EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Turner**

Respondent: **Mileta Sports Limited t/a TOG24**

Heard at: **Sheffield** **On: 16 October 2019**

Before: **Employment Judge Little**

Representation

Claimant: Mr K McNerney of Counsel (instructed by BRM Solicitors)
Respondent: Mr J Robinson, Solicitor (Schofield Sweeney LLP)

RESERVED JUDGMENT

My judgment is that:

1. It was an express term of the claimant's contract of employment that she be paid for a 30 minute lunchbreak.

2. Alternatively, there was an implied term to that effect.

3. The respondent was in breach of the contractual term entitling the claimant to resign with the consequence that that resignation was a constructive dismissal.

4. Alternatively, the respondent was in breach of the implied term of trust and confidence and again, that was such to justify the claimant resigning with the same consequence.

5. The constructive dismissal was unfair.

6. The constructive dismissal was wrongful.

7. The complaint in respect of unauthorised deduction from wages succeeds and the respondent shall pay to the claimant the sum of £115.96 forthwith.

8. Remedy in respect of unfair dismissal and wrongful dismissal will be determined at a remedy hearing, the date of which is to be fixed.

REASONS

1. **The complaints**

1.1 In a claim form presented on 20 June 2019, Mrs Turner brought the following complaints:

1.1.1 Unfair dismissal (constructive dismissal);
1.1.2 Wrongful dismissal (constructive);
1.1.3 Unauthorised deduction from wages.

2. **The Issues**

2.1 The parties had prepared what was described as an agreed list of issues. However, on discussing the matter further with the parties, and in particular, the respondent's solicitor, it was confirmed that several of the issues were in fact not relevant issues. The respondent did not contend that the claimant had resigned for any ulterior reason and nor did it contend that any fundamental breach of contract had been affirmed. Further, although in the grounds of resistance an alternative defence had been that if there had been a constructive dismissal, it was fair because of some other substantial reason, I pointed out that that reason had never been articulated. Having considered the matter, Mr Robinson confirmed that the respondent was no longer pursuing that alternative case. The defence to the unfair dismissal and wrongful dismissal cases were simply that there had been no constructive dismissal.

2.2 In those circumstances, and by reference to the parties list, the issues which I have to determine are as follows.

<u>Constructive dismissal</u>

2.3 Was there an express or implied contractual term which entitled the claimant to be paid for a 30 minute lunchbreak?

2.4 If so, was the cessation of payment for that lunchbreak, with effect from 1 February 2019 a fundamental breach of contract?

2.5 Alternatively, was the cessation of payment for the lunchbreak a fundamental breach of the implied duty of trust and confidence?

In the claimant's particulars of claim, she contended that trust and confidence had been destroyed because the respondent had imposed the change to her terms and conditions either at all, or in the manner in which it did (paragraph 35).

2.6 If the cessation was found to be a breach of trust and confidence, did the respondent have reasonable and proper cause for withdrawing the payment?

2.7 If the claimant was constructively dismissed, was that dismissal unfair?

On the basis that the respondent no longer contends that there was a potentially fair reason for a constructive dismissal, inevitably this would be found to be an unfair constructive dismissal.

2.8 If the claimant was constructively dismissed, was that wrongful having regard to the appropriate period of notice which should have been given by the respondent in respect of the dismissal?

Unauthorised deduction from wages

2.9 If the claimant did have a contractual right to be paid for her 30 minute lunchbreak, was the respondent's failure to make that payment for the period 1 February 2019 to 10 March 2019 (the effective date of termination) an unauthorised deduction from wages? It is agreed that the amount which would have been paid within that period if the claimant had a contractual right to it, it would have been £115.96.

3. Evidence

3.1 The claimant has given evidence in a 56 paragraph witness statement. The respondent's evidence has been given by Mr S Bethall, Head of Retail; Ms E Woodcock, Head of HR (who heard the claimant's grievance) and Mr R Lycett, Head of Business Systems (who head the grievance appeal).

4. Documents

4.1 The parties had agreed a trial bundle which ran to 165 pages.

5. Why was judgment reserved?

5.1 This claim had been listed for one day and the parties had not suggested that any longer hearing was required. The intention was that the one day hearing would deal with both liability and remedy. As noted above, there were four witnesses and the claimant's witness statement at least is quite lengthy. A good proportion of the bundle also had to be read prior to the live hearing. I am grateful to the parties' representatives for adhering to the timetable that we set which meant that it was possible to conclude the evidence just prior to 4 o'clock. However, there was insufficient time for the parties' submissions, let alone for me to deliberate and prepare a judgment to deliver to the parties on the day. In those circumstances, the representatives agreed that they would provide written submissions no

later than 23 October 2019 and my judgment would be reserved accordingly.

6. **The facts**

6.1 Mrs Turner commenced her employment with the respondent on or about 2 August 1996. She was employed as a store manager for the respondent's Doncaster branch.

6.2 The respondent's business is the sale of outdoor clothing.

6.3 The claimant was issued with a written contract at the commencement of her employment but unfortunately, this has now been lost. Neither party have been able to provide a copy.

6.4 The claimant's evidence is that when, in 1996, she was presented with the contract of employment to sign, she noticed that there was a clause which dealt with rest breaks and lunchbreaks but that it did not specify whether those breaks were paid or unpaid. The claimant says that she raised that issue with a manager called Joanne Ingham and the latter assured her that the breaks were paid. The claimant's evidence is that she then signed the contract on that understanding.

6.5 It is common ground that the claimant was entitled to two, 15 minute rest periods during the working day and these were paid. The dispute in this case is whether the 30 minute lunchbreak was also paid. It is also common ground that the claimant was in fact paid for the 30 minute lunchbreak for all but approximately the last month of her 22 years of employment.

6.6 On 23 June 2000, the claimant was promoted to the position of North Midlands Area Manager. Apparently no revised contract of employment was issued at this time. If it was, I have not seen it and it has not been referred to during this hearing.

6.7 In April 2015, the claimant was asked to sign a new contract of employment. A copy of this is in the bundle at pages 50 to 52. The claimant signed this document on 12 May 2015. This contract makes no reference to rest or lunchbreaks. It describes the claimant's hours of employment as 40 hours per week. It makes reference to the TOG24 staff handbook, but only in the context of the disciplinary rules. It also includes a clause which says that the written agreement contains the entire agreement between the parties and supersedes all prior arrangements and understandings, whether written or oral. The claimant does not contend that she raised any issue about the absence of references to rest and lunchbreaks and the payment thereof. However, she said in cross-examination, that this was because she had, by that stage, been in receipt of a paid lunchbreak for almost 19 years and in any event, that continued after the 2015 contract came into force.

6.8 In November 2018, Mr Scot Bethell joined the respondent as Head of Retail.

6.9 On 13 November 2018, the claimant began what would be a two week absence and the fit note which note which she provided to her employer (page 44d), gave the reasons for that as domestic/work stress. The claimant also sent her employer an e-mail on 13 November 2018, in which she gave her own explanation for the absence. She referred to being the principal carer for her mother who had various medical needs including dementia (page 45).

6.10 On 26 November 2018, the claimant wrote to Mr Bethell informing him that after much consideration, she would like to stand down from being an area manager and return to her role as store manager at Doncaster which she described as her first love. A copy of that e-mail is at page 47.

6.11 The claimant returned to work on 27 November 2018.

6.12 On 3 December 2018, a new contract of employment was sent to the claimant. A copy appears at pages 29 to 32. The claimant's job title was now described as 'Store Manager – Doncaster'. Clause 5 of the agreement provided that the claimant was contracted to work 40 hours per week. The contract made reference to the company handbook, but that was only in the context of identifying the location of the disciplinary and grievance procedures. Those procedures were described as being non-contractual (clause 13). Again, the contract included an 'entire agreement' clause (clause 21). This contract was also silent on the question of breaks.

6.13 On 18 December 2018, the claimant sent an e-mail to Emma Woodcock, from whom she had received the contract. She raised various queries about the contract, one of which was 'breaks remain paid', posed as a question. Ms Woodcock's reply to this query was "this is not a contractual term". This e-mail exchange is on page 49.

6.14 On 21 December 2018, Mr Bethell sent an e-mail to all the store managers and this was copied to area managers (which is what the claimant still was at this date). A copy of that e-mail is at pages 56 to 60. The subject matter is holiday and breaks and Mr Bethell said that there were going to be "exciting changes". On the topic of breaks, the e-mail contained the following:

> "Our teams welfare is important to us and therefore wanted *(sic*) to update our policy around break times to ensure we have consistency across our portfolio of stores. It is important that our employees take their breaks so that they are refreshed and firing on all cylinders to give that great TOG service we expect. The new guidelines are attached, this will take effect from 1 February."

6.15 The guidelines are set out on page 58. Break times are shown as varying according to the length of the shift. For example, for an eight hour shift, the break time would be one hour. However, in every case that was to be unpaid.

6.16 Also on 21 December 2018, Steve Conn, North East Area Manager (who would in due course become the claimant's new line manager) sent an e-mail to the Doncaster store, apparently addressed to the assistant manager there, Tony. This e-mail is obviously in response to something which Tony had sent to Mr Conn but I have not seen Tony's e-mail. Mr Conn writes that he hasn't "went right through it" (sic) and I assume that the "it" is the new holiday breaks guideline/policy. Mr Conn then poses the following question:

> "Does Michelle (the claimant) get paid for her lunches? I know some of the longer serving managers had a different contract."

6.17 On 1 January 2019, the claimant reverted to be a store manager, as she had requested.

6.18 On 3 January 2019, the claimant sent an e-mail to Mr Conn, as mentioned – now her line manager. A copy of that is at pages 61 to 62. The claimant writes that she understands that under the grievance procedure, she should raise issues with her line manager first. The claimant goes on to note that the new contract "does not clearly state that my breaks are to be paid, as they have the last 22 years, although I have an e-mail from Emma Woodcock confirming this, it needs to be included within my contract to avoid being replaced with future break times policies".

6.19 During the course of cross-examination, the claimant explained that the e-mail from Emma Woodcock to which she was referring were the responses to the claimant's queries of 18 December 2018 (page 49). The claimant acknowledged that Emma Woodcock had not confirmed that breaks would be paid, she had simply stated that that was not a contractual term.

6.20 On 4 January 2019, at 09:28, Mr Bethell sent an e-mail to the area managers and this was copied to Ms Woodcock. A copy is at pages 63 to 65. Mr Bethell referred to an updated policy with regard to breaks "with further clarification on what is paid etc".

He went on to write:

> "I think it is important that stores know that we are not a dictatorship and that reasonable concerns will be listed *(sic)*. This is all part of you raised a concern, we listened and we acted. *(I assume that that is a reference to some sort of grievance process*). This doesn't mean that all things will change if they don't like them, but I feel this is reasonable based off what we do here in the office and warehouse and what has been in place and this is a nice perk. But this isn't standard in retail so they need to be aware of this.
>
> We will be updating outdated policy continuously, some will change/some wont but we have to bring retail into modern times and change is inevitable. This was actioned initially due to stores applying their own rationale as shown in the old end of day reads to what is paid and what isn't, therefore, going forward consistent application across the fleet of any policy is critical. We have to be in a place that has a relevant policy

> in place in order to be able to hold our teams accountable to it, but also for them to ask for what they are entitled to. This is about openness and transparency."

He went onto write:

> "I do know there are some odd contracts out there, as I am sure you can imagine, I know Sally from Keswick has a contract for 23 days holiday. Therefore, we will need to manage this locally."

6.21 The breaks policy which was included within Mr Bethell's 4 January e-mail is at page 65. It included a table which again sets out breaks by reference to shift lengths but now with columns for paid breaks as well as unpaid breaks. Taking again the example of an eight hour shift, the paid break is 30 minutes and the unpaid break, a further 30 minutes.

6.22 Later in the morning of 4 January 2019, Mr Conn sent an e-mail to the managers within his area and attached to it a copy of the break policy. A copy is at page 66A. He noted that changes were happening within the company regarding breaks, holidays and other policy changes which he said were necessary "to enable the company to grow with everyone doing the same thing". He went on to note that at present, there were many different contracts with different breaks and an over-complicated holiday system. He went on to write:

> "Any changes remain with best intentions but it appears that a lot of staff are unhappy with some of these changes."

6.24 One of the people who was unhappy was the claimant. Later still, on 4 January, there was a telephone conversation between the claimant and Mr Conn. Mr Conn reported this to Mr Bethell in his e-mail of 4 January sent at 6:20pm (page 66). He wrote:

> "I had quite a challenging conversation with Michelle concerning breaks. It's her, not the staff who is the issue. As she has always had a full hour paid break, she sees this as an "unlawful reduction of pay" and is seeking legal advice over the matter. I did explain everything to her about what, why and how bus *(sic)* she is very negative about all the changes."

6.25 It seems as though there may have been a telephone conversation between Mr Conn and Mr Bethell in the meantime, but later still that evening, at 20:22, Mr Conn sent a further e-mail to Mr Bethell, in which he set out his notes of the telephone conversations he had had with the claimant that day. Mr Conn noted that the claimant's main issue had been that she had always had 'a full hours' paid lunch' (although referring to an hour is somewhat misleading, as the issue here is the unpaid 30 minutes, not the two paid 15 minutes) and that was something that had been done for 20 plus years. Mr Conn recorded that he had told the claimant that changes were needed so that everyone was on the same page and the practice of a full hours' paid lunch was something from the past.

Mr Conn added that:

> "Just to clarify the situation with the hours' paid lunch. When I first took over as area manager 15 years ago, I noticed the manager at our then Newcastle store (now long gone), was paying himself for an hours' lunchbreak, I questioned this with who I believe was Paul Ramsden (it might have been Ian Ward), and was told that managers who were employed from this period were paid their lunches as part of their divisional terms and condition *(sic)*. This is the only reason I know about this."

6.26 I should add that during the course of Ms Woodcock's evidence to me, she accepted that she had not been aware of this e-mail when she subsequently considered and determined the claimant's grievance on this matter.

6.27 On 7 January 2019 at 10:42am, Mr Bethell sent an e-mail to the claimant (page 68), he explained that he understood that there was some concern over the claimant's breaks. He went on to say that adjustments had already been made to the break policy and that would go out later that day. He said that he understood that "you have been working off having an hours' paid lunch". He then posed two questions. Was it just the claimant that had been doing that, or was it her store or previous area? Secondly, did she have any written documentation that supported that either in policy format, contract or e-mail.

6.28 The claimant replied to this e-mail (page 69) informing Mr Bethall that paid breaks were in place from the start of her employment 22½ years ago and that was prior to her being an area manager in 2000. She said that from the legal advice she had received, the paid breaks have formed part of her day-to-day contract.

6.29 On 7 January 2019, Mr Bethall sent an e-mail to various store and area managers and the recipients included the claimant. It was in these terms:

> "I understand from the recent wash-up of the breaks policy, that there are some staff that are accustomed to having a 30 mins paid lunch as well as having the 30 mins paid break.
>
> The business updated its' employee handbook back in 2007, where the policy around breaks and lunches was clearly outlined and available for everyone to see on the shared drive.
>
> I have agreed to maintain this generous benefit, therefore there will be no change to this allowance, which is our company policy, not a contractual term.
>
> I understand that you have been operating differently to this by having a paid lunchbreak, however, now that I am aware of this, I must ensure that we have one policy which is consistently applied across all our employees.
>
> Therefore, as of 1 February, as previously communicated, you will be required to adhere to the company breaks/lunches policy and paid lunchbreaks will not be allowed."

That is at page 73B.

6.30 On 8 January 2019, the claimant again wrote to Mr Bethell. She explained that having again consulted her solicitor, her complaint regarding there being any unpaid breaks stood. She said that it had been custom and practice that all her breaks had been paid since she had started in 1996. She believed that any changes to that would be classed as a unilateral variation of contract by the company. No negotiations or settlements had been made to change that to date. She believed further that any deductions from pay for breaks would be a breach of contract. She intended that her letter be regarded as an official grievance. (see page 74).

6.31 On 10 January 2019, Mr Bethell wrote to the claimant (pages 75 to 76). The e-mail sets out a list of questions which are said to be raised as part of the fact-finding aspect of the grievance process.

6.32 One of the questions was about the issue of a new employee handbook in 2007 which had only referred to two 15 minute breaks being paid. The claimant was asked whether as an area manager she had enforced that throughout her area. Further, did she raise with anyone at that time something in the handbook which contradicted what the claimant understood her entitlement to be. The eighth question is in fact a statement by Mr Bethell and it reads as follows:

> "We have not amended the policy since 2007, and are now just reiterating this, therefore no change has taken place. When we received the weekly wages sheet from you, all that it states is the hours that you are being paid for, as agreed by the store manager, in this instance yourself, therefore it is reasonable that the business would not know from this what you have or have not been paying yourself with regard to breaks."

6.33 Emma Woodcock, Head of HR, was asked to determine the claimant's grievance, once Mr Bethell had completed his investigation. Ms Woodcock chose not to invite the claimant to a grievance meeting – in breach of the respondent's own grievance procedure (see page 109) and for that matter, in breach of the ACAS code. No explanation for this is offered in Ms Woodcock's witness statement and in cross-examination her explanation was simply that they would normally have a grievance meeting. Instead, Ms Woodcock sent an e-mail to the claimant on 1 February 2019 (pages 86-88). Part of Ms Woodcock's investigation was to make enquiries of long-standing employees. On page 100 of the bundle is a list of employees and the two 'tram lines' indicate the range of the enquiry, starting with the claimant in 1996 and there are then employees whose employment began variously in 1997, 1998, 1999 and onwards up to 2003.

6.34 In her grievance outcome letter (pages 86-88), Ms Woodcock wrote that the contract terms for those individuals who had been investigated disclosed "no record of a paid 30 minute lunchbreak in addition to the two 15 minute paid breaks. In respect of custom and practice for the same period, there has been no supporting evidence found that others are claiming an additional 30 minutes paid lunchbreak. It was important to investigate this area in reference to your view of 'old contracts'.".

6.35 However, in Ms Woodcock's witness statement (paragraphs 4 and 5) she accepts that having spoken to Andrew Tucknutt, a store manager from Mansfield, who commenced employment in October 1998; Andrew Lloyd, an assistant store manager in Mansfield, who commenced employment in 2003, and Donna Emms, a store manager in Swindon who commenced employment in 1999, they had each confirmed that they all had been paid for their lunchbreaks. In paragraph 5 of her witness statement she goes on to state that none of these three employees were able to confirm why they had received that payment but did accept that it was "an historical arrangement going back at least 20 years". The witness statement also states that all three accepted that they were not entitled to it, although Mr Lloyd suggested that he would make a challenge, but I am told that he did not.

6.36 It follows that when in the grievance outcome Ms Woodcock refers to there being no supporting evidence, she must presumably be referring to no supporting documentary evidence, but fails to mention the oral evidence that she had received from these three employees. No written statements were taken from those employees.

6.37 The grievance outcome e-mail went on to inform the claimant that investigations into individual practices of those who had commenced employment around the time of the claimant's start date had not supported the claimant's view in respect of custom and practice. This also seems to be erroneous bearing in mind the evidence which Ms Woodcock has given to me. The respondent placed reliance on what was set out in the 2007 employee handbook. The outcome e-mail concludes in these terms:

> "Whilst it is possible for custom and practice to become an implied term within a contract, this would be if the custom was commonly known, however unfortunately, the findings of the investigation do not support your belief of an additional 30 minute paid lunchbreak, as well as the two 15 minute breaks and the findings support the policy as confirmed on 4 January 2019, therefore, considering all of the above it has been decided that your grievance has not being upheld *(sic*) and no further action is required. Therefore your entitlement to paid breaks are two 15 minute paid breaks and an unpaid 30 minute lunchbreak and this is consistent across the retail business."

6.38 So, it was that from 1 February 2019, the respondent ceased to pay the claimant for her lunchbreaks.

6.39 On 5 February 2019, the claimant appealed against the grievance outcome. A copy of her e-mail of that date and her grounds is pages 89 to 92. This is a copy of the grievance outcome with the claimant's comments and objections interspersed. The essential thrust of the appeal was as it had been in the grievance itself, namely that she had been paid lunchbreaks since 1996 and was disappointed that the respondent was now seeking to deny that and to take away the payment which she believed was a breach of contract. She believed that the respondent had failed to consider the appropriate facts and had reached a wrong conclusion.

6.40 The person appointed to hear the appeal was Mr Lycett from whom I have heard. He conducted an appeal meeting on 18 February 2019. Mr Lycett did not retain any notes from this meeting but there is some record of the meeting as recorded in the written decision which ultimately was sent to the claimant.

6.41 That was under cover of Mr Lycett's e-mail of 1 March 2019 (page 94) and the decision which was attached to that e-mail is at pages 95 to 99. The appeal was unsuccessful.

6.42 As part of his investigation, Mr Lycett randomly selected a number of employees from the list now at page 100 in the bundle, (long-serving employees). He selected five employees, Donna Emms and Andy Tucknutt (who had previously been approached by Ms Woodcock); together with Kevin Harris, James Harrison and Paul Ramsden. His enquiries were made by e-mail. An example, the e-mail which was sent to Mr Tucknutt, is at page 93f. The question posed is:

> "Are you aware of the practice? (historic or current) of retail employees being paid for lunch breaks?"

6.43 Mr Lycett's evidence is that Ms Emms, Mr Tucknutt and Mr Harrison telephoned with their replies. Mr Lycett was able to speak directly to Mr Harrison and Mr Ramsden because they were based in the same location as him, presumably head office. I have seen no notes in respect of what was said on the telephone or in person by any of these five witnesses. Mr Lycett, explaining that he was "a digital kind of guy" had destroyed the notes of the telephone conversations. In his witness statement, Mr Lycett simply sets out the 'yes' or 'no' answer to the question which he had posed. The answers given by Ms Emms, Mr Harris and Mr Tucknutt was 'yes' and the other two, 'no'. During the course of his cross-examination, Mr Lycett accepted that those he contacted were saying there was a verbal contract – that presumably means those who replied in the affirmative.

6.44 Mr Lycett confirmed that he had not made any enquiries about anyone working in the Newcastle area (despite what Mr Conn had reported to Mr Bethall about this previously). Mr Lycett was not able to explain or give any detail as to what else the three affirmative employees had said – for instance, how they were aware of the practice. Clearly, they were not asked any follow up questions, such as did the practice apply to them, did it apply to others that they knew of, over what periods had payments been made so on.

6.45 Within the appeal outcome (page 96), Mr Lycett recorded his findings in this regards as follows:

> "The responses received from the above and subsequent discussions with relevant individuals leads this investigation to believe that certain employees were indeed aware of the practice of lunchbreaks being claimed as work time. However, this was by *(sic*) not accepted as the norm by every employee questioned. The statistics being that of all the employees*, (therefore five*) questioned 40% of the responses given were

> not aware of this practice….. The consistent message from the employees who were aware and, in some cases, claiming the 30 minute lunchbreak as paid time until the policy change in early 2019, was that there was insufficient documentary evidence to support the practice and the historic agreements were purely verbal."

6.46 Whether or not that was the "consistent message" of the employees remains open to conjecture in the absence of any proper documentation of the enquiries which Mr Lycett made.

6.47 On 5 March 2019, the claimant's solicitors wrote directly to Mr Ward, a Director of the respondent. That letter is at pages 104 to 105. It was a letter before action in that it gave the respondent "one final opportunity to reverse (the) unlawful decision". Ms Woodcock subsequently replied (page 106) that the respondent's decision would not be altered.

6.48 On the evening of 8 March 2019, the claimant sent an e-mail to Ms Woodcock (page 107). She reiterated her position on entitlement to paid lunchbreaks and stated that she believed that by removing that payment without consent, there had been a repudiatory breach of the contract. She was resigning on that basis and believed that she had been constructively dismissed.

7. The parties submissions

7.1 As agreed, at the end of the hearing, both parties have provided their written closing submissions within the time stipulated.

Claimant's submissions

7.2 Mr McNerny describes the claimant's primary position as being that there was an express agreement that she should be paid for her lunchbreak. That is on the basis that the agreement was reached at the commencement of the employment when the claimant was assured by her then manager, Joanne Ingham, that these breaks were to be paid. The claimant relies also in this context on Mr Conn informing Mr Bethell on 4 January 2019 that long-serving managers were entitled to paid lunches as part of their original terms and conditions.

7.3 Alternatively, Mr McNerny contends that there was an implied term on the basis that the claimant had received the payment for over 20 years. It was contended that that in itself meant there was an implied term and the only alternative was that it had been paid in error. However, the claimant did not understand the respondent's case to be that a payment had been made in error (although as will be seen, this is eluded to in Mr Robinson's written submission). Mr McNerny therefore deals very briefly with the issue of an implied term.

7.4 Alternatively, it was contended that withdrawing the paid lunchbreak breached the implied term of trust and confidence. There had been no prior consultation, the change was effected unilaterally.

7.5 The respondent could not show that it had reasonable or proper cause for withdrawing the payment.

Respondent's submissions

7.6 Mr Robinson's submission begins with a statement that it was common grounds that there was no express term. In fact, as I have noted, Mr McNerny makes his submissions on the basis that the claimant's primary case is that there was an express term. I should add that although not much is said about the status of the alleged contractual term in the particulars of claim, at paragraph 24 the claimant does plead that there was an express verbal agreement or alternatively the entitlement was established custom and practice. Perhaps for this reason, Mr Robinson's submissions concentrate on the issue of whether there could be an implied term and the legal requirement for that to be found to exist.

7.7 Reference is made to the case of Heatherwood and Wrexham Park Hospitals Trust v Mrs Beer 2006 UK EAT 0087/06/140 and at the hearing Mr Robinson had provided me with a copy of that judgment of the Employment Appeal Tribunal. One of the issues which the Employment Appeal Tribunal was dealing within that case, was whether Whitley Council conditions had been incorporated into Mrs Beer's contract of employment. One of the arguments in her case was that those conditions were to be implied as being incorporated by custom and practice. The Employment Appeal Tribunal deal with the law on that issue in paragraph 51 of their reasons where it is indicated that for this to have been the case the test was were the conditions "reasonable, notorious and certain" (a phrase deriving from the case of Devonald v Rosser [1916] 2KB 728 and that the parties must be shown to be applying the term because there is a sense of legal obligation to do so – a principle deriving from Solectron Scotland Limited v Roper, 2004 IRLR 40.

7.8 Mr Robinson had also provided me with a copy of a first instance High Court decision, unreported and that was Patel v De Vere Group Limited in respect of a claim brought in the Mercantile Court. This is quite a lengthy judgment and I have been directed to paragraphs 45 to 72 and also it seems in particular to paragraph 73. Here, His Honour Judge Hegarty QC summarises the law on custom and practice implied terms. Among the relevant principles are that there must be sufficient evidence of the alleged custom and practice to allow the court to infer that both employer and employee would regard themselves as bound by the practice, notwithstanding that there might have been no express provision to that effect in any contract of employment. Reference is also made to what is described as the traditional phrase, "notorious, certain and reasonable". It is also pointed out that it would be difficult, if not impossible, for a term to be implied by reason of subsequent custom and practice where the proposed term would be inconsistent with the express provisions of the original contract; at the very least, it would need a very long-established practice to have such an effect.

7.9 As noted above, Mr Robinson does refer to mistake when he writes towards the end of the submission that the claimant was benefiting from enhanced pay which was inconsistent with company policy and that was predicated on a genuine mistake by the business arising from an antiquated system of pay based on the submission of wage sheets that were neither thorough nor scrutinised.

8. My Conclusions

8.1 Was there a relevant express term?

8.1.1 I need to determine whether, on the balance of probabilities, a representation was made to the claimant at the commencement of her employment that breaks, including crucially the lunch break, would be paid.

8.1.2 I then need to determine whether that representation became an express contractual term, where the essential issue is whether there was a contractual intention.

8.1.3 In respect of the first issue, the evidence before me is limited and one-sided. The claimant is relying upon a recollection of something she says that she was told over 23 years ago, by the time of this hearing. I have not, of course, had the benefit of hearing from the person who the claimant says made the representation, Joanne Ingham.

8.1.4 Despite the passage of time, it is clear that an entitlement to a paid lunchbreak has always been important to the claimant. It's removal in 2019 was sufficiently important to lead to the claimant resigning. On the balance of probability, therefore, I am prepared to accept the claimant's evidence that she did raise the issue in 1996 with Joanne Ingham and the representation was made.

8.1.5 On the second issue, the contractual status of that representation, I have considered the principles set out in the old, but still authoritative decision in **Heilbut, Symons & Co v Buckleton** [1913] AC 30. One of those principles is that if the representation is followed by the execution of a formal contract in writing, something which has been represented prior to the making of the contract is less likely to be regarded as part of the contract if it is not incorporated into the written document.

8.1.6 The chronology in the case before me is that the claimant queried the issue about paid breaks, received the reassurance and *then* signed the contract. The claimant does not suggest that any amendment was made to the contractual document to reflect the representation which had been made. However, I also need to take into account whether Ms Ingham was in a better position to ascertain the accuracy of the statement about lunchbreaks than the claimant at the material time. At this point in time in 1996 the

claimant was not yet an employee, whereas, Ms Ingham was a manager and therefore relatively senior employee. Accordingly Ms Ingham was in a good position to ascertain the accuracy of the statement that she made to the claimant.

8.1.7 On the vital question of contractual intention, I have heard no evidence from the maker of the alleged representation, although I appreciate that the burden of proof rests on the claimant. On the basis that the claimant says that she withheld her signature and delayed entering into the employment contract until she received this clarification from Ms Ingham, I am prepared to accept that when Ms Ingham made the statement, which I find she did, she was warranting the accuracy of that statement.

8.1.8 In general terms, I also take into account that Mr Conn acknowledged in his 4 January 2019 e-mail to Mr Bethell (page 67) that there were managers employed at about the time the claimant was, whose terms and conditions included payment for lunchbreaks.

8.1.9 Accordingly, on balance I conclude that there was an express term in the claimant's contract of employment to the effect that she would be paid, not only for the two 15 minute breaks during a working day but also the 30 minute lunchbreak.

8.1.10 For the sake of completeness, I find that what may have been set out in a 2003 employee handbook and which is apparently set out in the one page extract from the 2007 handbook (page 99), cannot be regarded as a contractual document, still less one which varies (unilaterally) the express term I have found. The reference in the handbook is clearly contradictory to the express term but that does not mean anything if the handbook itself is not contractual, let alone the difficulties for the respondent having regard to the unilateral aspect. There is nothing in the written contract of employment to suggest that the handbook is a contractual document. In fact, the inclusion of the 'entire agreement' clause in the contract and the reference to the disciplinary grievance procedure as set out in the handbook not being contractual clearly indicates the opposite.

8.2 Was there a relevant implied term?

8.2.1 This is essentially an academic question, having regard to my primary finding and on the basis that it there could not be an express term and an implied term about the same subject matter.

8.2.2 However, I go on to consider this issue because it is an alternative part of the claimant's case and it is necessary in case I should be wrong on my conclusion in relation to the express term.

8.2.3 An important factor here would is whether there is sufficient evidence of the alleged custom and practice to permit the inference that both parties regarded themselves as bound by the practice. There is also the requirement for the practice to be notorious, certain and reasonable. In Patel it was said that 'notoriety' for these purposes meant no more than sufficiently widespread knowledge and understanding of the practice. I also have to look at the circumstances prevailing at the time when the contract was made.

8.2.4 Returning to my findings about what Ms Ingham said, it appears that she was aware of the alleged practice otherwise she would not have informed the claimant of it. I also take into account that the result of the not exactly scientific or comprehensive enquiries made by Mr Lycett were that a significant majority, albeit of a small pool, were aware of the practice, at least one assumes at the time that their respective employments began. Although the evidence before me is limited, as no statements were taken from the five managers there is nevertheless a significant majority within that pool. Further, it is clear from Mr Conn's e-mail referred to earlier, that the respondent was aware of "old contracts". It is also clear from Mr Bethell's e-mail of 7 January 2019 (page 73b), that he was aware that, when addressing his area managers, "you have been operating differently … by having a paid lunchbreak". Mr Bethell's e-mail goes on to in effect say that he is bringing that practice to an end.

8.2.5 In terms of certainty, the provision was a simple one and it was hardly unusual and so in my judgment cannot be regarded as being unreasonable.

8.2.6 For these reasons, I conclude that if I should be wrong in relation to my finding on an express term, there was nevertheless an implied term that the claimant would have a 30 minute lunchbreak paid.

8.3 Was there a breach of the implied term of trust and confidence?

8.3.1 This is again, now an academic question but again for the sake of completeness I deal with it should I be wrong in relation to my conclusions in respect of the express and implied terms.

8.3.2 What is abundantly clear is that, for these purposes regardless of contractual entitlement, the claimant had in fact been paid for her lunchbreak throughout the whole of her employment in excess of 22 years. The respondent does not contend that that state of affairs had arisen because of any dishonesty on the claimant's part.

8.3.3 It is understandable that the respondent, realising that, as Mr Bethell put it in his 4 January 2019 e-mail (63) that there were "some odd contracts out there", that it would be a good thing for there to be equality and uniformity in terms of not only daily breaks but also annual leave arrangements.

8.3.4 However, a reasonable employer who wished to make such changes as were necessary to achieve that uniformity would be duty bound to consult with the affected employees and particularly those who were likely to lose out if the reform was put into effect. The consultation would have permitted the employer to fully explain it's rationale, and for employee to explain his or her understanding of their entitlement. In a given case there might have been scope for any perceived rights to be "bought out". Ultimately, if mutual agreement could not be reached, the employer would have the "nuclear option" of dismissing the employee but then immediately offering the employment on new terms.

8.3.5 However, none of that happened here. Instead, and somewhat cynically, the employer chose to insist to the claimant that she had no right to the entitlement and removed it unilaterally. Such consultation as took place was at the instigation of the claimant albeit by the mechanism of raising a grievance. However, by failing to have a grievance hearing, the respondents' failure in terms of consultation was exacerbated. Having an appeal hearing did not sufficiently remedy that failure.

8.3.6 Whilst this employer could, in principle, have had reasonable cause to remove the paid lunchbreak, after due process, the way in which it approached the matter led to there being loss of trust and confidence by a very long serving employee.

8.3.7 Accordingly, I find that even if there was no express or implied contractual term for payment, the claimant's resignation can properly be regarded as in response to the breach of the fundamental implied term of trust and confidence.

9. The status of the constructive dismissal

9.1 Inevitably, the claimant's constructive dismissal must be found to be unfair as the respondent has not argued in the alternative that any dismissal found was for a potentially fair reason.

9.2 The dismissal was also wrongful insofar as the notice to which the claimant was entitled on dismissal was less than that which she gave on resigning.

10. **The unauthorised deduction from wages complaint**

10.1 In circumstances where I have found that there was an express term, or failing that, an implied term, the failure by the respondent to pay for lunchbreaks in the latter part of the claimant's employment amounted to an unauthorised deduction from wages.

Employment Judge Little

Date 5th November 2019