EMPLOYMENT TRIBUNALS

Claimant: Mr JA Parry

Respondent: Orient Direct Limited t/a Berlitz Manchester

HELD AT: Manchester **ON:** 11 December 2020 and 18 December 2020 (in chambers)

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: Mr Cunningham, lay representative
Respondent: Ms Miller, counsel

JUDGMENT

1. The claimant was not expressly dismissed by the respondent, however he was constructively dismissed. The claimant's unfair dismissal claim succeeds.

2. The claimant's claim for holiday pay of £446 is not made out on the facts before the Tribunal and fails and is dismissed.

3. The claimant is to provide an updated Schedule of Loss to the Tribunal and the respondent within 28 days of the date this judgment and reasons is sent to the parties.

4. There is to be a remedy hearing listed, with an estimated length of hearing of 3 hours, on a date to be notified to the parties by the Tribunal.

REASONS

Preliminary Matters and Issues for the Tribunal to Decide

1. This was a remote hearing which was not objected to by the parties. The form of remote hearing was a code "V" hearing, being conducted entirely by CVP video platform. A face to face hearing was not held because it was not practicable and no-one requested the same. The documents that I was referred to are in a bundle the contents of which I have recorded. Witness statements were provided by all witnesses in these proceedings, being for the claimant, Mr Parry himself, Mr Duval and Miss Pepper and for the respondent, Mr Hall and Mr Harrington. The claimant had provided further statements from witnesses not in attendance at this hearing. The Tribunal is only able to give limited weight to statements given by witnesses who do not attend the hearing. This was explained to the claimant during the hearing.

2. The claimant brings claims of unfair dismissal and holiday pay. The losses that he says were caused by his dismissal are set out in a schedule of loss contained in the bundle, save for the sums claimed by way of holiday pay which were contained in the claimant's ET1 form. The claimant's losses for holiday pay are £446.

3. The issues for the Tribunal to decide were confirmed by the claimant's representative Mr Cunningham. These are whether the claimant was dismissed and if so, was his dismissal unfair, and whether he is entitled to recover sums for unpaid holiday pay. Mr Cunningham confirmed that he wished to plead the claimant's case in the alternative and it was agreed that the claimant's primary case would be that there had been an express dismissal and his alternative case that there had been a constructive dismissal.

4. The respondent's case is that the claimant was employed on a "zero-hours" contract and therefore the respondent had no obligation to provide him with work. The respondent further says that the claimant was never dismissed. They expected him to return to work following a period away teaching in Japan. Their case is that they were not aware that the claimant considered himself dismissed until they received his ET1 claim form.

5. In terms of the facts of the case, it is agreed by the parties that on 22 August 2019, Mr Parry returned from annual leave to be told that there was no work available for him that week or the following week.

6. The respondent's case is that this was done in accordance with the terms of his contract as signed in 2010, a copy of which was before me in the bundle.

7. The claimant's case is that he had a right to be provided with work by the respondent. When he was told in August 2019 that there would be no work available for him for that week or the week after, he took this as an indication that he was being dismissed. The claimant will say that this was based on an expectation that he would be provided with "full time" hours of work, that being 25 hours per week, each week.

8. The claimant will also say that he reached the conclusion that he was being dismissed because of what he says has happened to members of staff in the past, including Mr Duvall and also because he had understood that Miss Kumari, the respondent's business development manager, had taken a dislike to him, partly because he had refused a request to act as a teaching facilitator at the University of Salford when asked to do so by her.

Findings of Fact

The claimant's working patterns

9. It is agreed by both parties that the claimant worked as a language instructor for the respondent from July 2010.

10. The claimant was managed by Russell Hall for much of his time with the respondent. Mr Hall's role during that time included scheduling teachers' duties and timetabling. It was agreed evidence before the Tribunal that Mr Hall and the claimant had an agreement by which Mr Hall would seek wherever possible to provide the claimant with 25 hours work per week, but at the same time allow the claimant time off should he need it to take up acting jobs or attend auditions.

11. Mr Hall told the Tribunal that he was happy to do this wherever possible because he respected the claimant's ambition to pursue an acting career.

12. The claimant seeks to demonstrate to the Tribunal that this arrangement with Mr Hall, over the nine years that he had worked for the respondent, became a contract that obliged the respondent to provide him with 25 hours work per week. The respondent disagrees with this assertion. Mr Hall characterised it as a "gentlemen's agreement" that he would provide as much work as was available to the claimant, but that it was not something that resulted in a change to his contract.

13. The claimant told the tribunal that in 2013 he was told by the respondent that he was obliged to work a minimum number of hours or he would lose his job. The respondent disputed that the claimant was told this. It was accepted by both parties that the claimant took time off from the respondent as a sabbatical to teach in Japan from September to December 2012 and that he applied to repeat this in September 2018 but did not take it up.

14. It was agreed by both parties that in July 2019 the claimant's employer in Japan contacted the respondent to request an updated reference as the claimant had applied for another teaching post in Japan for the period from September to December 2019.

15. Although it is the claimant's case to the tribunal that he had a contractual agreement to work 25 hours per week with the respondent, elsewhere in his evidence he acknowledges that on occasion his working week fell below 25 hours per week.

16. The witness statement of Miss Pepper, which was not disputed by the respondent, notes that when she worked for the respondent and was responsible for timetabling, she would timetable Mr Parry for 25 hours per week or "*on occasion 20 hours if student numbers fell, but always the maximum number of teaching hours available at the time*". Even on the claimant's own evidence it is clear that while the respondent regularly offered him as much work as was available and that although this was often 25 hours per week, there is no evidence that he was given 25 per hours per week if this work was not available. Mr Hall's evidence was that his working hours varied between 15 and 25 hours per week.

17. Furthermore, it is accepted by both parties that in September 2017 the claimant was offered but declined a "permanent" guaranteed-hours contract. It was the evidence of Mr Hall that the claimant had refused this because he preferred the flexibility that his original contract afforded him. Mr Harrington's evidence was that the claimant had been offered "*the reassurance*" of a guaranteed hours contract and that this was "*a reward for progression*" and an indication that the claimant was considered suitable to progress for example into management roles. Mr Harrington's evidence was that "*he didn't want to do that and that was OK*".

18. The claimant told the Tribunal that he did not accept the offer of guaranteed work in September 2017 because he had been assured by Mr Hall that they would "*always timetable me for a full 25 hours each week. This proved to be the case over the 10 years I worked for the school until my dismissal. I was given no reason and had no cause to change my contract*."

19. Mr Hall's evidence, which I accept, was that the full-time "permanent" teachers were given teaching hours first, as they would have to be paid anyway and the zero-hours staff would be offered teaching hours thereafter. Mr Hall told the Tribunal that "*the ones who were there the longest got the hours they wanted, and Mr Parry was at the top of the list*".

The events of 22 August 2019 onwards

20. It is accepted by both parties that towards the end of his holiday on 22 August 2019, the claimant was informed by Mr Hall that he was not being offered any work the following week in what the parties agree was a telephone call of 8 or 9 minutes' duration. The claimant's evidence was that he had been surprised that Mr Hall had told him before he went on his leave that he should call him near the end of his period of leave about lessons because at the time he would automatically receive the timetable for the following weeks' lessons on a Friday by email.

21. The claimant's evidence was that on 22 August, Mr Hall informed him that he had been told not to schedule the claimant for any work for the following week and that this also applied to another teacher, Hannah Robinson.

22. Mr Hall said that he told the claimant that Mr Harrington had told him that there would be no work for the claimant for the following week because there were a number of teachers on short-term full-time summer contracts who had

to be provided with teaching hours in accordance with their contracts and therefore had to take priority over teachers on zero-hours contracts such as the claimant.

23. Mr Hall explained to the Tribunal that student numbers had dropped towards the end of August. His evidence was that he felt bad for the claimant that he was not going to be offered any work because this was an unusual situation as the claimant was normally offered as much work as possible.

24. It was the claimant's evidence that he knew during that conversation that he was being dismissed. The claimant said, in answers to cross-examination during the hearing,

> "*it was clear to me that he and I understood they were getting rid of me…I had no doubt they were getting rid of me and I would not be offered any more hours*."

25. The claimant also said that Mr Hall had told him that their arrangement had "*worked well for nine years but it's not going to work anymore.*" The claimant also said that Mr Hall told him that he could not timetable the claimant or Hannah Robinson because they had both taken leave in August which was a busy time at the school.

26. The claimant's evidence was that

> "*at the end of the call, I was completely sure they were dismissing me but without explicitly saying so purely by not allowing Russell* [Mr Hall] *to schedule me again but giving no clarity. I felt they considered they were entitled to do so because my written contract, which was ten years old, was under a no fixed hours"*.

27. I find on the balance of probabilities that the claimant was to no longer be given preference for working hours at the respondent in the way that Mr Hall had done previously. Mr Hall told the Tribunal that he was no longer at that point going to be carrying out the work of timetabling tutors and students for classes and that this was being passed to Miss Kumari, which I accept. I find that Mr Hall communicated to the claimant, and the claimant understood, that Miss Kumari would not be giving him the same treatment in future.

28. It was Mr Harrington's case that, had the claimant remained in Manchester there would have been more hours available in October or November 2019. This would have meant a significant and enforced gap in the claimant's pattern of work when compared with the pattern that had taken place over the past nine years with the respondent. I find on the balance of probabilities that both Mr Hall and the claimant understood, at the time of their telephone call, that it may well be several weeks before more work would be made available to the claimant.

29. The claimant's case before the Tribunal is that he was dismissed during this conversation, or that in the alternative this telephone conversation amounted

to a fundamental breach of his contract that entitled him to accept the breach and consider himself dismissed.

30. There is no evidence before the Tribunal that, following this telephone call, the claimant told the respondent that he considered himself dismissed. The claimant's evidence was that he did not ask the respondent at any point whether he was being or had been dismissed. He did not inform them that he considered himself as having been dismissed.

31. There was evidence before the Tribunal that after the telephone conversation of 22 August, communications between the claimant and Mr Hall demonstrate that both men continued to behave as if the claimant was still employed by the respondent. The claimant sent a WhatsApp message to Mr Hall on 26 August that said:

> *"…since I'm not being timetabled lessons now, I'd like to request the remaining paid leave I've accrued. I think it's about 8 days – I'll check with Rob. Are you in tmrw morning? If I get a request form on your desk tmrw morning are you happy to approve? And what date would you suggest I begin the leave from?"*

32. There were further messages on 27 August, 30 August, 2 September, 3 September and 4 September, concerning the claimant's leave request and his August pay slip. Mr Hall writes on 3 September that Ms Kumari "*…confirmed you are still on the books.*"

33. The claimant submitted his annual leave request on Monday 2 September 2019, for leave to start on 16 September. It was given to Mr Hall, who passed it to Ms Kumari to approve. She failed to contact the claimant and so he emailed her and Mr Harrington on 6 September, asking for an update. They failed to respond. He emailed again on Wednesday 11 September, both to Ms Kumari and Mr Harrington, who again failed to respond to him.

34. Between his return from annual leave after 22 August and Friday 13 September, the claimant received no contact from Ms Kumari or Mr Harrington. Mr Hall had confirmed that he no longer had authority to approve holiday or timetable the claimant for work and this had to come from Ms Kumari, but she made no attempt to contact him and did not respond to his emails. Given the regularity with which the claimant had previously worked for the respondent over a period of more than 9 years, it was reasonable that the claimant found this absence of communication to be deeply troubling.

35. He told the Tribunal that on Friday 13 September, as he had heard nothing about his leave which was due to start the following Monday, he went into the school to try to sort matters out. He asked to see Mr Harrington, but was met by Ms Kumari and they went together into Mr Harrington's office. His evidence, which I accept, was that she told him that she had not seen him "*since you left us in the lurch in August*", which he took to be a reference to him having refused to do extra teaching hours in Salford.

36. He brought up the subject of his leave request, which he noticed was sitting on top of Mr Harrington's desk unsigned. Ms Kumari told the claimant that Mr Harrington would contact him later about it. The claimant's evidence, which I accept, was that the meeting was awkward. The claimant left the office and waited for a telephone call from Mr Harrington, which did not come. He returned to the school at the end of the day and saw Mr Harrington in reception, who asked him to wait downstairs. The claimant's evidence was that Mr Harrington looked uncomfortable to see him.

37. The claimant went downstairs as asked but was met instead by Ms Kumari who ushered him into a classroom. She asked him to wait and left the room. When she returned, she told him his annual leave was sorted and ushered him out of the building. Mr Harrington emailed the claimant on Sunday 15 September to ask him if he was planning to travel to Japan, but the claimant did not respond.

38. The claimant took annual leave from 16 September to 2 October 2019. He did not contact the respondent at all after his visit to the school on 13 September 2019.

39. He left the country to take up the teaching post in Japan in mid-September 2019 and returned in late 2019. On his return from Japan he submitted his ET1 claim form. He confirmed that he was not given a P45 by the respondent. He has subsequently secured employment elsewhere in Manchester. It was the respondent's evidence that they only realised that the claimant would not be returning to work when they received his claim form, which was lodged with the Tribunal on 27 November 2019 and that they had expected that he would return to work for them after his return from Japan, as he had done in the past.

40. In relation to the claimant's claim for holiday pay, I have carefully considered the evidence in the bundle in relation to the claimant's holiday request from September 2019 and the emails between him and Robert Squire, the respondent's Financial Administration Officer. When asked what the basis of his holiday pay claim was, the claimant's reply was "*I was told I was owed holiday pay as part of being unfairly dismissed*", but no further clarification was provided.

The Law

41. Section 27A(1) Employment Rights Act 1996 defines a zero-hours contract as a contract under which the worker's obligation to do work or perform services is conditional on the employer making work or services available, and under which '*there is no certainty that any such work or services will be made available to the worker*'. There is no obligation on the employer to make work available, and no obligation on the worker to accept any work offered.

42. If a relationship between a worker and an employer is to amount to a contract of employment, there must as a minimum be a degree of mutual obligation on the parties; on the employer to offer work and on the employee to accept it. In *Cotswold Developments v Williams [2006] IRLR 181* it was established that

the issue is not whether there may be circumstances when the employer can choose not to offer work, or the employee refuse to do it, but rather whether there is an obligation to offer some work and some corresponding obligation to do it. Therefore, a contract of employment can still exist even where the hours worked every week are not fixed and completely consistent.

43. Employment Tribunals must not simply focus on the wording of contractual documents or on how the parties themselves describe their relationship, but on the factual reality of the situation (*Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC*). Furthermore, what may have begun as commercial imperatives, as opposed to binding legal obligations, at the start of a relationship over time can crystallise into legal obligations (*St Ives Plymouth v Haggerty UKEAT/0107/08*). It is a question of fact for the Tribunal to determine whether a particular relationship contains sufficient legal obligations to amount to a contract of employment and if so, to determine the terms of it.

44. Implied into every contract of employment is a mutual duty on the employer and the employee not to act in a manner which has the purpose or effect of destroying or seriously damaging the relationship of trust and confidence between them, referred to as the "mutual duty of trust and confidence". A breach of this duty can amount to a fundamental breach of contract, entitling the employee to consider himself dismissed.

45. As to whether the claimant has been dismissed, where there are ambiguous words and ambiguous conduct on behalf of the respondent, all the surrounding circumstances both preceding and following the incident and the nature of the workplace are to be taken into account. The Tribunal is to ask the question as to how a reasonable employee would have understood the respondent's words in the light of the circumstances? Any ambiguity is to be constructed against the party seeking to rely on it.

46. Where an employer breaches the terms of an employee's contract of employment, the employee has two courses of action open. He can waive the breach and carry on working or he can inform his employer that he is accepting the breach of his contract and that he considers himself to have been dismissed. If the employee chooses the option of accepting the breach of contract, the employee must communicate to his employer within a reasonable time that he considers himself to have been dismissed, by clear words or clear conduct. If the employee simply walks away from the employment relationship without having communicated to the employer that he considers himself dismissed by words or actions, he is deemed to have resigned and no dismissal will have taken place.

47. A resignation may amount to a constructive dismissal if it is in response to a fundamental breach of contract by the employer, as per sections 95(1)(c) and 136(1)(c) of the Employment Rights Act 1996. In order to establish a claim of constructive dismissal, there must be a causal link between the employer's breach and the employee's resignation, that is, the employee must have resigned because of the employer's breach and not for some other reason, such as the offer of another job. It is a question of fact for the employment tribunal to determine what the real reason for the resignation was. In order to

establish a constructive dismissal it is necessary that the employee resigned in response, at least in part, to the fundamental breach by the employer, although the employer's conduct need not be the only reason for the claimant's resignation (*Nottinghamshire County Council v Meikle [2004] EWCA Civ 859*).

48. There is no absolute legal requirement on a claimant for constructive dismissal to have communicated to his ex-employer exactly why they were leaving (*Weathersfield Ltd v Sargent [1999] IRLR 94*). The Tribunal must consider all the facts including the 'acts and conduct of the party'.

49. The submission of the ET1 claim form can in certain circumstances amount to communication to the respondent that the claimant considered himself dismissed. While the repudiatory breach has to be accepted by the employee, the acceptance need not be communicated directly to the employer; indeed, the presentation of a claim to the Tribunal can be effective acceptance of the breach. (*Mr Clutch Auto Centres v Blakemore UKEAT/0509/13 (8 May 2014, unreported))*.

50. In the case of *Chindove v William Morrison Supermarkets plc EAT 0201/13*, the Employment Appeal Tribunal warned against looking at the passage of time in isolation when determining whether an employee has lost the right to resign and claim constructive dismissal. What matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign. Where an employee is absent for a period of time before resigning, this will not necessarily indicate that they have accepted the breach of contract.

51. The right to claim unfair dismissal is only available to those individuals employed under a contract of employment. Workers and those who are self-employed cannot bring claims of unfair dismissal.

52. In order for a dismissal to be fair as per part X of the Employment Rights Act 1996, the respondent must establish that the claimant was dismissed for a potentially fair reason (s98(2) and the Tribunal must consider whether the dismissal was fair (s98(4)).

Application of the Law to the Facts Found

53. The claimant's primary case is that he was unfairly dismissed on 22 August 2019 following his communications with Mr Hall.

54. Having considered all of the evidence before me, I find that there is no evidence that he was dismissed on 22 August 2019. No actual words of dismissal were spoken by Mr Hall. Mr Hall's comments were insufficiently indicative of the termination of the claimant's contract. Saying "*not good I'm afraid*" in relation to the availability of work of someone who is not employed under a fixed-hours contract is not tantamount to a dismissal. The claimant's witness statement notes that Mr Hall "*continued by saying this had worked well for nine years but it is not going to work anymore. I understood this to mean my continuing to work at the school. I can think of no other*

interpretation." There is nothing in the words of Mr Hall, taking the claimant's case at its highest that indicated that he was being dismissed on that occasion.

55. Furthermore, it is clear from the conduct of the parties after 22 August that the claimant did not consider his relationship with the respondent to have ended on 22 August. His case to the Tribunal is that he was dismissed on 22 August with 9 weeks' notice, but this is not supported by the evidence of his behaviour during that time.

56. The claimant's behaviour from 22 August onwards indicated that, although he was, I find, shocked and disappointed by the significant changes in his working relationship with the respondent, he did not consider his employment relationship to have ended on that date. As set out above, he was in frequent contact with Mr Hall from 22 August to 3 September, and with Mr Squire in early September concerning his pay. Mr Hall contacted him on 3 September to confirm that Ms Kumari considered him to still be "*on the books*". He also made several unsuccessful attempts to communicate with Ms Kumari and Mr Harrington before attending the respondent's premises on 13 September. He eventually had his annual leave request approved on 13 September, which ran from 16 September to 2 October. He did not raise a grievance, or ask for an explanation of why he had been dismissed. When enquiring about his holiday pay, he did not ask for payment of notice monies that he now claims for at this Tribunal.

57. As there was no express dismissal of the claimant, was the claimant constructively dismissed? Was there a fundamental breach that entitled the claimant to treat himself as dismissed? If so, did the claimant resign in response to the breach within a reasonable time thereafter? When was this breach and when did the claimant resign?

58. The claimant says there was an obligation on the part of the respondent to offer him work and they did not do so. This, and the lack of payment that was a consequence of the lack of work, is capable of amounting to a fundamental breach of contract.

59. Although the claimant has not established on the basis of the evidence before the Tribunal that he was a permanent, full-time member of staff (and indeed he rejected the offer of such a contract from the respondent), it is clear that the parties understood that the claimant would be offered work every week (even though the hours varied) and that he would accept it. To this end, there was a mutual obligation between the parties, including an obligation on the respondent to offer the claimant work. I note that Mr Hall's witness statement at paragraphs 12 and 13 states:

> *"12. The Claimant worked a regular 5-day week (Monday to Friday) for most of the time. Generally he would work for three hours every morning, and possibly two or four afternoons; thereby working between 15 and 25 hours in an average week...*

> *13. As the Claimant was on a zero hours contract, this meant that he could refuse the work we offered him and on occasion, (with our agreement) he would work for other employers… Given the occasional nature of such work, the Claimant would sometimes request leave at short notice, and we would seek to accommodate him, as long as his taking leave at short notice would not have a negative effect on the Respondent. In addition, on three occasions the Claimant requested permission to take a more prolonged period of absence in order to teach in Japan. "*

60. It is notable that the expectation of the respondent, as indicated in Mr Hall's statement, was that the claimant would work and that any non-attendance at work would be by way of "leave" which the respondent would "seek to accommodate….as long as…[it] would not have a negative effect on the Respondent". There was an obligation on the claimant to request time off from regular work, not refuse the work in the first place. This is not consistent with a zero-hours contract where neither party has an obligation to the other in terms of hours of work.

61. A member of staff who was employed under a "zero hours" contract generally is asked at the start of every working week what his availability is and would be able to refuse work offered, or would have no expectation of being offered work in the first place. It is clear from the facts of the claimant's case that this was not the nature of the parties' relationship. Even if this was what was expected at the outset of the claimant's employment in 2010, over time I find that a mutual obligation to offer and accept work developed between the parties. It is clear from the evidence before the Tribunal that the claimant was given regular work over a significant period of time by Mr Hall and Miss Pepper.

62. It is also notable that all parties agreed that the claimant worked most days every week. The email from Mr Squire dated 12 September 2019 notes in response to the claimant's query about holiday pay:

> *"Only teachers who worked the week of the bank holiday were paid for it. This has always been the case. I'm guessing that you probably weren't aware of it because this is the first time that you haven't worked the week of a bank holiday?"*

63. However, the claimant did not accept the respondent's breach of contract in failing to offer him work at the time when it happened. He remained in contact with the respondent and applied to take a period of leave. He was also told on 3 September that he remained "on the books". I find that he did not resign at this stage partly because he sought to recover some income by taking his remaining annual leave. He also, I find, was waiting to be contacted by the respondent with some information about when he might be offered further work.

64. Was there a further breach of contract by the respondent that entitled the claimant to resign? Was this a breach of the mutual duty of trust and confidence? I find that it was.

65. The claimant's evidence was that he was told by Mr Hall that he had fallen out of favour with Ms Kumari by taking leave in August and by not agreeing to work extra hours to assist with a course at Salford University at short notice. The respondent denies this. The claimant also states in his witness statement at paragraph 31 that Ms Kumari told him in their meeting on Friday 13 September that she had not seen him since he had "*left them in the lurch*" in August.

66. Given the claimant's long-standing relationship with the respondent and the regularity and quantity of the hours worked by him, I find that had there been an objective and non-personal reason for the lack of work offered to him, there was no reason why Ms Kumari would not have explained to him what the situation was, and when he could expect to resume teaching.

67. However, Ms Kumari did not contact the claimant from his return from holiday after 22 August or at all. On the balance of probabilities, I find that this was because she sought to reduce his working hours because he had fallen from her favour.

68. Could it be said that this behaviour of the respondent, in failing to offer the claimant work and in failing to provide him with an explanation for doing so, was a breach in the mutual duty of trust and confidence? I find that the respondent did cause a fundamental breach of the duty of trust and confidence to the claimant by failing to contact him after 22 August. The claimant was left without a source of income as a result and did not know when he might be able to return to work.

69. The tribunal was told by Mr Harrington that the respondent did not anticipate that there would be a full timetable of work available until October or November 2019 but I find that the claimant was never told that this would be the case. Indeed, there is no contemporaneous evidence before the Tribunal that this was in fact the case.

70. Can it be said that the claimant resigned in response to this breach? It is accepted by the claimant that he did not inform the respondent that he considered himself to have been dismissed. I accept that the respondent only learned of his complaints when he began ACAS Early Conciliation in October and submitted his ET1 claim form.

71. It is possible for the submission of a claim form to stand as communication to an employer of acceptance of a breach of contract (*Mr Clutch Auto Centres v Blakemore)* and the claimant used this method of communication by submitting his claim form to the Tribunal on 27 November 2019. Did he do so within a reasonable time? I find that he did. He was on a three-month sabbatical in Japan for most of the period before his claim form was submitted, and so it cannot be said that from 16 September onwards he did anything to affirm the breach of contract (as per *Chindove v Morrisons Supermarkets*).

72. Therefore the claimant has established that he was constructively dismissed, in that the respondent committed breaches of the duty of trust and confidence and he resigned in response, within a reasonable time. The date of his dismissal is the date that the claimant submitted his ET1 form to the Tribunal, therefore 27 November 2019.

73. As the respondent denies that the claimant was dismissed, they have failed to establish a potentially fair reason for his dismissal or follow any procedure in relation to it and therefore the claimant's unfair dismissal claim succeeds (as per s98 Employment Rights Act 1996).

74. The claimant has not established on the balance of probabilities that he is owed holiday pay and this part of his claim fails and is dismissed.

Remedy Hearing

75. There is to be a remedy hearing to determine the compensation owed by the respondent to the claimant, with a time estimate of three hours on a date to be notified to the parties in due course. The claimant indicated in his claim form that he does not wish to be reinstated or re-engaged, but seeks compensation only.

76. In order to prepare for this hearing, the claimant is to update his Schedule of Loss and provide any documents in support of his claim for compensation to the respondent, including evidence of mitigation of his losses, within 28 days of the date that this decision is sent to the parties.

77. At the remedy hearing, the Tribunal will consider the following issues:
    a. If there is a compensatory award, how much should it be? The Tribunal will decide:
        i. What financial losses has the dismissal caused the claimant?
        ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
        iii. If not, for what period of loss should the claimant be compensated?
        iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
        v. If so, should the claimant's compensation be reduced? By how much?
        vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
        vii. Did the respondent or the claimant unreasonably fail to comply with it?
        viii. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
    b. What basic award is payable to the claimant, if any?
    c. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
    d. What was the claimant's notice period and was the claimant paid for that notice period?

Employment Judge Barker

Date: 19 February 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
23 February 2021

FOR THE TRIBUNAL OFFICE