company, to draft contracts of employment, he could not say whether the previous directors did that, or he did not, nor could he, comment on whether statutory written particulars of employment, or any statements of change, had been issued to the claimant and, if so, when.

(o) Mr Wright stated again that he had only become a director of the respondent company on 24 July 2018. He had asked the claimant to produce a copy of her contract of employment, in an earlier email exchange with her, which she had not done, until this Final Hearing, and he stated that he had only received two of the three Med3 certificates referred to by her in her evidence to this Tribunal.

(p) Mr Wright further stated, in his evidence in chief, that the claimant wanted to resign, and that she left of her own accord. He added that he did not believe the stated reason, given in her resignation letter of 10 October 2018, for her immediate resignation is the true reason.

(q) Stating that he personally had raised civil proceedings against Tomasz Dziedzic, in Glasgow Sheriff Court, for which he produced to the Tribunal an extract Judgment of 23 August 2018, for payment of £10,000, following decree in absence being granted to him by the Sheriff, Mr Wright further stated that he believed the likely reason for the claimant's exit from the respondent's employment was that he had turned up.

(r) Further, he added, she knew there were financial irregularities in the company, and whether or not she was involved, he thought she knew about it, but just turned a blind eye to what he referred to as "***a crime***". In answer to a query from me, as presiding Judge, Mr Wright further stated that he had not reported matters of any alleged criminality to the Police.

(s) Mr Wright further stated that while her resignation letter suggested the claimant had been forced out because she had not been paid her outstanding wages, he stated that she had not been forced out, and that the reason she had not been paid was that the company had no funds to access to pay her, and that she had later refused his personal offer to pay her out of his own money for her month's pay due and unpaid.

(t) Further, Mr Wright also stated that the unpaid wages were ***"a matter for the company's previous directors",*** that they had committed "***financial misdemeanours***", and it was "***almost impossible that the claimant did not know about it".*** That said, he accepted it would be a repudiatory breach of contract by any employer not to pay an employee for work done, and while accepting that, he then went on to reiterate, for a further time, that he had no means to pay her from the company's bank account.

(u) As regards the claimant's claim that she was entitled to a statutory redundancy payment, Mr Wright stated that she was

not made redundant, she was offered employment on several occasions, and he also did not accept that the respondents have any responsibility to compensate the claimant for any unfair dismissal. He then suggested, but without any real specifics, that the claimant had acted dishonestly, and accordingly she was not entitled to anything, closing his statement by stating: "***I am not the devil. I have actually saved this company."***

(v) Further, submitted Mr Wright, the claimant knew about the financial irregularities, as it is such a small office in Largs, and while he could not prove that she did anything irregular, he was not suggesting that the claimant's conduct in any way had been somehow culpable or blameworthy. He then compared and contrasted that to his own actions where he stated he had acted responsibly since he knew there was an issue at the Largs company, and that he had acted responsibly at every turn.

(w) Asked about Melanie O'Boyle's letter to the Tribunal dated 3 March 2019, which, during an adjournment, he had the opportunity to read, and digest, Mr Wright stated that she had not attended to give evidence, but he referred to her as being "***by and large culpable for what went on***", as it was her name on the company's bank account, and she was the manager albeit she had been absent for almost one year, on maternity leave, while the claimant ran the office, in the absence of the other director, Tomasz Dziedzic.

(x) Mr Wright then stated that he doubted the sincerity of Ms O'Boyle's reference to a "***family emergency***", and he stated that she had never appeared at shareholders meetings called by the company accountant either.

(y) In answering questions asked of him by the claimant, during her cross examination of his evidence in chief, Mr Wright explained

that once Melanie O'Boyle had given two weeks' notice, but only worked four days, from on or around 16 August 2018, the business at Largs was transferred to Kilmarnock, as Largs was deemed no longer viable, and by the time he became a director, there was no money in the company bank accountant to pay the claimant.

(z) I doubted the veracity of his evidence here, as if a business is not viable, it seemed highly unlikely to me that any company would, instead of closing it down, continue to operate, albeit from different premises in the same town. That just did not ring true on any logical basis.

(aa) When asked about the claimant's resignation letter, and why he had not referenced it in the ET3 response, lodged on 25 October 2018, Mr Wright stated that he was unsure when he had seen that letter. He then added that he is not a lawyer, and not an employment lawyer, but, morally, he can pay, and he had offered to pay, her one months' unpaid wages, but there was a problem with the other issues that she had raised about alleged unfair constructive dismissal.

(bb) Mr Wright also added that the respondent company had no funds as at the date of this Final Hearing to meet any judgment that might be issued in favour of the claimant. However, he produced no vouching documents to evidence that assertion as fact. In closing, he stated that "***I am certainly not to blame for this***", and that he did not like two days sitting here at the Glasgow Employment Tribunal.

(cc) I felt it was wholly disingenuous of Mr Wright to say that the effective date of termination of the claimant's employment with the respondents was 14 August 2018, when he says she stated she was not coming back, yet on the other hand he accepted

that she was due all her wages for the whole month of August 2018, as per the payslip provided to her by the respondents.

(dd) Overall, having heard Mr Wright's evidence, I did not find him to be a compelling, or convincing witness. Indeed, I found him to be a confused, and often confusing witness. I also found him to often be evasive, and all too easily prepared to put the blame for the claimant's situation on others, including the claimant, and the company's former directors, rather than himself, as a current director of the company.

(ee) Where there was a dispute between his recall of events, and the claimant's, I preferred the claimant's evidence, as the more likely scenario. I did not find Mr Wright to be a credible or reliable witness.

(iv) <u>Ms Melanie O'Boyle: Letter of 3 March 2019</u>

(a) Ms Boyle's letter, and appendices, had been emailed to the Tribunal on the evening prior to the first day of this Final Hearing. A copy was provided to both parties to read, and digest, and provide, as part of their oral evidence, their response to the various points made by Ms O'Boyle.

(b) As Ms Boyle was not led as a witness, by either party, and as the terms of her letter were not open to cross examination by either party, or questions of clarification from myself, I have given letter of 3 March 2019 no weight whatsoever in my consideration of this case.

(c) In assessing the evidence led before the Tribunal, I have had regard to, and only had regard to, the oral evidence provided by the claimant, Ms Clarke, and Mr Wright, for the respondents, and the documents in the Bundles, and the Tribunal's casefile from both parties.

<u>Issues for the Tribunal</u>

48. In this case, with two unrepresented, party litigants, and no earlier Case Management Preliminary Hearing, there was no previously agreed List of Issues before the Tribunal. In clarification of the issues, with both the claimant, and Mr Wright, on day one of the Final Hearing, I sought to clarify the issues, as I saw them, as follows: -

    (i) What is the effective date of termination of the claimant's employment with the respondents? Is it 10 October 2018, as submitted by the claimant, when she resigned with immediate effect, or 14 August 2018, as submitted by Mr Wright, for the respondents, when he says she said she would not be coming back?

    (ii) It being agreed there was no actual dismissal of the claimant by the respondents, was the claimant's resignation on 10 October 2018 an unfair constructive dismissal of the claimant by the respondents?

    (iii) If so, what compensation, if any, is the claimant due for any unfair constructive dismissal?

    (iv) Further, what sums (if any) is the claimant due from the respondents for other sums outstanding to her as at the end of her employment with the respondents, in particular unpaid wages, statutory sick pay, holiday pay, and redundancy pay?

    (v) Is the claimant due any other type of award from the Tribunal?

Parties' Closing Submissions

49. I heard oral, closing submissions from both the claimant in person, and Mr Wright for the respondents, on the afternoon of day 2, Tuesday, 5 March 2019. In opening her closing submissions, when the afternoon session resumed, at around 2.16pm, the claimant stated that she was looking for the Tribunal to make a finding of unfair, constructive dismissal, in her favour, on the basis of her letter of 10 October 2018, to Mr Wright, and based on her evidence put to the Tribunal at this Final Hearing.

50. Having revisited the **£4,031.31** total figure in her original Schedule of Loss, as per her email of 19 December 2018, in light of the evidence led at this Final Hearing, the claimant then stated that she believed she was due the sum of **£3,755.07**, including bank charges for overdraft at **£26.79.** She explained that she had calculated this revised figure from a revised total of **£3,720.02**, which she advised included credit account of **£302.40** for the 4.2 days holiday pay overpaid to her by the respondents, and took into account reducing SSP from £178.40 to **£142.72**, as her employment with the respondents ended on 10, and not 12, October 2018.

51. Further, the claimant added, in addition to a finding of unfair constructive dismissal, and payment of the sums due to her for that, she was also seeking any compensation for unfair dismissal in whatever amount the Tribunal saw fit according to the circumstances of her case.

52. At that stage, conscious of the fact that the claimant, and indeed the respondent's representative, were not legal representatives, and so neither was necessarily familiar with the Tribunal's practices or procedures, or the relevant law on compensation for unfair dismissal, I explained the broad concepts of a basic award, and a compensatory award for unfair dismissal, including adjustments and reductions, all in terms of **Sections 118 to 124A of the Employment Rights Act 1996.**

53. In reply to my brief explanation of the available compensation remedies, the claimant then advised that having secured new employment, post-termination of employment with the respondents, where she would be going from temporary, into a permanent role, as from the following Monday, I suggested to the claimant that she needed to clarify, for the avoidance of any doubt, whether she was only seeking a declaration of unfair, constructive dismissal, or that, plus compensation for an unfair constructive dismissal.

54. In that regard, I signposted the claimant to the Citizens Advice Bureau Scotland online guidance on preparing a Schedule of Loss, and how to value a claim, in an unfair dismissal claim, and I allowed her an adjournment, from 2.31pm, until we resumed again at 2.45pm, to allow her to consider her

position, and her Schedule of Loss, and to perhaps discuss matters with her parents, before further addressing me as regards the remedy she was seeking from the Tribunal, in the event of success for her claims.

55. When the Final Hearing resumed, after that adjournment, at 2.48pm, the claimant, without producing a written statement of her losses, orally stated that she was seeking a basic award of **£1,080**, being three years at 40 hours per week at £9 per hour equals **£360 per week**, multiplied by 3, together with a compensatory award, comprising loss of statutory rights of **£500**, past loss of earnings at **£695.10,** calculated on the basis of **£33.10** per week, multiplied by 21 weeks, from 10 October 2018 to date of this Final Hearing, and, as regards employer's pension contributions, she was seeking a payment of **£157.50**, calculated on the basis of 7 months at **£22.50 per month**, from August 2018 to February 2019.

56. The claimant's oral submissions having concluded, at around 2.53pm, I invited Mr Wright to reply, and make his submissions on behalf of the respondents. He opened by stating that I should dismiss the whole claim brought against the respondents, and in giving his reasons, he did so speaking at speed, from what appeared to be a pre-written document, resulting in me asking him to slow down, and deliver his oral submissions at a speed which was consistent with my note taking. He made no specific comment about the claimant's revised figures for compensation she was seeking from the respondents.

57. When Mr Wright then continued to speak at speed, and I noticed that he was reading from notes, I asked him whether he was prepared to hand them up, in order that I could get them copied by the clerk to the Tribunal, for my use, and for the claimant's perusal, and that would also allow me to ensure that I had captured the full terms of his closing submissions.

58. After a brief adjournment of about five minutes, when proceedings resumed, at 3.04pm, Mr Wright then proceeded to read from, and draw to my attention, the full text of his six-page, handwritten notes, a copy of which is held on the

Tribunal's case file, and to which I have made reference in writing up this Judgment.

59. At the lunchtime adjournment, at 1.13pm, when the Tribunal adjourned until 2.15pm, for closing submissions, I drew to Mr Wright's attention, as also the claimant's attention, the specific terms of reductions to basic award, and compensatory award, in terms of **Sections 122(2) and 123(6) of the Employment Rights Act 1996,** in order that both parties could consider their respective positions on that matter.

60. While the claimant, in her closing submissions, made no reference to any contribution being deducted from any compensation otherwise payable to her, I took that to mean that she did not consider any such reductions were appropriate, whereas, in Mr Wright's handwritten notes, he made express reference to both of those statutory provisions, and that, in his view, reductions to compensation were appropriate, and that they should be made by the Tribunal.

61. As Mr Wright's handwritten notes were subject to certain deletions, amendments, and some spelling errors, it is convenient that in these Reasons, I set forth the full text of his written notes, as they were read into these proceedings, as follows: -

> ***"The claimant is ARLA registered qualified agent.***
>
> ***The case is not constructive dismissal. The reason for that is I believe that Amy Rose deemed her position unattainable due to the serious financial malfeasance with client funds.***
>
> ***The company was running at a loss and was using client deposits and client rents to meet the company's obligations. The claimant also did not know the respondent therefore she could not have a personal opinion of him not to work for him. The claimant stated she was leaving on the day the respondent appeared at the Largs office. The claimant and her manager requested the respondent***

did not do the audit. The claimant was aware the bank account was frozen to deny access to financial records.

The claimant knew about the financial malfeasance with the company deposits. It was her responsibility to lodge the deposits on the government website. She was solely responsible for this in the period Melanie O'Boyle was absent which was around 1 year.

The claimant would have known utilising the deposits was illegal. The claimant is a registered ARLA qualified agent. The claimant would know the deposits were not paid and the legal implications that could bring. The claimant would have known the company was trading as insolvent while not registering the deposits.

On the respondent entering the premises, 18/08/2018, AR (the claimant) ***cancelled her company mobile phone. She removed her pictures from the website. She informed the company she would be leaving. On the same day she informed the company manager Edith Clarke she was suffering from stress.***

The respondent's position is that the claimant's stress was a direct result of her own doing with regards to the company deposits.

The Director had only been in his position for 2 weeks. The bank account was frozen deliberately by the previous director so an audit could not take place. The respondent had no way of paying the claimant and informed her of this.

On several occasions the respondent offered to pay the claimant the wages sum from alternative funds. The respondent did not want the claimant to leave her employment. Indeed, they offered her a bonus and large rise to stay. The reason for this is that the claimant had built up client relationships. The claimant refused payment as they sought extra compensation.

Therefore under point 122, Basic Award Reduction, the Tribunal should reduce the amount of any basic award. The main issue surrounds the conduct of the claimant. The claimant took a position of responsibility in the period Melanie O'Boyle was absent. This was around one year in 2016/17. The other director Thomas Dzielz (sic) ***was in Poland at that time. The claimant is a qualified letting agent. She would have been aware client deposits were being not paid over and mis-proportioned. The claimant would have known this is highly illegal and should have acted. The claimant accepted the position with the deposits until the company came to be audited.***

Under point 2 of 122 Basic Award reduction the Tribunal should in the event of any award reduce it further. Also in terms of clause 122, point 6 regarding any compensation award, the Tribunal should dismiss any compensation on the grounds the claimant contributed by their actions by not registering company deposits.

The respondent asked the claimant for her contract at the first day of audit in August 2018 and several times subsequently. The claimant did not produce the contract. The contract was only produced at the 1st day of the Tribunal.

The contract did not mention sick pay. The respondent did not receive the requested contract from the claimant therefore he was unaware as to how to act. Therefore the claimant should not receive any sick pay.

The claimant was not made redundant therefore no award should be made for redundancy. Redundancy is not mentioned in the contract. The claimant has claimed for holidays yet she is only entitled to 21.8 days and took 26.

The claimant is not due 4 days wages as she left the company for the reasons stated. There are no further losses as the claimant was looking for work from the date of leaving 247."

62. In clarifying the basis of the closing submissions for the respondents with Mr Wright, he acknowledged that there had been no mention in his evidence to the Tribunal of any bonus or pay rise to the claimant to stay with the respondents.

63. Further, Mr Wright clarified that he wished me to dismiss the claim, and make no award of any sort to the claimant. When I asked him for some specific clarification, about his arguments about reduction of any compensation due to the claimant, Mr Wright stated that while he could not prove or disprove things, his position was that the claimant left the company of her own accord, and "***definitely 100%"*** she was aware, and she should not be getting anything from the Tribunal.

64. Indeed, Mr Wright stated, the claimant should get "***zero***" for unfair dismissal, but she should get the amount for her pay for August 2018, as per her payslip, at **£1,425.31**, but nothing for September or October 2018.

65. At 3.12pm, having heard Mr Wright's closing submissions for the respondents, I then invited the claimant to let me know if there was anything further she wanted to add by way of reply. In response, she stated that there had been no proof of anything provided by Mr Wright, and she completely denied his allegations, and further stated that she is entitled to her full compensation of whatever is appropriate.

66. At that point, Mr Wright interrupted proceedings, and stated that the claimant did know about what was going on in the company under Ms O'Boyle, requiring me to remind him not to interrupt proceedings, and to show the claimant the same courtesy she had shown to him by listening to his closing submissions for the respondents.

Reserved Judgment

67. In closing proceedings at 3.14pm, I advised both parties that I was reserving my Judgment, which would be issued in writing, with Reasons, in due course, after time for private deliberation in chambers.

68. In reply, Mr Wright asked about how to appeal against my Judgment, to which I responded stating that the matters of reconsideration of a Judgment, or appeal to the Employment Appeal Tribunal, by either party, would be explained in the Judgment letter to follow to both parties, when the Tribunal's Judgment with Reasons was promulgated in due course.

69. On account of a combination of factors, relating to other judicial commitments, some annual leave, and other writing commitments, the delay in issuing this Judgment is regrettable, and the Tribunal has previously written to parties, on my behalf, offering my explanation, and apology for the delay.

Post-Hearing Correspondence from the Claimant

70. In light of the claimant's position, in revising the amounts she was seeking from the respondents, it was discussed with her, and Mr Wright, during the course of that afternoon session on day 2, that whatever the final outcome, the Tribunal would require to make findings in fact about the claimant's new employment, and her earnings in new employment which, in the event of success with her claim, would require to be netted off against any unfair dismissal compensation awarded for loss of earnings.

71. On that basis, I allowed the claimant to provide further documentation and vouching on that matter. Subsequently, on 11 March 2019, the claimant forwarded to the Tribunal, by email, with copy sent at the same time to Mr Wright, most of her last 12 weeks' payslips, as per 10 attachments, and advising that she was still waiting for her payslip for week ending 24 February 2019, where she was expecting a gross payment of £326.90 for that week

72. Further, on 13 March 2019, the claimant forwarded to the Tribunal, by email, with copy sent at the same time to Mr Wright, her payslip dated 15 March 2019, for the weeks ending 24 February 2019, and 10 March 2019, showing gross payment of £657, less deductions, producing net pay of £471.16.

73. Mr Wright made no reply to the Tribunal in respect of these additional documents from the claimant, which I have treated as written representations, and taken these further payslips into account, at unchallenged, face value, as showing the claimant's earnings to date of Final Hearing from that new employment.

Relevant Law

74. As neither party was legally represented, neither party addressed me on the relevant law. With unrepresented, party litigants, this is the usual practice, and I explained to parties that it was my responsibility, as presiding Judge, to apply the relevant law to the facts as I might find them to be in reviewing the evidence led before the Tribunal. As such, I have required to give myself a self-direction, in the following terms, as regards the law on constructive dismissal.

75. **Section 94 of the Employment Rights Act 1996** "(ERA") sets out the right not to be unfairly dismissed and **Section 95 (1) (c) of the ERA** says that an employee is taken to have been dismissed by his employer if the employee terminates his / her contract of employment (with or without notice) in circumstances in which the employee is entitled to terminate it without notice by reason of the employer's conduct, i.e. "***constructive dismissal".***

76. If the dismissal is established, then the Tribunal must also consider the fairness of the dismissal under **Section 98 of the ERA**. This requires the employer to show the reason for the dismissal (i.e. the reason why the employer breached the contract of employment) and that it is a potentially fair reason under **Sections 98 (1) and (2)** ; and where the employer has established a potentially fair reason, then the Tribunal will consider the fairness of the dismissal under **Section 98 (4),** that is: (a) did the employer act reasonably or unreasonably in treating it as a sufficient reason for dismissal; and (b) was it fair bearing in mind equity and the merits of the case. A constructive dismissal is not necessarily an unfair dismissal: **Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166.**

77. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, relying on an argument that there was no dismissal, then a Tribunal is under no obligation to investigate the reason for the dismissal itself. The dismissal will be unfair because the employer has failed to show a potentially fair reason for it**: Derby City Council v Marshall [1979] ICR 731.**

78. In a claim of unfair constructive dismissal, an employee resigns in response to a fundamental breach of a term of their contract of employment by the respondent. The claimant must show that there had been a fundamental breach of an express or implied term of that contract. The test is whether or not the conduct of the ***"guilty***" party is sufficiently serious to repudiate the contract of employment.

79. In **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**, Lord Denning stated that:

> "***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 intended 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."***

80. In **Woods v WM Car Services (Peterborough) Limited [1981] IRLR 347**, the Employment Appeal Tribunal held that it was clearly established that there was implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this

implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract.

81. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

82. That test was confirmed in the case **of Malik v BCCI [1997] IRLR 462**, by the House of Lords. It is recognised that individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim constructive dismissal: **Lewis v Motor World Garages Limited [1985] IRLR 465.**

83. In **WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516**, it was held that there is a fundamental implied term in a contract of employment that an employer will reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they may have.

84. In **Hilton v Shiner Limited [2001] IRLR 727**, it was held that the implied term of trust and confidence is qualified by the requirement that the conduct of the employer about which complaint is made must be engaged in without reasonable and proper cause. Thus, in order to determine whether there has been a breach of the implied term two matters have to be determined. The first is whether ignoring their cause there have been acts which are likely on their face to seriously damage or destroy the relationship of trust and confidence between employer and employee. The second is whether there is no reasonable and proper cause for those acts.

85. In **London Borough of Waltham Forest v Omilaju [2005] IRLR 35**, the Court of Appeal held that a final straw, if it is to be relied upon by the employee

as the basis for a constructive dismissal claim, should be an act in a series whose cumulative effect amounts to a breach of trust and confidence. The act does not have to be of the same character as the earlier acts, and nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the final 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 the final straw, even if the employee genuinely, but mistakenly, interprets it as hurtful and destructive of his trust and confidence in the employer.

86. The test of whether the employee's trust and confidence has been undermined is objective. In **Bournemouth University v Buckland [2010] IRLR 445**, the EAT confirmed the test in the case of **Malik v BCCI**, that to prove an alleged breach of the implied term of mutual trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence.

87. The Court of Appeal also confirmed that once a breach has occurred, it is not possible to remedy it. The Court endorsed the four-stage test offered by the EAT, as follows: -

> (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the 'unvarnished' **Malik t**est should apply;
>
> (ii) if, applying the principles in **Sharp**, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;
>
> (iii) it is open to the employer to show that such dismissal was for a potentially fair reason;
>
> (iv) if the employer does so, it will then be for the tribunal to decide whether dismissal for that reason, both substantively and

procedurally, fell within the band of reasonable responses and was fair.

88. Once a fundamental breach has been proved, the next consideration is causation - whether the breach was the cause of the resignation. The employee will be regarded as having accepted the employer's repudiation only if the resignation has been caused by the breach of contract in issue. If there is an underlying or ulterior reason for the resignation, such that the employee would have left the employment in any event, irrespective of the employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives, the Tribunal must decide whether the breach was an effective cause of the resignation; it does not have to be the effective cause.

89. In **Wright v North Ayrshire Council [2014] IRLR 4**, the EAT found that the Tribunal had been wrong to rely on the principle that, where there was more than one cause, it was only the main (i.e. effective) cause of the resignation which should be considered to decide whether there had been a constructive dismissal. The EAT said that the search was not for one cause which predominated over others, or which would on its own be sufficient, but to ask whether the repudiatory breach had 'played a part in the dismissal'. It was enough that the repudiatory breach was an effective cause and not the effective cause of the resignation.

90. The third part of the test is whether there was any delay between any breach that the Tribunal has identified, and the resignation. Delay can be fatal to a claim because it may indicate that the breach has been waived and the contract affirmed. An employee may continue to perform the contract under protest for a period without being taken to have affirmed it, but there comes a point when delay will indicate affirmation.

91. If it has been established that there was a constructive dismissal, the last part of the test is whether it was fair or unfair in all the circumstances. It is useful

to note some other reported case law decisions. In **Morrow v Safeway Stores plc [2002] IRLR 10,** it was confirmed that any breach of the implied term of trust and confidence is always to be viewed as fundamental.

92. Also, in, **Cantor Fitzgerald International v Callaghan and others [1999] ICR 639,** the Court of Appeal held that if an employer withholds or reduces an employee's pay, then that is a fundamental and repudiatory breach of contract, and going to the root of the contract, as the pay that an employee is entitled to receive is a matter central to the whole purpose of the employment contract.

93. Further, in **Croft v Consignia plc [2002] IRLR 851**, the EAT held that "***the implied term of trust and confidence is only breached by acts or omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach is very much left to the assessment of the Tribunal as the 'industrial jury'."***

94. As regards unlawful deduction from wages, the relevant law is to be found in **Part II of the Employment Rights Act 1996**. **Section 13** provides the right not to suffer unauthorised deductions from wages, and an employee may present a complaint to an Employment Tribunal, under **Section 23**, which the Tribunal can then determine under **Section 24**.

95. The key issue involved in determining whether or not there has been a deduction is whether the wages are properly payable, and the answer to that question turns on the contract of employment. Further, in terms of **Section 27**, "***wages***" is defined, as including any holiday pay, as well as statutory sick pay.

Discussion and Deliberation

96. In carefully reviewing the evidence in this case, and making my findings in fact, and then applying the relevant law to those facts, I have had to consider these questions: -

(i) What is the effective date of termination of the claimant's employment with the respondents? Is it 10 October 2018, as submitted by the claimant, when she resigned with immediate effect, or 14 August 2018, as submitted by Mr Wright, for the respondents, when he says she said she would not be coming back?

(ii) It being agreed there was no actual dismissal of the claimant by the respondents, was the claimant's resignation on 10 October 2018 an unfair constructive dismissal of the claimant by the respondents?

(iii) If so, what compensation, if any, is the claimant due for any unfair constructive dismissal?

(iv) Further, what sums (if any) is the claimant due from the respondents for other matters outstanding to her as at the end of her employment with the respondents, in particular any unpaid wages, statutory sick pay, holiday pay, and redundancy pay?

(v) Is the claimant due any other type of award from the Tribunal?

What is the effective date of termination of the claimant's employment with the respondents?

97. In considering this first question, and on the evidence before this Tribunal, I am satisfied that it is 10 October 2018, as submitted by the claimant, when she resigned with immediate effect, when she tendered resignation by letter of that date delivered to the respondents' director, David Wright, and not 14 August 2018, as submitted by Mr Wright, for the respondents, when he says she said she would not be coming back.

98. The Tribunal finds that the effective date of termination of her employment was 10 October 2018. Indeed, the fact that Mr Wright accepted that the claimant was due her wages for August 2018, as per her payslip from the respondents, shows that the respondents accept that the claimant's effective date of termination must have been after the end of August 2018.

Was the claimant's resignation on 10 October 2018 an unfair constructive dismissal of the claimant by the respondents?

99. Next, in considering this second question, I am satisfied that the claimant's resignation on 10 October 2018 was a constructive dismissal, and that it was an unfair dismissal, contrary to **Sections 94 to 98 of the Employment Rights Act 1996**.

100. The evidence led before the Tribunal merits that outcome, and Mr Wright, in his own oral closing submissions, accepted that failure to pay an employee wages properly due was a repudiatory breach of contract by the employer. Further, I am satisfied that the employer's failure to pay the claimant her wages properly due and payable was an effective cause of her resignation, and she did not delay too long in resigning.

101. Further, the respondents' repeated failures to pay the claimant her outstanding wages, despite several requests, is indicative of a breakdown in the employer / employee relationship of mutual trust and confidence, and of an employer's implied duty of reasonable support to an employee.

102. No fair reason for dismissal was put forward by Mr Wright, and while his evidence about lack of access to company bank accounts perhaps explains why he could not arrange for payment of wages properly due and payable to the claimant, in August 2018, it certainly does not excuse the non-payment of agreed wages thereafter, particularly in the period after he became the person with significant control of the respondent company, and therefore when he had access to its bank accounts, and whatever banking facilities it had access to though its bankers.

103. While the claimant's complaints of unfair constructive dismissal, and unlawful deduction from wages, accordingly both succeed, I have decided that her claim for redundancy pay fails, and that part of her claim against the respondents is dismissed by the Tribunal.

104. Put simply, there is no evidence of any redundancy situation in the respondents' business as at 10 October 2018. There is, on the evidence led at this Final Hearing, no evidentiary basis for any finding that there was a redundancy, as defined in **Section 139 of the Employment Rights Act 1996**. The change of the respondents' office location in Largs did not happen until December 2018, after the claimant's employment had ended.

What compensation, if any, is the claimant due for any unfair constructive dismissal?

105. On this third question, having found the respondents liable to the claimant, in respect of that unfair, constructive dismissal, I have then proceeded to consider what remedy from the Tribunal is appropriate, and what financial compensation (if any) is payable to the claimant.

106. Specifically, my task has been to assess the amount of compensation payable by the respondents for that unfair dismissal, taking account of any appropriate reductions, as sought by the respondents.

107. A declaration of unfair, constructive dismissal is an integral part of the remedy which the Tribunal has awarded to the claimant. If a Tribunal finds that a claimant has been unfairly dismissed by the respondents, then it can, subject to the claimant's wishes, order re-instatement to the old job, or re-engagement to another job with the same employer, or alternatively award compensation.

108. The claimant has indicated in this case that she seeks an award of compensation only in the event of success before the Tribunal. Compensation, in terms of **Section 118 of the Employment Rights Act 1996** ("ERA") is made up of a basic award and a compensatory award.

109. A basic award, based on age, length of service and gross weekly wage, in terms of **Section 119 of ERA**, can be reduced in certain circumstances. **Section 122(2) of ERA** states that where the Tribunal considers that any conduct of the claimant before the dismissal (or where the dismissal was with notice before the notice was given) was such that it would be just and

equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

110. **Section 123(1) of ERA** provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer.

111. Subject to a claimant's duty to mitigate their losses, in terms of **Section 123(4)**, this generally includes loss of earnings up to the date of the Final Hearing (after deducting any earnings from alternative employment), an assessment of future loss of earnings, if appropriate, a figure representing loss of statutory rights, and consideration of any other heads of loss claimed by the claimant from the respondents.

112. Where, in terms of **Section 123(6) of ERA**, the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, then the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

113. In their ET3 response, defending the claim brought against them, the respondents, understandably given they were not legally represented, did not make any legal arguments relating to remedy for the Tribunal to consider if it found, as I have found, that the claimant was unfairly constructively dismissed by the respondents.

114. However, in his closing submissions to this Tribunal, Mr Wright did suggest, as narrated earlier in these Reasons, at paragraph 61 above, that the claimant's compensation should be reduced, on account of what he described as her contributory conduct, and perhaps reduced to zero.

115. After careful consideration, I have rejected his argument that there should be a reduction to the claimant's compensation. On the evidence before the Tribunal, the claimant's constructive dismissal, on 10 October 2018, was not to any extent caused or contributed to by any action of the claimant, whereby the Tribunal considers it just and equitable that it should reduce, on account of any contributory conduct by her, the amount of the basic or compensatory award otherwise payable to the claimant.

116. While, at this Final Hearing, Mr Wright made various allegations against the claimant, he did so by assertion, and speculation, and without producing any tangible evidence of her alleged misconduct. It is of note, also, that no disciplinary proceedings were ever instituted by the respondents against the claimant, where the employer might reasonably have been expected to at least investigate its concerns, if any, about her alleged misconduct, while she was still in their employment. It is of further note that he advised me that he had not reported his suspicions of criminality to the Police.

117. While I was not addressed by either party on the relevant law, as regards mitigation of loss, I have reminded myself of the principles established by the Court of Appeal, in **Wilding v British Telecommunications plc [2002] IRLR 524**, that were re-affirmed by Mr Justice Langstaff, then President of the Employment Appeal Tribunal, at paragraph 16, in **Cooper Contracting Ltd v Lindsey [2015] UKEAT/0184/15**, now reported at **[2016] ICR D3**, and more recently by the Scottish EAT Judge, Lady Wise, in her unreported judgment in **Donald v AVC Media Enterprises Ltd [2016] UKEATS/0016/14,** at paragraphs 25 to 30.

118. Put simply, the burden of proof is on the wrongdoer; a claimant does not have to prove that they have mitigated loss, and the standard of proof on mitigation of loss is that of a reasonable person and the Tribunal must not apply too demanding a standard on the victim ; the claimant is not to be put on trial as if the losses were their fault when the central cause is the act of the wrongdoer ; and the test may be summarised by saying that it is for the wrongdoer to

show that the claimant acted unreasonably in failing to mitigate :- as per Mr Justice Langstaff in **Cooper** at paragraph 16 (1), (7) and (8).

119. On the evidence before me, I am satisfied that the claimant took reasonable steps to mitigate her losses. She found new, alternative employment, within 2 weeks of her resignation from the respondents' employment. In the circumstances of this case, it would be wholly unjust and inequitable to the claimant, where I have found that she had been unfairly constructively dismissed by the respondents, if the Tribunal did not award her any compensation for that unfair dismissal.

120. The issue which now arises is what is the appropriate amount of compensation that the Tribunal should order the respondents to pay to the claimant for her unfair, constructive dismissal.

121. In her closing submissions to the Tribunal, after the adjournment allowed for her to consider her position, as referred to earlier in these Reasons at paragraph 55 above, the claimant stated that she was seeking a basic award **£1,080**, being three years at 40 hours per week at £9 per hour equals £360 per week, multiplied by 3, together with a compensatory award, that I compute as a total of **£1,352.60**, comprising loss of statutory rights of **£500**, past loss of earnings at **£695.10**, calculated on the basis of £33.10 per week, multiplied by 21 weeks, from 10 October 2018 to date of this Final Hearing, and, as regards employer's pension contributions, she was seeking a payment of **£157.50**, calculated on the basis of 7 months at £22.50 per month, from August 2018 to February 2019.

122. I have carefully considered her revised calculations. On the matter of a basic award, I have found in my findings in fact that she was employed by the respondents from 1 June 2015 to 10 October 2018, a period of 3 continuous years' employment with the respondents. Taking that length of service, together with her age at effective date of termination, being aged 25 (date of birth:6 February 1993), that produces a basic award of 3 weeks' gross pay.

123. In her ET1 claim form, presented to the Tribunal on 27 September 2018, at section 6, the claimant stated that she worked an average 41 hours per week, for a monthly pay before tax (gross) wage of **£1,629**, and normal take home (net) pay of **£1,355**. Multiplied by 12, and divided by 52, those figures give **gross £375.92**, and **net £312.69** per week.

124. In the ET3 response, lodged by Mr Wright for the respondents, on 25 October 2018, he stated that he could neither confirm or deny the claimant's details, as he was "***unsure***".

125. In these circumstances, there having been no payroll records produced to this Tribunal by the respondents as the claimant's former employer, ordinarily I would have been content to proceed on the claimant's calculation of **£360 gross per week**, based on 40 hours @ £9 per hour.

126. A 40-hour week calculation is also consistent with the calculations used by the claimant in her email to the Tribunal, on 19 December 2018, as copied to Mr Wright for the respondents, and detailed earlier in these Reasons at paragraph 13 above. As such, I would ordinarily have agreed with her calculation, and awarded her a basic award of **£1,080**.

127. However, it is not appropriate that I do so, as it is within my judicial knowledge that, in properly calculating the amount of a week's gross pay, and applying **Section 221(2) of the Employment Rights Act 1996**, the Tribunal can also include employer pension contributions to a pension fund, in terms of the Employment Appeal Tribunal's judgment, by the Honourable Mrs Justice Slade DBE, in **University of Sunderland v Drossou [2017] UKEAT/0341/16 ; [2017] ICR D23**.

128. In the present case, however, the practical problem for the Tribunal is that it does not have adequate information before it to identify what is the employer's pension contribution payable by the respondents. The copy payslips produced by the claimant show varying sums deducted every month from

January to August 2018 (at productions A5 to A7), and yearly to date totals, but the employers' contribution rate is not identified, and there is no other information before the Tribunal, from either party, that assists in this regard.

129. Further, the only pensions related document lodged with the Tribunal, being the letter of 15 January 2019 from NEST (National Employment Savings Trust) to the claimant, as produced at page 32 of the claimant's Bundle, suggests that no pension contributions were made by the respondents, so, in all of the circumstances, I have decided to proceed on the basis of **£360 per week gross**, as the claimant's earnings from the respondents.

130. Accordingly, and on that basis, I have awarded **£1,080** as a basic award payable by the respondents to the claimant. Had I found the claimant had been made redundant by the respondents, her statutory redundancy payment would have been in that amount, and no basic award payable.

131. Next, I turn to the compensatory award. I am satisfied that an award of **£500**, as sought by the claimant, is appropriate for loss of her statutory employment rights, following termination of her employment with the respondents, and to recognise that she will have to work two years with a new employer to regain protection from unfair dismissal. As such, and as an award at that level is within generally recognised bounds for such an award, I have no difficulty with awarding her that amount as part of her compensatory award.

132. However, when I come to the other parts of her calculation for a compensatory award, I find that the claimant's figures for past loss of earnings appear to have been computed on the basis of the difference between her gross earnings of **£360** per week with the respondents, and, given she cites a **£33.10** per week difference, I deduce she has arrived at that figure by subtracting her new employment earnings (for a standard 35 hour week, at **£326.90**, as per her production A24, and, she has then multiplied that figure by 21 weeks.

133. The Tribunal's duty, under **Section 123 of the Employment Rights Act 1996**, is to assess the amount of the compensatory award as being ***"such amount as the Tribunal considers just and equitable, in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal, insofar as that loss is attributable to action taken by the employer."***

134. In determining the compensatory award, the Tribunal must proceed on the basis of the claimant's weekly net pay when employed with the respondents. As such, using the claimant's calculations based on gross weekly pay of **£360** with the respondents, and **£326.90** in her new employment is not the proper basis for calculation.

135. In these circumstances, I have used an online salary calculator to compute the appropriate net figure for pre and post termination gross earnings of £360 and £326.90 per week, and made those calculations using those gross weekly figures, then I multiplied each gross figure by 52 to get a gross annual salary of £18,720 and £16,998.80 respectively, and then made the calculation for a Scottish taxpayer, in tax year 2018/19, and using the claimant's own tax code as shown on her payslips.

136. This process produced the following calculations:

Gross annual income	£18,720	£16,998.80
Gross weekly income	**£360.00**	**£326.90**
Taxable Income	£132.12	£ 99.02
Tax deducted	£ 26.04	£ 19.42
NI deducted	£ 23.76	£19.79
Net weekly take home	**£310.20**	**£287.69**

137. As such, for the purposes of my calculations, I have used the pre and post termination net weekly earnings of **£310.20**, and **£287.69**, a difference of **£22.51 per week**. Multiplying that figure by 21 weeks, the period between effective date of termination of employment, on 10 October 2018, and the last day of this Final Hearing, on 5 March 2019, produces a figure of **£472.71**, which is therefore the amount which I award to the claimant, and not the sum of £695.10 as sought by the claimant.

138. The claimant made no claim for future loss of earnings or benefits, from date of this Final Hearing onwards. Accordingly, I have made no award to her for future loss of earnings or benefits. She did not give any evidence, or make any closing submission, to say that she would have any ongoing losses, in respect of net loss of earnings, or pension loss, for any specific period of time going forward.

139. Finally, I have considered the claimant's request for a payment of **£157.50**, calculated on the basis of 7 months at £22.50 per month, from August 2018 to February 2019, for employer pension contributions. As I understood that part of her calculations, she was seeking payment of what the respondents should have been contributing to her pension benefits, had she not resigned, and so regarding that as a loss suffered by her on account of her constructive dismissal.

140. It seems, from my perusal of her payslips from HRL 2 Ltd (for period 43/2018) that her new employer started pension contributions from 25 January 2019, with employee and employer pension deductions to 15 March 2019 of £48.93 and £32.61.

141. On the evidence led at this Final Hearing, the claimant's payslips show deductions made by the respondents for pension contributions, being £135.27 employee pension and £112.74 employer pension year to date, as per her 31 August 2018 payslip, at page 4 of the Bundle.

142. However, the letter from NEST, at page 32 of the claimant's Bundle, shows that, as at its date, 15 January 2019, these contributions were not remitted to NEST, and the respondents were therefore subject to further action by The Pensions Regulator if they failed to fulfil their duty to pay contributions on time.

143. This apparent failure by the respondents to remit the claimant's pension contributions to NEST is not a matter where the Employment Tribunal has any jurisdiction, and the claimant should accordingly purse her complaint in that regard direct with the regulatory body, if it has not yet been resolved to her satisfaction.

144. No information was provided to the Tribunal by the claimant about the pension benefit with her new employer, so it is not possible for the Tribunal to compare and contrast pre-and post-termination pension benefits to ascertain the full extent of the claimant's pension losses. Indeed, while the claimant states her loss is at the rate of £22.50 per month, it is not clear to me where that figure comes from.

145. Having regard to the Tribunal's duty, under **Section 123**, to make a compensatory award that it considers just and equitable, in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal, insofar as that loss is attributable to action taken by the employer, I am however satisfied that there should be some award made to the claimant in this regard, and so, on a broad brush approach, I award her a nominal sum of **£100**.

146. In all the circumstances, I have decided that the claimant is entitled to a **monetary award of £2,152.71** from the respondents, comprising a basic award of **£1,080**, and a compensatory award totalling **£1,072.71**, comprising loss of statutory rights at £500, past loss of earnings at £472.71, plus pension loss at £100, but no award for future loss of earnings or benefits.

147. As the claimant advised the Tribunal that she had not been in receipt of State benefits, after termination of her employment with the respondents, the **Employment Tribunal (Recoupment of Benefits) Regulations 1996** do not apply to this award of compensation made by the Tribunal.

What further sums (if any) is the claimant due from the respondents for other matters outstanding to her as at the end of her employment with the respondents?

148. On this fourth question, I have revisited the claimant's original Schedule of Loss, as intimated on 19 December 2018, and as reproduced earlier in these Reasons, at paragraph 13 above, where she then sought the undernoted amounts: -

(i) £1,425.31 (as per payslip) for August 2018;

(ii) £72.00 (holiday pay @ 8 hrs x £9.00 per hour for September 2018);

(iii) £288.00 (wages @ 4 days @ 8 hrs @ £9.00 per hour) for September 2018;

(iv) £267.60 (SSP for 3 weeks 10/9 to 28/9, 3 x £89.20) for September 2018;

(v) £178.40 (SSP for 2 weeks 1/10 to 12/10, 2 x £89.20) for October 2018;

(vi) £720.00 (lieu of notice, 2 weeks basic salary as per Contract of Employment dated 20/09/2015);

(vii) £1,080.00 (Statutory Redundancy Payment, 1 week per year for each year, total 3 years);

149. In her closing submissions, the claimant varied the amount sought at item (v), reducing it from £178.40 to £142.72, because her employment ended on 10, rather than 12, October 2018. The unpaid wages from August 2018 at **£1,425.31** was clearly established as due and payable to her, and so I have found in her favour in that regard. So too, on the evidence led at this Final

Hearing, I am satisfied that she is due **£288**, plus **£267.60**, plus **£142.72**, totalling **£2,123.63**. The claimant did not insist on her complaint of unpaid holiday pay.

150. As she was not dismissed by the respondents, but she resigned without giving them any notice, the claimant is not entitled to pay in lieu of notice, which she had claimed in the sum of £720.

151. While she founded that on 2 weeks' notice pay, as per her 2015 contract of employment, produced at pages 1 to 3 of her Bundle, the two week period stated there is at odds with an employee's statutory right to minimum notice, as per **Section 86 of the Employment Rights Act 1996**, where the employer is required to give one week's notice for each completed year of service, up to a maximum of 12 weeks.

152. In those circumstances, the claimant's statutory minimum notice period, had the respondents sought to dismiss her, would have been 3 weeks, and not only two weeks. While I have not included, in my determination of this part of her claim, any amount for failure to pay notice pay, that is because it is a breach of contract claim, if it were due. Further, I note and record here that the claimant's loss of past earnings, post termination of her employment with the respondents, are addressed in the compensatory award for unfair dismissal.

153. Accordingly, in respect of wages unpaid and outstanding to the claimant as at the effective date of termination of her employment with the respondents, I have found that the claimant suffered an unlawful deduction from wages, contrary to **Sections 13 to 23 of the Employment Rights Act 1996,** in the period from 1 August 2018 to 10 October 2018**,** and the respondents are ordered to pay to her the total amount of those deductions in the sum of **£2,123.63**.

154. Further, I have also decided to award her the further sum of **£26.79**, as an additional amount, awarded in terms of the Tribunal's powers under **Section 24(2) of the Employment Rights Act 1996**, in respect of financial loss

attributable to that unlawful deduction from wages, namely bank charges incurred by the claimant, as vouched by her productions A10 to A12.

155. **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA") provides that if, in the case of proceedings to which the section applies, which includes an unfair dismissal complaint, as also unlawful deduction from wages, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer or employee has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase, or decrease as the case may be, the compensatory award it makes to the employee by no more than a 25% uplift, or downlift.

156. The ACAS Code of Practice on Disciplinary and Grievance Procedures is a relevant Code of Practice. Neither party led any evidence, at this Final Hearing, on any aspect of the other party failing unreasonably to comply with the ACAS Code. As the respondents never issued the claimant with a copy of any applicable grievance procedure, she did not invoke whatever (if any) grievance procedure the respondents may have had in place for their employees. In these circumstances, the Tribunal has not made any adjustments in light of **Section 207A**.

Is the claimant due any other type of award from the Tribunal?

157. I turn finally to this fifth question.

158. In respect of the respondents' failure to provide the claimant with an itemised pay statement for September and October 2018, contrary to Section **8 of the Employment Rights Act 1996**, the Tribunal. in terms of the its powers under **Sections 11 and 12 of the Employment Rights Act 1996**, makes a declaration to that effect, but there is no further monetary award made, as the Tribunal has already ordered the respondents to pay to her the total amount of unlawful deductions from her wages.

159. Had the respondents issued the claimant with these two month's pay statements, as per their legal duty to do so, then I would have anticipated that the respondents, through their accountants, would have lodged copies for use of the Tribunal at this Final Hearing, but they failed to do so, thus evidencing their failure, and supporting the claimant's evidence that she had never received payslips for September or October 2018.

160. As regards their failure to use a P45 to the claimant, about which the claimant complained in her email to the Tribunal of 19 December 2018, and in her evidence at this Final Hearing, this Tribunal has no power to order the respondents to provide her with a P45, so if she has not yet received it, through the respondents, or their accountants, the claimant should pursue that matter again direct with the respondents, and / or with HMRC as the relevant body for her tax affairs.

161. On the evidence before me, it is clear that while the claimant received a contract of employment from Ms O'Boyle, on behalf of the respondents, on 29 September 2015, she thereafter never received from the respondents any statutory written particulars of employment, in terms of **Section 1 of the Employment Rights Act 1996,** nor any applicable discipline / grievance procedures for the respondents.

162. At this Final Hearing, Mr Wright was unable to provide any documentary evidence to rebut the claimant's evidence that she had never received from the respondents any statutory written particulars of employment, or statements of any changes.

163. As the claimant did not expressly complain of this failure by the employer in her ET1 claim form, on one view, there is no such complaint formally pled and before this Tribunal, and further as she did not include it in her details of compensation sought from the respondents, it could be thought that it is a matter that the Tribunal should not consider any further.

164. However, I reject that highly technical approach, because the Employment Tribunal does not operate on the basis of formal written pleadings, but, in

terms of its overriding objective under **Rule 2** to act fairly and justly in dealing with any claim.

165. The Tribunal must avoid unnecessary formality, and be flexible in its procedure, so far as compatible with a proper consideration of the issues before it, and so, in the same way as the higher Courts (e.g. the Employment Appeal Tribunal in **Langston v Cranfield University [1998] IRLR 172**) have allowed Employment Tribunals to consider as a matter of course certain standard points in a unfair dismissal claim, whether or not specifically pled by a claimant, I take the view that a similar, pragmatic approach should be taken here, where, on the clear and unequivocal evidence before this Tribunal, the respondents, as an employer, have failed to address a basic statutory duty to provide written particulars of employment to an employee.

166. To fail to take this significant breach of employment law into account will result in a windfall saving to the respondents, and no additional award for the claimant. That is both unjust and inequitable, and it does nothing to address the statutory mischief that Parliament clearly intended, in enacting the **Employment Act 2002**, that Employment Tribunals should be able to address in cases before these Tribunals.

167. As the claimant has been successful before this Tribunal on her principal heads of claim, for unfair, constructive dismissal, and unlawful deduction from wages, an award of additional compensation is open to the Tribunal under **Section 38 of the Employment Act 2002**, and so, acting on my own initiative, for it is in the interests of justice to so do, I have decided to make an additional award in favour of the claimant. On the evidence before me, there are no exceptional circumstances which would make such an award unjust or inequitable.

168. Specifically, I have decided to award two weeks' gross pay to the claimant for that failure, being satisfied that, as that is the statutory minimum sum that can be awarded, it is just and equitable for me to make such an additional sum in the amount of **£720**.

169. I am satisfied that the statutory maximum award, of the higher amount of 4 weeks' gross pay, is not appropriate, as some credit has to be given for the fact that Ms O'Boyle issued a written contract of employment, albeit the respondents never followed up on that letter of 29 September 2015, with any statutory written particulars of employment.

170. As the respondents employ staff, the Tribunal trusts that, in light of their failures in this case, they will take steps to review their employment practices and procedures, and ensure proper and timeous compliance with issuing employees with statutory written particulars of employment, and itemised pay statements.

Employment Judge: Ian McPherson
Date of Judgment: 19 June 2019
Entered in register : 20 June 2019
and copied to parties