



EMPLOYMENT TRIBUNALS

Claimants: Ms E D'Aquino and Mr D Landolfi v

Respondent: Hoxton Beach Ltd

Heard at: Watford by CVP

On: 19 March 2021

Before: Employment Judge Cotton

Appearances

For the Claimants: Mr I Hurst (solicitor)

For the Respondent: Mr Paul Matthews (in person)

RESERVED JUDGMENT

1. The claimants' claim of unfair dismissal is dismissed.
2. The claimants' claim for breach of contract is dismissed.
3. The claimants' claim that the respondent made unlawful deductions from their wages for failing to pay them for hours they had worked is dismissed.
4. The claimants' claim that the respondent made unlawful deductions from their wages by failing to pay them their entitlement to paid annual leave is to be determined at a separate remedy hearing.
5. The claimants' claim for unlawful deduction from wages based on pension contributions is dismissed upon withdrawal.

REASONS

Introduction

1. The respondent is a company owned and directed by Mr Matthews who, broadly, runs a number of food outlets in London. It was Mr Matthews who started the company and nurtured it into a successful business. Its core activity is falafel and Middle Eastern vegan food.
2. The claimants, who are in a personal relationship, worked for the respondent until 4 November 2019. Both worked in the Clissold Leisure Centre Café (“the café”). They claim that they were unfairly dismissed by the respondent. They also claim that the respondent breached their employment contracts by failing give them the notice for termination to which they were entitled; and that he made unauthorised deductions from their wages by failing to pay them for all the hours they worked. They also claim that the respondent made an unlawful deduction from their wages for failing to pay their holiday entitlement.
3. A decision was made that the claimants’ claims should be heard together as they arose out of the same or similar facts.
4. The respondent contests the claim, arguing that the claimants resigned from their posts and have received all the payments to which they are entitled.

Law and issues

5. The issues to be determined were agreed at the start of the hearing. Although the issues of Polkey and contributory conduct concern remedy, so would only be relevant in the event of a finding of unfair dismissal, it was agreed that these matters would be addressed in evidence and submissions. The issues identified are set out below.

Unfair dismissal

- 5.1 Did the respondent dismiss one or both of the claimants? Section 95(1)(a) and (b) of the Employment Rights Act 1996 (the 1996 Act) says that an employee will be treated as dismissed if his or her contract of employment is terminated by the employer with or without notice or he or she has been constructively dismissed. A constructive dismissal occurs when an employee resigns, with or without notice, because of a repudiatory breach of contract by the employer. The respondent assert that the claimants resigned because it sought to place restrictions on their private business activities which were or were perceived to be in competition with the respondent. The claimants assert that they were dismissed, either actually or constructively.
- 5.2 If the claimants were dismissed, what was the reason or principal reason for the dismissal and was it a potentially fair reason under

section 98(1) and (2) of the 1996 Act. The respondent asserts that, if the claimants were dismissed, the reason for dismissal was either some other substantial reason – an irretrievable breakdown of trust and confidence in the working relationship – and/or gross misconduct, namely the competitive business activities referred to above. The claimants asserts that they were dismissed because they requested written particulars of employment – an automatically unfair reason for dismissal, by virtue of section 104(1)(b) of the 1996 Act. Alternatively, that they were constructively dismissed because of the respondent by his conduct breached the implied term of trust and confidence.

- 5.3 If the dismissal was for a potentially fair reason, was it fair or unfair within section 98(4), and did the respondent in all respects act within the band of reasonable responses?
- 5.4 If the dismissal was procedurally unfair, what adjustment, if any, should be made to the compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in *Polkey v AE Dayton Services Ltd* [1987] UKHL 8. The respondent asserts that the employment relationship could not have continued given the breakdown in relationship.
- 5.5 Would it be just and equitable to reduce the amount of one or both of the claimants' basic award because of any blameworthy or culpable conduct before the dismissal, as set out in section 122(2) of the 1996 Act, and if so to what extent?
- 5.6 Did the claimants, by blameworthy or culpable conduct, cause or contribute to the dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6) of the 1996 Act?

Breach of contract

- 5.7 An employer's failure to dismiss an employee without giving the notice to which they are entitled, or paying a sum in lieu of notice, is a wrongful dismissal, that is, a dismissal which is in breach of contract.
- 5.8 It is not in dispute that the claimants were not given a notice period or payment in lieu of notice.
- 5.9 If the claimants were dismissed, how much notice were they entitled to receive?
- 5.10 Does the respondent prove that it was entitled to dismiss the claimants without notice because they had committed gross misconduct? This requires the respondent to demonstrate that the claimant actually committed the acts of gross misconduct.

Unlawful deduction from wages

- 5.11 Section 13 of the 1996 Act says that workers have the right not to suffer a deduction from their wages by their employer which is not an authorized deduction. Failing to pay a worker for hour he or she has worked may amount to an unauthorized deduction from his or her wages.
- 5.12 Workers are entitled to 5.6 weeks paid leave each year – including any bank holidays - by virtue of Regulations 13, 13A and 16 of the Working Time Regulations 1998. Failure to pay a worker's holiday entitlement may amount to an unlawful deduction from his or her wages.
- 5.13 Section 23(2) of the 1996 Act says that a complaint about an unauthorized deduction must generally be made within three months from the date upon which the deduction – or, if there has been a series of deductions, the last in the series – was made. The case of *Bear Scotland Ltd and ors v Fulton and ors* 2015 ICR 221 says that a gap of more than three months between any two deductions will break the 'series.' Section 23(4A) of the 1996 Act says that a claimant can only claim in respect of a series of deductions going back two years.
- 5.14 The issues are whether the respondent made an unauthorized deduction from the claimants' wages by:-
- 5.14.1 failing to pay their wages for hours that they had worked and/or
 - 5.14.2 failing to pay them for holidays they had taken during their employment with the respondent and/or
 - 5.14.3 Failing to pay them for holidays accrued but not taken.

Pension

6. An unlawful deductions claim based on pension contributions was withdrawn on the day of the hearing.

Preliminary issue

7. At the end of the hearing the claimants' representative sought to amend the claim to include a claim that the respondent would have treated the claimants more favourably had they been members of a union. This application was made in response to oral evidence from the respondent about previous situations he had handled where the staff were union members and had had access to union resources.
8. It was not clear which area of law Mr Hurst sought to rely upon. Possibly he sought to add a claim of automatic unfair dismissal pursuant to section 152(1)(c) of the Trade Union and Labour Relations (Consolidation) Act 1992. However I refuse his application. This is a new complaint requiring additional evidence raised right at the end of the hearing and is not particularised. The respondent was given no opportunity to respond.

Evidence

9. I had before me a 433 page bundle divided into four sections: Claimants' Documents, Respondents' Documents, claim forms and correspondence with the Tribunal, and some party-party correspondence, the privileged elements of which I disregarded.
10. I had witness statements from both claimants and from Mr Matthews for the respondent, all of whom gave oral evidence.

Findings of fact

11. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. Any references to page numbers are to the bundle of documents.

Start of employment

12. Ms D'AQuino started working for the respondent in around October 2010, initially on a casual basis. The respondent said that she responded to an advertisement and he appointed her at least in part because she had baking experience, which they were seeking at the time. Ms D'Aquino took a break in May 2011 and returned in April 2012.
13. Mr Landolfi, who had no baking experience, started working for the respondent in around November 2010. The respondent said that he was introduced to them by Ms D'Aquino, rather than replying to an advertisement as she had done.
14. The respondent said that both claimants started to work permanently for him from April 2012. However, Mr Landolfi said that, unlike Ms D'Aquino, he had not previously taken a break to travel. He said that he took a short break after being assaulted in August 2011 and returned to work in October 2011.
15. There was no evidence of the assault in the bundle, and no evidence of a working relationship prior to April 2012. I find that, on balance, it is likely that both claimants started to work permanently for the respondent in April 2012.

Pay and working hours

16. The claimants were paid an hourly rate. Weekly hours varied, but on average they worked around 27-35 hours per week. At the time the employment relationship ended their hourly rate was £11:25. A weekly rota system was in operation, with staff signing up for particular 'shifts'. The rota for any particular week recorded the total number of hours worked by each member of staff during that week.

Events leading up to end of employment relationship

17. It was common ground that, initially, the claimants were taken on to carry out general café duties. The respondent said that Ms D'Aquino worked more in the kitchen while Mr Landolfi carried more 'front of house' work, liaising with customers. However, their roles evolved over time. I heard a significant amount of evidence about the nature of the claimants' role, from a formal and an in-practice perspective, and about their understanding of it.
18. Ms D'Aquino said that it was in 2013/14 that she started carrying out some managerial duties to assist the then-manager, for example, helping with orders and carrying out cleaning checks, and that this was reflected in a pay rise; but it was not a formal arrangement. However, in around April 2015 the café was left without a manager. One way or another, the claimants stepped in to fill the gap.
19. Ms D'Aquino's evidence was that Mr Matthews approached Mr Landolfi and asked if the two of them would 'take care of the café' on a temporary basis pending the appointment of a new full-time manager. She said in practice they both carried out managerial duties though Mr Matthews preferred to refer only to herself as the manageress, and it was she who was introduced to others as such. Time passed. No full-time manager was appointed. Ms D'Aquino said that she kept performing the managerial duties with the help of Mr Landolfi. Their workload increased, since the managerial duties were carried out alongside the general café duties. They had to work extra hours for which they received no pay. However, neither she nor Mr Landolfi were formally promoted to managerial roles and no training was provided.
20. Mr Landolfi's evidence supported that of Ms D'Aquino. He said that although the two of them both 'ran the shop,' Mr Matthews preferred to just have one 'manager' and it was Ms D'Aquino who got this title. He said that the two of them were members of the 'managers' Whatsapp group and attended managers' meetings which were not attended by other staff.
21. Both claimants gave evidence that, although in practice they carried out managerial duties, there was no formal promotion or training, no new job description clearly setting out their roles. Ms D'Aquino said that a pay rise had simply appeared in her pay slips without it ever having been explained to her that this was to reflect her managerial role. They said that Mr Matthews had not been sufficiently clear about their roles, leading to confusion about what their responsibilities were. Ms D'Aquino said that there was no clear division between managerial duties on the one hand and general café duties on the other. All tasks were simply performed. She felt that she did not have adequate training – for example, managers should have Level 3 in hygiene whereas she had only level 2.

22. Mr Matthew's evidence was that he had asked Ms D'Aquino, whom he regarded as extremely capable, to take over as manager in April 2015. She had always been his choice for manager. He had never intended to appoint Mr Landolfi as a joint manager: 'I always regarded [Ms D'Aquino] as the manager and [Mr Landolfi] as her very nice boyfriend.'
23. Mr Matthews did not accept that the claimants were confused about their role and what their responsibilities were. He said that Ms D'Aquino had effectively 'created the job' with the previous manager and the transition had been seamless for her. In any event, he said that the fundamentals of running the business were straightforward and the claimants were fully aware of them. Cleanliness was paramount, and relationships with customer were also critical, as were managing staff and running the rota. An email to Mr Landolfi dated 16 October 2019 sums up his view on management: 'The first job of a manger is to lead by example - by being able to do every job you ask others to do and by being constantly busy.'
24. Mr Matthews said that the first time he became aware that Mr Landolfi regarded himself as an assistant manager was early in 2018 when he, rather than Ms D'Aquino, turned up to a meeting with the café's landlords. He said that, although not overly enthusiastic, he accepted the situation and gave Mr Landolfi a pay rise to recognise his new role. On page 210 of the bundle was a graph showing the Mr Landolfi had received a pay rise in July 2018. When asked how Mr Landolfi could have known what his new role was he said 'I would have done better to give him a piece of paper. I felt that money would speak louder than words.'
25. At no point did either claimant receive a written contract of employment or any statement of terms. They said that they had requested a contract continually throughout their employment, but Mr Matthews had 'always procrastinated'. They wanted clarity about their duties and their rights – including, for example, the company's position on sick pay, pension rights, role and responsibilities. In particular, they wanted clarity about being paid for attending management meetings. I was taken to a sample 'management' contract which the respondent used for some of its staff, pages 174-179, but this was never used for the claimants. I heard that Mr Matthews had a 'staff handbook' project, setting out the company's position on pension, holidays hours, sick pay and so on which he had asked Ms D'Aquino to help him with – but she said it just had titles in it.
26. Mr Matthews said that neither claimant had requested a written contract until 2019. Both her predecessor and successor were given written statements of and he said that had she or Mr Landolfi asked for a contract the would have given them one - indeed he was seeking to negotiate a contract with Mr Landolfi in the days prior to the employment relationship ending.
27. When asked why he had not given the claimants a contract, Mr Matthews conceded his failure and said that it would have been 'a good and simple thing to do. It would have taken very little effort.' But he had been busy

with his family and his business. He said that it was nonsense to say that he had dismissed them because they asked for a contract: they had managed for years without one.

28. I find that, by November 2019 and well before that, both claimants were in practice carrying out a managerial role in the café – indeed they acknowledged this. They attended management meetings. They were on the Whatsapp managers' group. Their complaint being that the role had not been formalised leading to a lack of clarity which caused problems.
29. I am not persuaded that the claimants were confused about their role, or about the difference between being a manager and being 'front of house;' or that a written contract, though required by law and in any event highly desirable, was critical to their understanding. They had worked for the respondent since 2012, carrying out management duties for some time, accepting by their conduct that they had a managerial role. I conclude that they must have understood both the industry and the respondent well, including what is involved in management responsibilities. I find that at all relevant times, they were contracted by the respondent to work as managers in the café.

Rent rise

30. In 2018, the café's landlords put the rent up. Thus, the café – which, Mr Matthews said, had high levels of staff compared with other cafes run by the respondent - came under pressure to make more money, and discussions began about how to make it profitable.

Melting pot

31. In Spring 2018, Ms D'Aquino set up, in Mr Matthew's words, 'her own cake making business' called Melting Pot Lab. Mr Matthews said that while staff quite often leave the respondent to pursue their own business interests, this was the first time someone had set up a competing business while still on the pay roll. However, at least to begin with, he accepted the situation. He said that during 2019, Ms D'Aquino had asked if she could sell some of her excess stock on the respondent's counter in return for Mr Matthews receiving 20% of the sales, and that he had given 'one off' permission on two or three occasions. (Ms D'Aquino said that she had offered him 50% of the sales, but he had decided that 20% would be fairer.) He said that he had never given generalised permission and had had no intention of giving Ms D'Aquino a 'subsidised outlet for their stock'. Mr Matthews said that the company made all its own cakes at a particular London-based bakery and did not have a practice of buying baked goods from staff. He said that when he later learned that Ms D'Aquino had provided her own cakes for birthday parties at the Clissold Leisure Centre, he saw this as her using the café as a 'platform' for her business, and regarded the Melting Pot as a rival enterprise, and one which took away time that Ms D'Aquino should have been dedicating to the respondent.

32. I accept Ms D'Aquino's evidence that the Melting Pot was never intended to be a rival enterprise. She said it was more of a hobby than a business. She was a sole trader. She baked from home. Profit was low. It was mainly a word of mouth operation. The Clissold Leisure Centre hosted birthday parties and she had provided some cakes for a few parties. Any arrangement she made with Mr Matthews to sell her baked goods was made for their mutual benefit and she had never intended to take advantage. Given the very high regard Ms Matthews clearly had for Ms D'Aquino's ability, I accept that it is likely that his fears about possible rivalry were genuine.

New Area Manager

33. In Spring 2019, a new Area Manager was appointed. ("The new AM.") She did not specifically work at the café, but was part of the managers' Whatsapp group. She instructed the claimants to make some changes. The claimants did not agree that these changes would be good for the business. However, they executed the changes. There was a downturn in sales. The new AM attributed this to staffing levels and inefficiency, and the claimants were asked to further reduce staff hours.

34. In September 2019, Mr Landolfi was further promoted to joint manager with Ms D'Aquino, on an equal footing. Whatsapp exchanges in September 2019, on pages 81-83 of the bundle, demonstrate how this happened. A message from Mr Landolfi describes Ms D'Aquino as 'assistant manager'. Mr Matthew responds, 'By the way, I always understood [Ms D'Aquino] was manager and you were assistant.' Mr Landolfi replies that the two of them divide their duties, each playing to their strengths: 'It's like having two consoles (sic) same as the ancient Roman republic used to have.' Mr Matthews objects. He writes, 'There is a principle which is that as business owner I appoint people to jobs. You can't simply unilaterally promote yourself.' Mr Landolfi responds that he had not meant to promote himself but that Ms D'Aquino could not do all the work herself; and that he was happy to be 'assistant'.

35. Mr Matthew's evidence was that, though not initially enthusiastic – his impression being that Mr Landolfi was more interested in discussions than in practical outcomes - he had reflected on the situation and come round to the view that, if both claimants were in practice working as joint managers, this should be recognised and they should be paid the same, rather than Ms D'Aquino being paid significantly more. They were in a relationship and it made sense to put them on an equal footing: 'Because of my regard for [Ms D'Aquino] I felt it was her right to rely on her boyfriend for support.' He wrote to Mr Landolfi on 16 October 2019 saying, 'I would like to offer you a contract as co-manager of Clissold (with [Ms D'Aquino]).' His evidence was that he saw a formal contract as an opportunity to make him work as the business required. He advises Mr Landolfi that there is no such thing in the business as an 'administrative manager,' stressing that he himself still carries out 'hands on' tasks. He writes 'The first job of a manager is to lead by example – by being able to

do every job you ask others to do and by being constantly busy.'

36. At around this time, the evidence indicates that the claimants were struggling and confused. In a Whatsapp exchange on 15 October 2019 (page 249) Mr Landolfi writes 'It's just everything is a bit confusing at the moment.....we really need to understand how you want us to run this place and what direction it has to take and what are the possible solutions for the possible issues... I've just heard everything and the opposite of everything. It doesn't matter if we agree or not we just need to know what to do.' Mr Mathews recommends that they follow the new AM's instructions and notes that she 'basically sees a lot of people not doing much work.'
37. The exchanges on page 249 shows that the confusion arose not because of the absence of written terms but because – in a stressful situation where the café was unprofitable and staff hours were being cut - the new AM was instructing them to change things; and others – including Mr Matthews - were giving the claimants conflicting instructions, or this was their perception. The confusion and distress were genuine – the claimants needed clear guidance about how to manage the situation - but I find that it did not stem from the absence of a written contract.
38. A series of Whatsapp exchanges on 30 and 31 October 2019 - pages 257-258 of the bundle – illustrate the events leading up to the end of the employment relationship on 4 November 2019. There is a shortage of baked goods. The new Area Manager writes, 'I heard [Ms D'Aquino] does lovely cakes, could she make carrot cake?' Ms D'Aquino writes that she has no time to bake at Clissold with the hours having been cut but 'I am regularly baking for my own business from home. I can bake some extras if needed.' Mr Mathews thanks her but says '...we don't buy from outside - maybe increase your hours...and bake onsite...' Ms D'Aquino responds that if something is needed for the following day 'for the usual agreement of the 20%' she can provide it. Another manager writes 'We really *never* buy cakes from staff' and goes on to explain why. The New AM comments, saying that 'I'm quite shocked that managers are seeming to take the piss....it is not acceptable to exploit the good nature of [Mr Matthews and his wife] for personal gain. Please concentrate on making your cafes fully efficient before starting your own enterprises.' Mr Landolfi responds that this is insulting and requests a contract. Mr Matthews responds 'You know perfectly well I am shit at keeping contracts up to date or even creating them in the first place' but 'I can create contracts for anyone who wants them and of course should do.' He also says that he does not agree with the suggestion that the claimants have been 'taking advantage' and apologises.

Letters of 3 November 2019

39. Following this exchange, and on 3 November 2019, the claimants each emailed a letter to Mr Matthews.

40. Ms D'Aquino's letter:-

- 40.1.1 Stated that she was not able to hold any position in the company involving direct contact with the new AM.
- 40.1.2 Complained that she had taken on a management role with few guidelines and on terms that were never formally agreed. Contracts had been requested but not provided.
- 40.1.3 Complained that Mr Matthews had not supported her against unjustified accusations from the new AM, and she no longer had any enthusiasm for a leadership position. She wrote that the new leadership was 'poisoning her personal life' and 'causing nervous breakdowns'.
- 40.1.4 Stated 'I am formally asking you to cancel me from the manager group and exempt me from any managerial duties. However, I will be available for shifts, according to conditions to be agreed in a formal contract.'

41. Mr Landolfi's letter:-

- 41.1 Stated that he had been forced to ask Mr Matthews to take him off the café managers group 'and from all those managerial duties that I've been doing since 2015.'
- 41.2 Complained that he and Ms D'Aquino had been 'behaving like managers' despite not having a contract setting out a clear job description and their employment rights.
- 41.3 Stated they have worked 'an incalculable number' of unpaid hours.
- 41.4 Asked for a written contract including a job description 'as a simple front of house'.

42. On 4 November 2019, shortly after reading these letters, Mr Matthews responds to both, by Whatsap: 'Very sorry to receive your resignation. When would you like to leave?' Mr Landolfi replies, 'They are not resignation requests, but simply a request of a contract without any managerial duties.' Mr Matthews responds that they have asked to stop working as managers but this does not mean a different role can be found. He writes, 'When a football manager resigns he doesn't suddenly pop up as a goal keeper.' He says that, while he is very sorry to lose them, in practice they have for some time been carrying out a management role and keeping them on in a different role would not work. Given the problems with the new AM, and their refusal to accept her advice, he is not confident that they would be able to work with any new manager he might wish to appoint to run the cafe. He says 'You can either leave immediately or continue coming to work while we work out severance terms.' He later follows this up with formal letters to each claimant. An exchange with Mr Landolfi on 16 November shows that Mr Matthews paid them for a couple of weeks 'without prejudice'. Mr Landolfi rejected this payment and said any such payments would be refunded. It was not clear whether this happened.

43. The claimants' position is that they had never intended to resign – they merely wanted a different role which did not involve management duties

or contact with the new AM. They said that their letters were essentially grievance letters.

Dismissal

Were the claimants actually dismissed by the respondent?

44. It is for an employee to show that he or she has been dismissed. If the facts are ambiguous, the employee must demonstrate that it is more likely than not that he or she was dismissed rather than having resigned. Events preceding and subsequent to the incident in question, and the nature of the workplace, are to be taken into account.
45. My conclusion is that, on balance, the claimants have failed to demonstrate that they were dismissed by the respondent. Their letters of 3 November were letters of resignation which Mr Matthews was entitled to accept, which he did on 4 November, and I find that his actions following 4 November are consistent with this acceptance. The claimants' letters made it clear that they did not wish to continue working in their current role, or continue working as managers, or continue working with the new AM. They were not prepared to do their job, and wished to terminate their employment in that job. They said they were prepared to do a different job for the respondent, a front of house job, in which the pay would have been lower. The respondent was entitled to reject this offer if he did not consider it to be in the interests of the business, and he did so. His evidence was that the café was already overstaffed and his view was that the claimants would have difficulty working under new management.
46. I find that the claimants' letters, though undoubtedly emotional, were not 'spur of the moment' letters, written in the heat of the moment when the claimants did not mean what they said. I did not read or hear any evidence which suggested that the claimants were put under any pressure to resign.

Were claimants constructively dismissed by the respondent?

47. By virtue of section 95(1)(c) of the 1996 Act, there is a dismissal when an employee terminates the employment contract in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. The conduct has to amount to a fundamental breach of contract. It is not sufficient for an employer to have acted in an unreasonable way. There must be a breach so serious that it shows that the employer no longer intends to be bound by one or more of the terms of the contract. In this case the term alleged to have been breached is the implied term of trust and confidence.
48. The claimants worked for the respondent for about seven years. They seem to have had a close and for the most part constructive working relationship with Mr Matthews. They were skilled, they were capable, they worked hard and tried hard and gave 'their all' to the café, and Ms

D'Aquino in particular came across as committed to the business and to Mr Matthews. Therefore it is unfortunate that things ended as they did.

49. Mr Matthews' principles, aspirations and good intentions, at least in relation to his staff, were not always reflected in his actions. For example, he had experience of union work and was in favour of employee rights, policies and procedures - yet he sometimes failed to prioritise them. He started a staff handbook and asked Ms D'Aquino to assist, but at that time did not get far beyond the headings. He believed in providing contracts for staff, and had drafted some templates, but his practice was erratic, with some staff receiving written contracts and others not. He could be contradictory. He permitted Ms D'Aquino to sell her baked goods from his counter even though, as later communications made clear, this was against company policy and was poor practice for a number of reasons. When Ms D'Aquino was challenged about this by the new AM, arguably he might have defended her more robustly and acknowledged his own role in the misunderstanding. His communication could be poor. He gave pay rises and made payments without identifying to the individuals affected what they were for. Ms D'Aquino did not know whether she was entitled to sick pay or not. He was against cash in hand payments, but on occasion he made them, putting pragmatism above principle in a hectic industry. It seems that he did not invariably provide clarity and a firm sense of direction. Events happened and he responded to them, such as his appointment of Mr Landolfi as a manager. However, despite these shortcomings, in my judgment Mr Matthews' acts tended to confirm the employment relationship rather than undermine it.
50. In conclusion, I find that Mr Matthews, whether by a single act or as a cumulative result of a number of acts, was not guilty of conduct so serious as to destroy the trust and confidence between employer and employee, entitling the claimants to terminate the contract and claim that they were constructively dismissed.
51. The claimants' claim that they were unfairly dismissed by the respondent is not successful. Their claim for breach of contract for a failure to give notice also falls away.

Unlawful deduction from wages – failure to pay for hours worked

52. The claimants complained that during their employment with the respondent they had worked on average six hours per week each more than they were paid for and more than they had claimed for.
53. The claimants were paid an hourly rate, and their hours varied from week to week. As noted above, on the date that the employment ended, their hourly rate was £11-25, and they said they worked an average of 27-35 hours per week. Staff recorded their own hours on a rota and on time sheets, and were paid for the hours they recorded. It was common ground that the claimants had been paid for the hours they had recorded on their time sheets. The claimants said that they had not recorded all the hours

they had worked. This was partly because the business was running at a loss, and staff hours were being cut; yet they still had to do the necessary work. Mr Landolfi said that he had not recorded his hours on the rota because he did not wish to 'create issues'.

54. There were no documents in the bundle demonstrating this. However Mr Landolfi said that the claimants had attended management meetings on their days off and had taken work-related calls while on holiday.
55. Mr Mathews' evidence was that he had never had a problem with paying any hours he was asked to pay. The claimants had been free to record their hours on the rota. He said that he had paid them for the hours they recorded, and prior to the claim neither claimant had asked him to pay for hours they had worked and not been paid for.
56. I find that in this context the amount properly payable to the claimants was payment for the number of hours the claimants recorded as having been worked. As noted it was common ground that the respondent paid the claimants for their recorded hours.
57. Accordingly, the respondent made no deductions from the claimants' wages by failing to pay for hours worked.

Unlawful deduction from wages – failure to pay holiday entitlement

58. During the relevant period, and from late 2015, Mr Matthews said that he operated a system of 'rolled up' holiday pay. In around 2015 he raised everyone's pay by about 9% and told them that he was doing it, and got their verbal consent. He said that this represented 28 days paid holiday for everyone. He said that the staff agreed with this change, and that it was done for convenience as staff worked irregular hours and were often casual.
59. The claimants' evidence supported this explanation. Also, in the bundle was a statement from an employee of the respondent confirming that, from around November 2015, he had received a pay increase; he had understood that this was 'rolled up' holiday pay' and he had given his verbal consent at the time.
60. I was directed to some payslips for Mr Landolfi, covering the period from 2015-2018. These show a box for 'holidays accrued to date,' a box for 'holidays taken', which is always 0, and a 'holiday balance', which, on these particular payslips, is 38.24 for the period ending 25 October 2015, 50.45 for the period ending 23 October 2016, 63.65 for the period ending 22 October 2017, 72.44 for the period ending 15 July 2018, 72.44 for the period ending 15 October 2018 and 75.91 for the period ending 21 October 2018. There were similar pay slips for Ms D'Aquino. At the hearing, none of the witnesses were able to explain clearly how this information was to be interpreted.

61. Workers are entitled to 5.6 weeks paid leave each year – including any bank holidays - by virtue of Regulations 13, 13A and 16 of the Working Time Regulations 1998. Generally this should be paid at the time that the leave is taken. Arrangements to the contrary amount to an unlawful payment in lieu of annual leave and/or are prohibited as a mechanism placing restrictions on the taking of leave.
62. In some circumstances an employer may be given credit for payments of rolled up holiday pay which he has made, and at the hearing the respondent submitted that if its system of rolled up holiday pay were to be found to be non-compliant, it should be credited with the sums paid as holiday pay pursuant to this system.
63. I find that, in operating a system of rolled up holiday pay, the respondent has failed to pay the claimants their holiday pay entitlement.
64. The provisional remedy hearing listed for **22 June 2021** will now proceed. Separate directions for that hearing, which – subject to paragraph 65 below - will be limited to the issue of the claimants' holiday pay entitlement are set out in a case management order of today's date.
65. The issue of an award under section 38 of the Employment Act 2002 for the respondent's failure to give a statement of employment particulars will also be determined at the remedy hearing.

Employment Judge Cotton

Date: 16 April 2021

Sent to the parties on:

.....
For the Tribunal Office