Case Number: 2203682/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT (sitting alone)**
BETWEEN:

Ms S Burton

Claimant

AND

Troia (UK) Restaurants Ltd

Respondent

ON: **26 January 2021**
Appearances:
For the Claimant: **Mr S Sanders, counsel**
For the Respondent: **Mr S Joshi, solicitor**

REASONS

1. This decision was delivered orally on 26 January 2021. The judgment was sent to the parties on 29 January 2021. The claimant made a request for written reasons by email on 11 February 2021.

2. By a claim form presented on 22 June 2020, the claimant brought claims of unfair dismissal, unlawful deductions from wages and breach of contract for notice pay. The claimant was employed by the respondent restaurant group as an events manager. She seeks three months full pay from March to June 2020 and three months' notice pay.

3. The unfair dismissal claim was struck out by Regional Employment Judge Wade because the claimant did not have two years' service. The claimant did not object to the strike out.

This remote hearing

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. On the date of this hearing there was no option to hold an in person hearing at the London Central Employment Tribunal as the building was closed. The tribunal considered it as just and equitable to conduct the hearing in this way.

5. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

6. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties.

7. The participants were told that is was an offence to record the proceedings.

8. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The issues

9. The issues were identified at a preliminary hearing by telephone before me on 1 December 2020.

10. It was accepted by the parties at that hearing that there was a binding contract between the parties.

Unlawful deductions from wages

11. Was there a deduction from wages with effect from 23 March 2020 until the claimant's termination date (10 August 2020)?

12. If so, was the deduction required or authorised to be made by virtue of a relevant provision in the claimant's employment contract?

13. Specifically, was the suspension of the claimant's start date carried out in implementation of a lay-off clause in her employment contract set out in the Staff Handbook? Did the claimant have notice of this clause?

14. Was the lay-off clause incorporated into the claimant's employment contract?

15. Did the respondent exercise that clause?

16. In the alternative, did the commencement of a government enforced lockdown, with effect on 23 March 2020, entitle the respondent to withhold pay from the claimant?

17. If not, did the claimant either agree to: defer her 23 March 2020 start date to 23 April 2020 or to defer her start date indefinitely?

18. If not, did the claimant waive her right to payment for the period from 23 March 2020 to 10 August 2020?

Constructive wrongful dismissal

19. Was there a dismissal? Did the respondent act in one, or some, or all of the following ways, and if so, did the same amount to a breach of an express term of the employment contract and/or the implied term of mutual trust and confidence?

    a. The unilateral postponement of the claimant's start date from 23 March 2020 to 23 April 2020 or indefinitely.

    b. The unilateral indefinite suspension of the claimant's start date thereafter.

    c. The failure to pay the claimant.

    d. The refusal to acknowledge the claimant's employment when the respondent stated that there was no binding contract of employment.

20. If so, was / were such breach(es) sufficiently serious to be repudiatory breaches?

21. If so, did the claimant waive the breach?

22. Did the claimant resign in response to the breach(es)?

23. Is the claimant then entitled to her contractual notice pay of three months?

Witnesses and documents

24. The tribunal heard from the claimant. For the respondent the tribunal heard from two witnesses: Ms Sarah Conway, HR Manager and Ms Claudia Ward, Head of Events.

25. There was an electronic bundle of documents of 106 pages. The tribunal was also sent the respondent's 81 page Staff Handbook, although most of it was not relevant to the issues for determination. The relevant section was contained in the original bundle.

26. I had written submissions from both parties to which the representatives spoke plus a bundle of authorities from the claimant. All submissions and authorities referred to were fully considered, whether or not expressly referred to below.

Findings of fact

27. The claimant was offered employment with the respondent as an events manager in their restaurant group. She was sent a contract of employment on 27 January 2020. She considered this in detail and replied at 22:57 hours the same day, saying she had made some notes on the contract that she felt needed to be discussed. This included a note on deductions from pay in respect of which she said "*some of these are unfair and unenforceable"* and

in relation to certain points she said "*if it is unlawful behaviour, you have recourse through the courts".* She queried a point on the group vehicle insurance policy, the change of early May Bank Holiday in 2020 and said that Statutory Sick Pay alone was unacceptable for a management role and should be full pay at least for a minimum period.

28. She was told in a reply dated 28 January 2020 that the sick pay provision was not negotiable and they would not change the standard wording of the contract for her individually. The Bank Holiday position was agreed by email as relating to 2020 only, due to the change nationally to Friday 8 May 2020. She was told that if she felt unable to proceed, she should choose to withdraw.

29. On 30 January 2020 the claimant signed the contract of employment with the respondent. A binding contract was formed.

30. The claimant's contractual start date was Monday 23 March 2020. This became the start of the first national lockdown due to the pandemic. Restaurants along with most other hospitality businesses were required to close.

31. At the top of the contract is says, referring to the statement of terms and conditions: "*This and our employee handbook are the prime documents that set out your terms and conditions of employment"* (page 43).

32. The claimant's gross annual salary was £36,000 equating to £3,000 per month. The provision as to notice was "*This contract can be terminated its course by three months' written notice by you or by us".*

33. There was also a clause headed "Additional Notice Provisions" which said:

> *"Your contract of employment remains in force during the notice period. However, we may require you not to attend your normal place of work. We may require you not to perform your regular duties. We may provide reasonable alternatives. We may let you stay at home (garden leave). This is all at our absolute discretion.*
>
> *You must remain available for us to contact you and to work if we wish. You may not take any alternative employment during this period except with our express written consent. We may expect you to take any accrued annual leave.*
>
> *We may make a payment in lieu of notice at our absolute discretion. Where we offer such payment, subsequent discovery of any repudiatory breach of contract on your part will lead to revocation. Where payment has already been made and we discover such conduct, we have the right to seek recovery."*

34. There was a declaration at the end of the contract (bundle page 48) which said:

"I accept this employment on the terms and conditions identified above. I have also read the employee handbook dated February 2019, including its Personal Information and Data Protection clause. I understand and accept that these are prime documents setting out my terms and conditions of employment. I will ensure I remain aware of their contents and follow their relevant provisions."

35. The claimant's Job Description was at page 50 of the bundle.

36. The respondent has a Staff Handbook which has a section on Lay Off and Redundancy. It says:

What would we do if the police declared the area around one of our restaurants a crime scene? How would we cope if an arctic snowstorm dumps 50 centimetres of snow? This section explains how we deal with unexpected interruptions to normal business as well as more permanent changes.

LAY OFF

Where there is a reduction in work or something affects our organisation's normal operations, we may lay you off. Alternately, we may seek to introduce shorter working hours. During lay-off you will only be entitled to receive statutory guarantee payments. We will, where possible, offer you any alternative work available. You should not refuse unreasonably. We reserve the right to select those best suited to carry out whatever work is available.
You remain continuously employed during a lay off period. We expect you to remain available to attend work as required.

37. The claimant's evidence was that at no time was she provided with the Handbook either prior to signing her contract, at the time of signing the contract and being sent a new starter form or at any time thereafter. She says that the first time she saw it was during the disclosure exercise in these proceedings. The contract includes a declaration that she has read the Handbook. The claimant said that she agreed to sign the contract to expedite the agreement and she expected to be provided with the Handbook once she started work.

38. The respondent's case is that the claimant agreed to defer her start date from 23 March 2020. They also assert that as the claimant was not able to carry out her contractual duties due to lockdown, she was not entitled to be paid.

39. On 23 March 2020 at 16:46 hours the claimant sent an email to Ms Tanya Paneco, HR Assistant and Ms Sara Conway, HR Manager, saying "…*I am writing to you following my call with Claudia last week when Claudia asked if I would be able to postpone my start day by a month, In the light of the government's announcement that they would pay 80% of salary capped at £2500, for furloughed employees, I wondered whether you might kindly*

reconsider this request." (bundle pages 70-71). Claudia is Ms Claudia Ward, the Head of Events. The claimant said that she had been asked by Ms Ward to defer her start date; she did not say that she had agreed to this.

40. I saw a text message between the claimant and Ms Ward, bundle page 85, dated Monday 16 March 2020 where the claimant said: "*Hi Claudia, thanks for the call, I completely understand that this is a difficult situation and fingers crossed things improve ASAP but thank you for keeping me in the loop. Chat soon. Thanks, Suzie".* Ms Ward replied "*…thanks for your understanding. We will absolutely keep you in the loop.".* The claimant did not say in that message that she agreed to a postponement of her start date. She said she understood it was a difficult situation, which it was. Ms Ward did not say in her reply, I confirm that we have agreed to defer your start date. She said she would keep the claimant in the loop.

41. The claimant and Ms Ward had a telephone conversation on 16 March in which the claimant said she was told that they would postpone her start date until 23 April but they would try to bring that forward if they could. It was put to Ms Ward in cross-examination that there was no agreement during that call to postpone, it was just to inform the claimant that her start date was being postponed. She replied: "*That's correct".*

42. I find that the subsequent text message does not record a contractual agreement to defer the claimant's start date to 23 April or otherwise. The claimant was understandably being polite with her brand new employer with whom she had not yet performed a single day's work. She expressed her understanding of a difficult situation and nothing else. It was open to Ms Ward, who had the benefit of access to HR professionals, to say, if it were the case, "*you have agreed to defer your start date to 23 April*" or "*you have agreed to defer indefinitely*". In any event, Ms Ward confirmed in evidence that the claimant did not agree, but was just informed. I find as a fact that there was no agreement to postpone the start date.

43. The Director of People, Ms Jane Pretorius replied to the claimant by letter on 6 April 2020 setting out the difficulty of the closure of their restaurants and stating: "*We will confirm your new start date as soon as reasonably practicable…."* (page 73). Ms Pretorius made no reference in that letter to the claimant having agreed to defer her start date.

44. During their one of their telephone conversations Ms Ward suggested to the claimant that she take up some temporary work. The claimant did not do so because of the uncertainty surrounding her start date with the respondent. Ms Ward's evidence was that when she spoke to the claimant to say they had no news on a start date, the claimant was "*disappointed but entirely understanding".* Again she did not assert that the claimant expressly agreed to the position.

45. On 5 May 2020 Ms Ward emailed to say that there was no further news on the start date. The claimant emailed on 11 May 2020 to say that she had yet to receive a formal start date and had been without income since 23 March.

She asked the respondent to honour the contractual terms. She said "*Please formally advise me this week of a new start date within May 2020 or please terminate the agreement and pay me the three months notice as per the contractual agreement."* (page 76).

46. In an internal email from Ms Ward to Ms Conway on 11 May 2020 after a telephone conversation with the claimant, Ms Ward said that the claimant was "*very understanding on the phone but mentioned that she was struggling financially after leaving her previous position and having her start date extended with us. I said it was unfortunate but given the current situation sadly not something that we could change….".* This does not show an agreement to having the start date deferred. Had there been an agreement to postpone the start date I find on a balance of probabilities that Ms Ward would have informed Ms Conway of this, by saying words along the lines of "*she has agreed to defer her start date indefinitely*" or to a certain specific date. Instead, Ms Ward had told the claimant that the situation was not one they were prepared to change. I find that there was no agreement to defer the start date. The claimant was simply told the situation.

47. On 4 June 2020 Ms Conway emailed saying that they were sorry that they had not been able to start the claimant's employment as hoped. She said that the business was due to be closed until at least July 2020 and possibly later and then only in a limited fashion. She said they were not able to offer a confirmed starting date. She said: "*As you haven't commenced employment, the terms of your contract have not come in to force and you are not eligible for any notice payment".*

48. The claimant's contract started too late to be eligible to be included in the furlough scheme, as it was necessary to be processed through payroll by 19 March 2020 under the terms of the Treasury Direction.

49. By the beginning of August 2020 many restaurants in the UK had reopened but group dining was not permitted and this meant that the respondent was not taking significant private dining and events bookings. The claimant still did not have a start date and she was not being paid. She had not been offered an alternative role at the respondent. She gave up hope on 10 August 2020 and sent Ms Conway a resignation email (bundle page 81). She stated that she was resigning: "*in response to your continuing repudiatory breaches of my contract, namely (i) your unilateral variation to the material terms of the contract by postponing my start date twice; and (ii) your failure to pay my contractual payments and benefits from 23 March 2020. Furthermore, you have not sought to terminate my contract lawfully as per the terms of my employment contract by giving me three months' notice".* I find that her reasons for resigning were as set out in this email. It was not put to the claimant that she resigned for any other reason.

50. There was no evidence from the respondent of the claimant being sent the Handbook or being provided with access to it in any way. Both the respondent's witnesses confirmed in evidence that they had included in their witness statements everything that was relevant. I find, based on the

claimant's evidence that she was not provided with the Handbook and the lack of any evidence from the respondent that they did provide it; that it was not provided to her and she was not pointed towards a way in which she could reasonably access it.

51. I also find on the evidence of both the respondent's witnesses that at no time did they tell her that she was being laid off in accordance with the terms set out in the Handbook and at no time did they seek to exercise the lay off provisions. It was raised for the first time in the ET3. The claimant also has not been paid a guarantee payment.

Findings as to remedy

52. On delivering the decision on liability I checked whether the respondent had any further cross examination on remedy and they did not.

53. The claimant carried out some ad hoc babysitting work in July 2020 at £60 on two occasions. This was prior to her resignation. She took on a role as a Nanny with her first day in the role being 3 August 2020. This was on a gross annual salary of £25,800.

54. The claimant submitted that she had been told that she could take up some temporary work. The respondent said that she had to be available to work and she was not available for work during that period 3 – 10 August 2010.

55. I agreed with the respondent and find that the claimant had entered into a new contract of employment as a nanny and she was not available for work in that week.

56. The respondent submitted that there was an affirmative obligation on the claimant to mitigate loss during the notice period and there was no evidence of any applications made by the claimant that might have mitigated. The claimant submitted that the burden was on the respondent to show that the claimant had failed to mitigate and there was evidence to show she was in work during the notice period and therefore had mitigated her loss.

57. In the circumstances of a pandemic I consider that the claimant took proper steps to mitigate her loss by taking this job at a lower salary than her salary with the respondent. It is common knowledge that redundancies were on the increase throughout 2020 and jobs were hard to come by. The claimant worked throughout the notice period. She did not fail to mitigate her loss.

The relevant law

58. Section 13(1) of the ERA 1996 provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction

59. Under section 147(1) ERA 1996 an employee is taken to be laid off for a week if (a) their contract of employment is such that their remuneration depends upon them being given work to do and (b) in the week in question they get no work and therefore no pay. An employee who is laid off may be entitled to a guarantee payment. Statutory guarantee pay is £30 a day for 5 days in any 3-month period. The maximum to which an employee is £150. Employees who are laid off are normally entitled to their full pay unless it is agreed otherwise or allowed by the contract.

60. Laying off of employees gives rise to statutory rights for those employees, including the entitlement to guarantee payments under section 28 ERA and the right to a redundancy payment under section 148 ERA.

61. The claimant relied on the decision of the Court of Appeal in ***AEG (UK) Ltd v Logic Resource Ltd 1996 CLC 265*** on the issue of incorporation of terms into a contract. It is not an employment case. The CA in that case held that the question must always be "has reasonable notice of the terms been given?" and this is essentially a question of fact depending on the circumstances of the case and in particular the nature of the business and the position of the parties to the transaction. Where there is a particularly onerous or unusual condition it was held in that case that the supplier was under a duty to draw it fairly and reasonably to the buyer's attention and that was not discharged in that case by a generalised reference in the confirmation of order, to the existence of conditions.

62. The starting point for entitlement to wages is that the employee must be ready and willing to work in order to be entitled to their pay. The House of Lords in ***Miles v Wakefield Metropolitan District Council 1987 IRLR 193*** said: "*In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work*."

63. In ***North West Anglia NHS Foundation Trust v Gregg 2019 IRLR 570*****,** the Court of Appeal described the question of being ready willing and able to work as the "co-dependency principle" and said "*developments in both employment and regulatory law mean that, in the present day, the co-dependency argument needs to be treated with considerable caution… the contractual analysis is fundamental*".

64. Coulson LJ in that case set out the following propositions:

> *(a) If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction of their pay.*
>
> *(b) If he or she was ready and willing to work, and the inability to work was the result of a third-party decision or external constraint, any deduction of pay may be unlawful. It all depends on the circumstances. (Unfortunately, his Lordship gave no examples of such decisions or constraints, beyond the third-party suspension in the case before him.)*
>
> *(c) An inability to work due to a lawful suspension imposed by the employer by way of*

sanction (which was not the position in Dr Gregg's case) will permit the lawful deduction of pay.

(d) By contrast, an inability to work due to an 'unavoidable impediment' (Lord Brightman in Miles v Wakefield) or which was 'involuntary' (Lord Oliver in Miles v Wakefield) may render the deduction of pay unlawful.

65. It is necessary to consider whether there is any contractual basis for withholding the pay and if not, then the question of being ready, willing and able to work falls to be considered.

66. In ***Beveridge v KLM*** **UK** ***Ltd 2000 IRLR 765 (EAT)*** the employee who had been on sick leave had a medical certificate confirming that she was fit to work and she wished to return. She was prevented from returning for six weeks by her employer whilst it waited for its own medical report. Her entitlement to contractual sick pay had run and the employer did not pay her for that six week period. The contract was silent on whether wages could be withheld during this time. The EAT held that in the absence of a contractual term to the contrary, wages were payable for the six-week period. The employee was willing to work and had done all she could to perform her part of the bargain.

67. ***Burns v Santander UK plc 2011 IRLR 639*** is a case where the employee was remanded in custody on criminal charges. The EAT said that the claimant had conducted himself in such a way that, according to the criminal court, he should be deprived of his freedom and therefore deprived of his right to attend work. This amounted to an avoidable impediment and it was held that he was not entitled to his wages. The claimant was convicted of the charges and his period of remand went towards his sentence.

68. The claimant relied upon a case at ET level, of ***Andreeva v Surrey County Council Case No.2317861/10*** where the claimant was employed to teach art on the Council's adult and community learning programme. In January 2010 her class was cancelled by the Council at short notice due to snow. She was asked to rearrange the class for a different day and when she refused to do so, she was not paid for the day in question. The ET held that this was an unauthorised deduction. The claimant was engaged to work on that day and was ready and willing to do so. Her contract did not make any provision requiring her to work outside her agreed hours. The Council was not contractually entitled to rearrange her class and she was entitled to be paid for the day.

69. The leading authority on affirmation when the employer is in fundamental breach of contract is ***W E Cox Toner (International) Ltd v Crook 1981 IRLR 443 (EAT)***.

70. The respondent relied upon ***Dixon v London and General Transport Services Ltd EAT/1265/98*** where the EAT held that conduct in cutting wages did not amount to a continuing repudiatory breach. Although the initial change in terms and conditions constituted a repudiatory breach of an express term of the contract, the subsequent payment of lower wages was

merely a consequence of that breach.

71. In relation to a lay off the Court of Appeal in ***Miller v Hamworthy Engineering Ltd 1986 IRLR 461*** (a case on appeal from the County Court) said that where there is an admitted contract of employment under which salary is payable: *"If the provision as to payment of salary in that contract of employment is to be displaced, the defendants must show some agreed variation of the contractual terms binding upon the plaintiff."* (paragraph 46). If there is not, then the contract stands and the proper amounts payable under that contract should be paid.

Conclusions on liability

72. The respondent accepted at the preliminary hearing on 1 December 2020 that there was a binding contract of employment between the parties.

73. I have found as a fact above that there was no agreement on the part of the claimant to defer her contractual start date of 23 March 2020. A person can be understanding of a situation but not in agreement with it and this was the case here.

74. I have considered whether the lay-off clause was incorporated into the claimant's contract of employment. It was undoubtedly referred to, twice, in the contract of employment which she signed. However, my finding of fact is that she was never provided with a copy of it or a reasonable means of access to it. There was no positive evidence from the respondent that they had provided the claimant with a copy of the Handbook and I found as a fact that they did not. All the respondent could rely upon was the signature to the contract which referred to the Handbook.

75. The respondent relied upon a decision of the High Court in ***Hallet v Derby Hospitals NHS Foundation Trust 2018 EWHC 796*** which said that the overarching issue is what the parties intended on the basis of the words used and their context,. The question is whether the parties have expressly or impliedly agreed that the document forms part of the contract between them. If they have, the terms of the document must be "apt" for incorporation. There is a distinction between "*statements of entitlement …..intended to have contractual effect"* and *"quite distinct procedural, aspirational or discretionary matters*". ***Hallet*** was a case about junior doctors' terms and conditions and there was a finding in that case that the relevant documents were readily available to the junior doctors. It was those documents that were incorporated by reference to a particular clause, and those documents that explained or provided the detail of the local monitoring requirements which were in question. I find that ***Hallet*** is distinguishable from the present case, as I have found that this claimant was not provided with or pointed towards a way of accessing the Handbook.

76. I accept the claimant's submission that the more onerous the provisions the more important it is to ensure that the provisions are brought to the claimant's attention. As held by the Court of Appeal in ***AEG (UK) Ltd v Logic***

Resource (above) where there is a particularly onerous or unusual condition, the party relying on it has a duty to draw it fairly and reasonably to the other party's attention. That obligation is not discharged on my finding, simply by referring to the existence of Handbook without doing more to ensure that its contents are brought to the attention of the claimant. The contract highlighted provisions on data protection and privacy and nothing else. Nothing was done in this case to make sure that this happened and it did not.

77. I therefore find that notwithstanding the claimant's signature to the declaration, factually I have found that she did not see the terms in the Handbook and the respondent had a duty to bring them to her attention. She is the weaker party to the contract, she wanted the job. If the respondent wished her to be bound by important terms and conditions that substantially affected her right to pay, it was necessary for them to ensure that the claimant had notice of these provisions. I find that the lay-off clause was not incorporated into the terms of her contract.

78. It was not the respondent's position that they consciously exercised the lay off clause, but the respondent submits that it is a deeming provision and the claimant can be "taken" as having been laid off, even retrospectively.

79. I agree with the claimant's submission that the lay off provisions give rise to important statutory rights for employees who may become eligible to a redundancy payment under section 148 ERA 1996 or a guarantee payment. I accept that in this case this claimant did not have sufficient service for a redundancy payment but she was also not afforded the opportunity to claim or be paid a guarantee payment. The exercise of a lay off clause was not raised with the claimant during her employment and was only raised for the first time in the ET3.

80. Although the respondent submits that section 147 ERA is a deeming provision, the claimant submits that it is a contractual question as to how that power can be exercised. I find that the starting point is that there has to be a contractual right to lay off before the statutory provisions come into play. I have found that the lay off provisions were not incorporated and in the absence of a contractual right, the claimant cannot be deemed retrospectively to have been laid off.

81. The respondent submits that the claimant was ready, willing but unable to carry out her role due to the magnitude of the external constraint, being the pandemic. The respondent submits that the claimant was thus disentitled from remuneration. The respondent did not rely, in this case, on a frustration of contract argument.

82. Based on the case law set out above, I find that the claimant was ready and willing to perform her role. Paragraph (d) of the points set out by Coulson LJ in the ***Gregg*** case, as set out above applies: *an inability to work due to an 'unavoidable impediment' or which was 'involuntary' may render the deduction of pay unlawful.* This was an unavoidable impediment that was not the fault of the claimant. As with the other cases cited, in the case of a

cancellation of a class due to a snowfall, the claimant was entitled to her wages, a claimant who had to wait when declared fit to work, for the employer's medical report, was entitled to her wages. Where it was conduct that the claimant could have avoided, such as the commission of criminal conduct, then there is no such entitlement. The pandemic was an unavoidable impediment and was involuntary on the claimant's part so I find this renders the deduction of pay unlawful.

83. In terms of affirmation of the contract I deal with the respondent's reliance on the ***Dixon*** case above. This was a case in which the claimants had brought earlier proceedings for unlawful deductions from wages which were successful and they subsequently brought a constructive dismissal claim. The finding of fact in that case, upheld by the EAT, was that the claimants resigned because of a pending disciplinary so the comments made on the breach of contract point were obiter. The repudiation in that case, if repudiation it was, was found to be the wholesale change of the terms and conditions imposed on those employees who did not object. One of the ongoing consequences of those new terms and conditions was the reduction in pay. It was the imposition of the new terms and conditions that was the repudiatory breach and the ongoing consequences was the reduction in wages. This was described as a "run off" of the repudiatory breach and not the repudiatory breach itself. I find that this case is not on point with the present case. This is not a situation where different terms and conditions had been imposed which reduced her pay. It is a case where she was not paid under the terms of the binding contract entered into on 30 January 2020.

84. I find that a failure to pay wages is not a single breach on 23 March 2020 with continuing consequences as submitted by the respondent. Every time wages fell due, there was a failure to pay those wages. Wages do not just fall due on one date when a contract of employment is formed. There is a breach every time the wages fall due. I therefore reject the submission that there was a single breach the first time the claimant's wages fell due. There was an ongoing breach every time the claimant's wages fell due.

85. Did the claimant affirm the breach? I find that she did not. I have found that there was no agreement to postpone her start date. She was understanding of the position, but this did not mean that she agreed to it. She was told that the position would be kept under review, so she was entitled to wait for a period of time to see if the respondent's position would change. It was open to the respondent to terminate the contract if they had no work for her or to look for something for her to do, particularly once restrictions began to ease and seek her agreement to this, if it did not already fall within the remit of her contractual duties and job description.

86. By 11 May 2020 the claimant made her position clear, she either wanted a start date or the termination of her contract with her notice pay. It is not a case of the claimant affirming the contract by continuing to work because at no time was she given the opportunity to do any work. She made her objections known by 11 May 2020 and she did not vary from that position.

87. Restrictions on restaurants began to ease from 4 July 2020. The claimant was not offered any alternative work to do and she resigned on 10 August 2020. I find that she was entitled to wait to see whether the position changed under the respondent's review of the situation and that by 10 August 2020 when it became clear to her that she was not going to be given a start date, or any work to do, or to have her contract terminated with notice pay, she resigned.

88. This was a resignation in response to the repudiatory breach of non-payment of wages which was a fresh breach at each and every pay date and the continual postponement of a date upon which she could perform any work under the terms of the contract. There is no doubt in my mind that both are fundamental breaches of the contract of employment.

89. In the circumstances the claims for unlawful deductions from wages and constructive wrongful dismissal succeed.

Conclusions on remedy

90. As the claimant started her new job as a nanny a week before her resignation from the respondent so there was no gap between jobs. It does mean that having taken that job on 3 August 2020 she was no longer ready and willing to work for the respondent so on my finding a week falls to be deducted. She is therefore entitled to 19 weeks rather than the 20 weeks claimed.

91. The claimant is entitled to her pay from 23 March 2020 to 3 August 2020. Her gross annual salary was £36,000 and 19 weeks amounts to the gross sum of **£13,153.85.** She is also entitled to her auto enrolment employer pension contributions at 3% over 19 weeks at **£394.62.**

92. The claimant is entitled to her notice pay which is awarded net along with pension contributions for the period 10 August 2020 to 9 November 2020. She has worked as a nanny during this period and her notice pay falls to be reduced by the amount by which she has mitigated her loss. Her gross annual salary in her new job was £25,800.

93. The parties agreed that the figure for notice pay, taking into account earnings, was **£1,810.40.**

94. I was grateful to both representatives for the high standard of their work, advocacy and submissions in this case.

_____

Employment Judge Elliott
Date: 16 February 2021

Sent to the parties and entered in the Register on: :16 Feb. 21
_____ for the Tribunal