EMPLOYMENT TRIBUNALS

Claimant: Miss V Alexander

Respondent: Carl Keogh

Heard at: Manchester ET via CVP **On:** 13 July 2021, 3 September 2021 & 28 October 2021

Before: Employment Judge Rawlinson

Appearances

For the claimant: In person

For the respondent: In person 13 July 2021, Mr Cliff, counsel, 3 September 2021 & 28 October 2021

JUDGMENT

The judgment of the Tribunal is:

1. **The claimant's complaint of constructive unfair dismissal is not well founded and is dismissed.**

2. **The claimant's claim for holiday pay partially succeeds. The respondent is ordered to pay the claimant the net sum of £403.20.**

3. **The respondent failed to provide the claimant with written particulars of employment. The respondent is ordered to pay the claimant the sum of £1,152.08.**

REASONS

Introduction

1. The claimant, Miss Vicky Alexander, was employed by the respondent Carl Keogh as the Manager of the "Old Town Barbers" from around October 2015 until 3 July 2020 when, both parties agree, her employment ended.

2. The claimant claims that having tendered her resignation via email on 3 July 2020 she was in fact constructively unfairly dismissed as of that date, relying upon the respondent's handling of a variety of issues between March 2020 and July 2020 concerning the business's proposed post COVID reopening on 4 July 2020. The claimant places particular reliance upon alleged issues concerning the provision and suitability of PPE, allied to a general lack of clarity and a failure by the respondent to provide her with sufficient information and communications regarding the proposed return to work and related issues. The claimant asserts that these matters breached the implied term of trust and confidence as between the parties.

3. The claimant also claims holiday pay for leave to which she was entitled but, she asserts, she had not taken and had not been paid for. The claimant also alleges that her leave for the previous year had, by agreement, carried over and accrued as at the date her employment ended. She asserts that due to constant staffing issues she was unable to ever take her full entitlement to holiday as the shop was never allowed to be closed.

4. The respondent contests the claim of constructive unfair dismissal. He states that there was sufficient and suitable PPE purchased for the staff in anticipation of the reopening, and that he both sufficiently accommodated and properly responded to the various concerns and worries of the claimant throughout the relevant period. At a staff meeting held at the salon on 27 June 2020 the respondent stated that no such issues were raised and, as far as he was concerned, all the staff including the claimant were looking forward to going back to work on 4 July 2020.

5. In terms of the claim for holiday pay, whilst he does not dispute that the claimant is owed some from October 2019 - June 2020, he disputes the amount claimed by her. He also disputes the assertion that the claimant never took any leave and further denies that there was ever any provision or mechanism for the claimant to carry over holiday entitlement from one year to the next. He asserts that there were no staffing issues that prevented the claimant from taking leave and that the employees would all accommodate each other.

The Hearing on 13 July 2021

6. The claimant represented herself and gave sworn evidence. Before she did so, it became clear on the morning of day one of the hearing, 13 July 2021, that the claimant had not received the respondent's bundle and therefore the case was stood down to allow the material to be supplied and also to allow sufficient time for her to familiarise herself with it. It subsequently became clear that the respondent had also not seen various documents produced and supplied to the

Tribunal on behalf of the claimant, and so this was also remedied in an identical fashion.

7. In terms of the claimant giving her evidence, this process was truncated in that her evidence began on 13 July 2021 but had to be interrupted as the proceedings were stopped around 15:15 hours on that date due to technical difficulties suffered by the respondent, Mr Keogh, which meant that he could not effectively participate in the hearing via CVP. The case was then adjourned and went part heard until the next available date that the parties were available, namely the 3 September 2021.

8. At the point of the interruption, the claimant had reached the point in her evidence whereby in the absence of a witness statement she had effectively adopted two separate documents (one appended to her ET 1 and an email drafted on 6 July 2021 and sent to the Tribunal on 7 July 2021) as constituting her evidence in chief. Thereafter, in her oral evidence, she had had dealt with, briefly contextualised and explained the various messages and emails that had passed between the parties between March and into late June and early July 2020.

The Hearing on 3 September 2021

9. The claimant's evidence was due to recommence at the resumed hearing on 3 September 2021.

10. However, at the point of the resumed hearing on 3 September 2021, it became apparent that the respondent, who had previously represented himself and appeared in person, was now represented by both solicitors and counsel. Mr Cliff, counsel, attended at that hearing on the respondent's behalf.

11. At this stage, on 3 September 2021 the claimant Miss Alexander made an application to adjourn the hearing in order that she could obtain legal representation. The basis of that application was that she said that she did not truly understand until she joined the hearing that morning that the respondent was to be represented by a barrister, Mr Cliff of counsel, appearing for the first time at the hearing. The application was opposed by the respondent, who drew attention to various pieces of correspondence that had passed between the parties prior to the hearing as evidence that the claimant ought to have been well aware that the respondent was going to be represented.

12. Ultimately, having heard and considered submissions on the issue from both sides, I decided that, regrettably, the hearing should be adjourned. Full reasons for that decision were given orally by me on 3 September 2021 and I do not propose to rehearse those in the body of this document.

13. For present purposes, what is of significance, is that I made clear at the conclusion of those reasons that, should the respondent wish to pursue an application for costs in respect of the hearing of 3 September 2021, then that application would be considered at the conclusion of the substantive merits hearing.

The Hearing on 28 October 2021

14. Following the adjournment of 3 September 2021, the case resumed part heard on 28 October 2021. The claimant was able to conclude her evidence. At the conclusion of her evidence-in-chief, the claimant was then cross-examined by Mr Cliff, counsel on behalf of the respondent.

15. Following completion of the claimant's case, the respondent then gave evidence. He had also not submitted a formal witness statement and therefore he also adopted the factual narrative within his response form as his evidence-in-chief. He was also subjected to cross-examination by the opposing party, Miss Alexander.

16. As well as the respondent himself, I also heard evidence from two other witnesses called by the respondent, namely Angela Davies and Rebecca Hough. Both were employees at the Old Town Barbers at the material time and also attended a staff meeting held on 27 June 2020. Each of the witnesses adopted the accounts they had previously provided by email (see pages 26 and 27 of the respondent's 83 page bundle) before being cross-examined by the claimant.

17. As well as hearing live evidence, I also received and considered the numerous documents that had been produced by both parties. This included an 83 page PDF bundle prepared by the respondent. This contained much of the correspondence that passed between the parties at the material time, and containing (amongst other things) various emails, text messages and WhatsApp messages. The claimant also supplied a variety of documents, including payslips, emails and a variety of relevant text and WhatsApp messages. I will refer to various of that documentation and those messages and exchanges in due course within these reasons.

18. Following the conclusion of the evidence on the afternoon of 28 October 2021, and also following consideration of closing submissions made by each side, I also heard and considered an application by the respondent for costs in respect of the adjourned hearing of 3 September 2021. My decision and reasons in respect of that matter is also dealt with in the course of these reasons.

Issues for the Tribunal to Decide

19. At the start of the hearing, before hearing any evidence, I went through and agreed with the parties the issues for me to decide. In simple terms, for the purposes of the constructive dismissal claim, these were:

    i. Did the respondent do the following things:

        a. Create or allow a situation whereby there was a lack of suitable PPE at the workplace?
        b. Fail to properly communicate with the claimant regarding her potential return to work, health and safety matters and PPE?
        c. Fail to provide the claimant with sufficient information regarding her return to work, health and safety matters and PPE?

ii. Did the above matters individually or taken together breach the implied term of trust and confidence?
iii. Was the breach a fundamental one?
iv. Did the claimant resign in response to the breach?
v. Did the claimant affirm the contract before resigning?
vi. Has the Claimant proven that she was constructively dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996 (ERA)? i.e. was the claimant constructively dismissed due to a breach of trust and confidence on the part of the respondent, or was employment ended by the claimant's resignation?

20. For the purposes of the claim for holiday pay, the issues in simple terms were:

    i. What was the claimant's leave year?
    ii. How much of the leave year had passed when the claimant's employment ended?
    iii. How much leave had accrued for the year by that date?
    iv. How much paid leave had the claimant taken in the year?
    v. Were any days carried over from previous holiday years? In that regard:

        a. was there a contractual term which dealt with the issue of carrying over leave?
        b. was the claimant prevented by the respondent from taking paid holiday in 2018/19?

    vi. How many days remain unpaid?
    vii. What is the relevant rate of pay?

21. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

Facts

22. The claimant Vicky Alexander was employed by the respondent Carl Keogh for a period of almost 5 years from 2015 until her resignation by email in July 2020. She was employed as the Manager of the "Old Town Barbers" located in Runcorn. There were no written employment particulars provided to the claimant by the respondent during her employment. The claimant had a holiday entitlement of 28 days per year. The claimant's leave year ran from October to October each year. By the time of her resignation on 3 July 2020, the claimant had accrued 21 days holiday for that year.

23. In March 2020, due to the COVID 19 pandemic, the claimant was placed on furlough and the business was closed. Various text messages passed between the parties around March and April 2020 regarding furlough arrangements and also what money the claimant would receive during this period (see pages 44 – 50 of the respondent's bundle).

24. On 3 May 2020 the claimant sent a text message to the respondent asking whether getting facemasks, gloves and hand sanitiser in for when the business reopened was a good idea. The respondent Mr Keogh responded that this did sound like a good idea and that the claimant should remind him to order some that week (p 50 of the respondent's bundle (RB)).

25. On 11 May respondent Mr Keogh sent a text responding to the claimant's text. In that text, the respondent stated that he would "*look into getting all the PPE equipment needed this week"* (p 51 of RB). The claimant responded on the same date, and indicated that there was up to a month's wait on some items of PPE and that she wanted to make sure that "*we've got everything in place so we can go back as soon as possible and work safely*".

26. Within the respondent's bundle (p 41 – 42) there are various messages in May 2020 whereby the claimant sent the respondent some online links to PPE equipment. These included face shields and gowns. The respondent replied by way of WhatsApp message dated 21 May 2020 stating:

    "*all ordered plus 5 litre sanitiser refill and automatic dispensing unit*."

    Documents in the respondent's bundle (pages 77 – 79 inclusive) confirm that the respondent ordered various items on 21 May 2020 including disposable gloves, hand sanitiser gel, reusable face coverings and a sign encouraging people to use hand sanitiser.

27. It was agreed between the parties that the shop was due to reopen after lockdown for the first time on Saturday 4 July 2020.

28. On 17 June 2020 the claimant sent the respondent a WhatsApp message (claimant's bundle). This stated that the shop needed more cleaning products than the claimant first thought, and asked the respondent to order them. This included various items including clippercide and barbercide spray, as well as barbercide wipes and cleaning products for chairs and units. The message also asked if the respondent could please let her (the claimant) know what PPE the respondent had and how much of it.

29. Around this time, 17 June 2020, the claimant also sent an email to the respondent regarding the potential return to work and making various suggestions. That email was sent at 7:53 AM on 17 June (see documents bundle produced by the claimant).

30. Within that email, the claimant set out various matters, including the measurements of the shop and the distances between various workstations. She suggested that barriers between the chairs were "*essential*". The claimant also pointed out various matters regarding the premises of the shop itself that she felt needed repairing or updating. The only reference to PPE within that email was a reference to the fact that some sort of air conditioning unit would be needed when staff were wearing PPE through the summer.

31. The respondent replied the claimant by email the same day, 17 June 2020, at 9:40 AM. He indicated that he would not be putting screens up in the shop as this was a guideline only. He also indicated that he would send over a rota in due course.

32. A further email in response, sent from the claimant to the respondent on 17 June 2020, read:

    "*I've spoke to you on the phone and sent you several messages over the last couple of months trying to get a response to my questions and ideas. Some of things I've raised in the email have needed addressing since I've worked for you almost 5 years.*

    I can't answers any of the girls' question if I don't have a clear plan to put in place and we're all eager to get back as soon as the government lets us.

    Hopefully after you respond we will have a better understanding and can move forward with the next stages that need to be put in place for customers and staff."

33. At 21:09 hours on 17 June 2020 the respondent sent a further email in response claimant's email. This took issue with various of the concerns and suggestions that the claimant had raised. It also stated:

    "*Also regarding the fact that you have sent me serval (sic) messages regarding your concerns over the last few months, the only messages I have received from you are regarding your wages. I have not received any messages regarding the salon re opening*."

34. That email from the respondent concluded by stating:

    "For the past few years the business has not been profitable and I have personally sustained this business to keep you all in employment, which is fair to say I have tried my best. I am going to conduct a full COVID risk assessment before asking you all to return. However with this being a small business I feel this is a big undertaking and a great expense to myself again. I think I need some time to digest this and decide whether this business will be viable in the present climate. I will get back to you once I have made a decision."

35. At 11:30 hours on 18 June 2020 the claimant again emailed the respondent. In that email, the claimant agreed that the respondent needed to do a COVID risk assessment prior to start returning and reopening, and indeed pointed out that this was legally required take place before staff could return to work. It also stated:

    "Could you please you send me a list of equipment you have already purchased a and cost of it (so i know what we have and what we need how much it cost) I can do a breakdown for you. This will help us address the price increase that is needed."

    The claimant made various further observations regarding the continued viability of the business, and also posed a number of questions to whether her

and her colleagues still had a job or needed to start looking for a new job. Towards the end of the email there was also a suggestion by the claimant of a meeting on the 19 June 2020 between the respondent and staff, including the claimant. It seems that for various reasons this had to be rearranged and, ultimately, the meeting took place on 27 June 2020.

36. On 24 June 2020 11:38 hours the respondent sent a message to the claimant via WhatsApp. This stated that he would give her a call later to discuss reopening the shop on 4 July 2020 and also to discuss about a potential meeting with her and her colleagues.

37. Later that day, 24 June 2020, the claimant sent a text message to the respondent at 16:12 hours. The message asked "*So does this mean we've all still got a job?*" It also asked for a copy of the rota.

38. The respondent responded via text at 19:40 hours same day, 24 June 2020. Whilst making various comments on the continued potential viability or profitability of the business, the message also stated that the rota would be discussed when they all met. The message concluded by stating that the respondent would meet the claimant in the salon at 12:30 hours on Saturday, 27 June 2020.

39. The claimant sent a further text message to the respondent at 21:19 hours on 26 June 2020. This made reference to the respondent's comments about the profitability or otherwise of the business. The message made no mention of PPE or any other concerns regarding safety. It concluded by stating:

    "Hopefully more will be cleared up tomorrow a week before opening which is not ideal to be honest".

40. A meeting took place at the salon on 27 June 2020. Present at the meeting with the claimant, the respondent and two other members of staff: Rebecca Hough and Angela Davies.

41. After the meeting held on 27 June 2020, the claimant sent the respondent a text message at 18.20 hours the same date. The message enquired about what the claimant should do to update the Facebook page of the business (p 62 of RB).

42. The respondent responded at 21:08 hours with some instructions, and also made reference to taking customers contact details for track and trace purposes, a small price increase to reflect the use by staff of gowns and using common sense when customers were queueing to keep social distancing. The message also referenced staff using the sanitiser machine provided when entering the shop, and separate appointments being made for vulnerable customers.

43. The claimant also sent another message to the respondent via WhatsApp on 18:24 hours the same date, 27 June 2020. That message stated:

    "*hi Carl the pictures I sent on 17 June we could do with for the shop please*".

This was accompanied by some images of barbercide and clippercide. There was also a further message (possibly part of the same exchange – see pages 37 and 39 of RB) sent by the claimant on 27 June 2020 after the meeting, with a picture of disposable hairdressing gowns, also stating that *"we could do with these for the shop please".* The message from the claimant also asked whether the face shields were reusable or disposable, asked in response to various Amazon Web links to PPE equipment that had been sent to her by the respondent (34 – 36 of RB).

44. On Sunday 28 June the respondent responded to the claimant via WhatsApp, stating:

"*Already ordered should be here Wednesday and yes the visors are reusable*".

The Wednesday referred to in that message was a reference to Wednesday, 1 July 2020.

45. There were also various other text messages between the claimant and the respondent on Sunday 28 June 2020 (see pages 64 – 72 of RB).

46. In these messages, the claimant sent the respondent the draft wording for the Facebook page of the business in readiness for the reopening. She also queried how many people would be working at any one time and how many workstations would be available to work at. The wording drafted by the claimant for the Facebook page (p 68 of RB) included reference to customers using the hand gel provided, to adhering to the markers in the shop to stand/sit and an instruction to them to adhere to social distancing. It also stated:

"*All staff will be provided with full PPE and will be working this Saturday from 8 AM to deal with customer demand*".

47. There was no reference in any of those messages to any outstanding concerns that the claimant had regarding her safety or the provision of PPE.

48. The claimant next contacted the respondent at 15:18 hours on Monday, 29 June 2025 via text message. That message simply asked whether the respondent would like to sort out a rota. Various messages exchanged thereafter that day were in similar terms and dealt with rota issues. Again, there was no reference in any of those messages to any outstanding concerns that the claimant had regarding the safety or the provision of PPE.

49. The final text message sent from the claimant to the respondent prior to her resignation was sent at 18:34 hours on Wednesday 1 July 2020. That message dealt with a query regarding the offering of appointments and any particular hours to senior citizens. There was no mention within that final message regarding any outstanding safety issues or issues surrounding PPE.

50. By text message sent at 08:01 hours on 3 July 2020 the claimant alerted the respondent that she had sent him an email. A copy of that email appears at page 28 of the respondent's bundle. The email, which is timed at 7:30 AM, tenders the claimant's resignation with immediate effect. The email stated:

"Due to your conduct and behaviour and lack of communication/support over the last few weeks, I feel I cannot continue to work for you at the Old Town Barbers. It has created an extreme amount of anxiety and stress to my personal life and I am not willing to continue, so due to the circumstances and other factors including my payslips and holiday pay issue which I am still owed 6 weeks holiday pay I would like to resign with immediate effect."

51. The claimant's resignation having been accepted, it follows that the claimant's employment with the respondent ended on 3 July 2020 and, in due course, she presented her claim for constructive unfair dismissal and holiday pay to the Tribunal.

The Law

Written Particulars of Employment

52. **Section 1 of the ERA** provides that where an employee begins employment "*the employer shall give to the employee a written statement of particulars of employment" and that this "shall be given not later than two months after the beginning of employment*".

53. If an employer fails to provide such a statement, a complaint can be brought under **section 12 (3) of the ERA**. In addition under **section 38 of the Employment Act 2002 ("EA")** if an Employment Tribunal makes a finding in favour of an employee in a number of specified claims (including for unfair dismissal and unlawful deduction of wages) and makes an award to the employee in respect of those claims, and in so doing finds that the employer was in breach of its **section 1 ERA** duty when the proceedings were begun "*the tribunal must…increase the award by the minimum amount [2 week's pay] and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount [4 week's pay] instead*". This does not apply if there are "*exceptional circumstances which would make an award or increase…..unjust or inequitable*".

Constructive Dismissal

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

55. It was established in the case of **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27** that the employer's conduct which can give rise to a constructive dismissal must involve a "*significant breach of contract going to the root of the contract of employment*", sometimes referred to as a repudiatory breach. Therefore, to claim constructive dismissal, the employee must show:-

a. that there was a fundamental breach by the employer;
b. that the employer's breach caused the employee to resign;
c. that the employee did not delay too long before resigning, thus affirming the contract of employment.

56. In respect of what is required in the nature of the breach, it is whether the employer, in breaching the contract, showed an intention, objectively judged, to abandon and altogether to refuse to perform the contract, see **Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420** and **Leeds Dental Team Ltd v Rose [2014] IRLR 8.**

57. There is an implied term in a contract of employment that neither party shall, without reasonable and proper cause, act in a way which is calculated or likely to destroy or seriously undermine the relationship of trust and confidence between the parties, see **Malik v BCCI SA (in liquidation) [1998] AC 20.** Such a breach may be because of one act of conduct or a series of acts or incidents, some of them may be trivial, which cumulatively amount to a repudiatory breach, see **Lewis v Motorworld Garages Ltd [1986] ICR 157.**

58. In respect of constructive dismissal, in **Kaur v Leeds Teaching Hospitals [2019] ICR 1**, Underhill LJ gave the following guidance at paragraph 55: In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(2) Has he or she affirmed the contract since that act?
(3) If not, was that act (or omission) by itself a repudiatory breach of contract?
(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju [2005] ICR 481**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the ***Malik*** term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)
(5) Did the employee resign in response (or partly in response) to that breach?

Holiday Pay

59. **The Working Time Regulations 1998 (WTR)** give workers the entitlement to 5.6 weeks leave each leave year (including any bank holidays the worker is entitled to take). 4 weeks of this was to implement European law (The Working Time Directive 1993, replaced by the 2003 Directive) (**reg 13**) and the further 1.6 weeks' leave is a matter of domestic law only (**reg 13A**).

60. **Regulation 14 WTR** provides for the payment of accrued but untaken holiday pay on termination. The general rule under the **WTR** is that the worker is only entitled to be paid in lieu of holiday accrued but untaken in the final leave year: **Reg 13(9)(a).** The terms of the contract will determine whether there is a

contractual right to carry over leave. If there is no express right to do so, a right is unlikely to be implied.

61. The **WTR** do not make any provision for carrying forward any unused leave from the 4 weeks' leave into a following holiday year. Employers and workers can agree to carry over any of the additional 1.6 weeks' additional statutory leave into the next leave year (but not beyond) by means of a relevant agreement: **reg 13A(7).**

62. A claim can be brought under regulations **30, 13 and 13A WTR**, which allow a worker to bring a complaint that the employer has refused to permit the worker to exercise their right to annual leave.

63. There are exceptions, developed in case law, allowing the 4 weeks' **WTR** leave (but not the additional 1.6 weeks' leave) to be carried over in situations where the worker was unable to take leave – e.g. when prevented from doing so by denying the worker has any entitlement to leave – **King v Sash Window Workshop [2018] IRLR 142 ECJ**; or where the employer has not taken sufficient steps to encourage workers to take their holiday entitlement - **Kreuziger v Land Berlin Case C-619/16, ECJ**, and **Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu Case C-684/16, ECJ**.

Conclusions and Further Findings of Fact

64. I make my findings and conclusions with reference to the list of issues that were agreed at the start of hearing.

Did the respondent:

1. **Create or allow a situation whereby there was a lack of suitable PPE at the workplace?**
2. **Fail to properly communicate with the claimant regarding her potential return to work, health and safety matters and PPE?**
3. **Fail to provide the claimant with sufficient information regarding her return to work, health and safety matters and PPE?**

65. These matters can be taken together as they are interlinked.

66. In this case, I prefer the evidence of the respondent and also the witnesses Angela Davies and Rebecca Hough with respect to these issues. I conclude that there was provision of suitable PPE at the workplace by the respondent. Further, the claimant has not established that such equipment that was required was not available to staff at the time the shop opened on 4 July 2020, or would not have been made available to her in a similar fashion.

67. Not only is this borne out by the evidence of those witnesses, but it is also borne out by the material within the bundle supplied by the respondent. I accept the evidence of Carl Keogh, Angela Davies and Rebecca Hough to the effect that always a supply of barbercide and clippercide in hand as that was a requirement for the efficient running of the business generally.

68. Further, I note in particular the evidence of Angela Davies expressly on this topic. In response to a question as to why she went back to work on 4 July 2020 she stated unequivocally:

"there was more than enough PPE, we also had the relevant plastic gowns. I personally wouldn't have gone back to work if that was not in place."

69. In similar terms, Rebecca Hough, gave evidence about serious health problems that she had suffered with throughout the material period. On this topic she stated:

"*I had sepsis on my lungs. I would never have gone back to the shop if it was not safe, it was safe. We wore masks constantly. When we did open environmental health check the shop so I was fine by that. This included PPE and barbercide which is always kept in the shop all "*

70. The fact that no other employee made a similar complaint, in circumstances where some of them suffered from serious health conditions, fortifies my view in this regard.

71. I also conclude that, on balance, the respondent did properly communicate with the claimant and provided her with sufficient information regarding her potential return to work, health and safety matters and PPE. An analysis of the various emails and text messages that passed between the parties throughout the relevant period again demonstrates this to be so.

72. Whilst the claimant may not have been totally satisfied with the degree of communication, or indeed the equipment that was provided, in my view it was more than sufficient in the circumstances. It is also of some significance in my view that the claimant in fact resigned some days prior to the date that the shop was actually due to open. In that regard, she simply could not have known what the state of the equipment would be by the time the shop opened. It would seem on the evidence of others the provision was more than satisfactory and sufficient by that date i.e. by 4 July 2020.

73. It is also of some significance that, as per the unchallenged evidence of the respondent, Angela Davies and Rebecca Hough, the claimant expressed no concern about the PPE situation at the meeting held on 27 June 2020. To the extent that text messages and communications were sent by the claimant to the respondent after that date it is again worthy of note that none of them expressed any outstanding concerns at all with respect to the PPE situation. A plain reading of those messages is suggestive of the claimant being content and ready to go back to work and doing her best to get things in order e.g. drafting the wording of the Facebook page – which notably included the phrase*: "All staff will be provided with full PPE and will be working this Saturday."*

Did the above matters individually or taken together breach the implied term of trust and confidence?

74. For the reasons outlined above, I find that they did not. In those circumstances, I need not consider the remaining elements as to whether the breach was fundamental or whether the claimant resigned in response to the breach.

75. For the sake of completeness, I find that the matters complained of did not amount to a fundamental breach which entitled the claimant to resign and treat the contract at an end. In my view, the claimant's resignation was premature, being tendered even before she knew the state of the equipment available on opening day, and in the absence of any concerns raised either at or after the meeting of 27 June 2020.

76. Even had the matters the claimant complained of before the 27 June 2020 amounted to breaches of the implied terms of trust and confidence in claimant's contract (which I find they did not) I would have concluded that the claimant affirmed the contract in any event by her failure to raise any such substantive issues on 27 June 2020 or thereafter failing to raise any further concerns regarding PPE or similar matters prior to her resignation. In my view the claimant's conduct on and after 27 June 2020 was inconsistent with somebody resigning in response to a fundamental breach of contract committed by the respondent.

Was the claimant constructively dismissed due to a breach of trust and confidence, or was employment ended by the claimant's resignation?

77. For the reasons outlined above, I conclude that the claimant's employment was ended by her own resignation via email on 3 July 2020 and not by any constructive dismissal by the respondent. There was no breach of contract by the respondent and the claimant's complaint of unfair dismissal therefore fails and is dismissed.

The claim for Holiday Pay

What was the claimant's leave year?

78. This was agreed between the parties to be from October to October each year.

How much of the leave year had passed when the claimant's employment ended?

79. This was agreed as from October 2019 until July 2020.

How much leave had accrued for the year by that date?

80. This was also agreed evidence between the parties as 21 days.

How much paid leave had the claimant taken in the year?

81. This was disputed. The claimant asserted she had taken no leave at all in her final year of employment. The respondent, and indeed the two witnesses Angela Davies and Rebecca Hough all indicated in their evidence their recollection that the claimant had taken leave.

82. I prefer the evidence of the respondent and the other two witnesses who worked at the salon, Miss Davies and Miss Hough with respect to this issue. I conclude that the claimant did take some paid leave. I accept the respondent's evidence, and indeed the evidence given by Miss Hough, to the effect that the claimant took 14 days leave in her final year of employment.

Were any days carried over from previous holiday years?

83. For the reason detailed below, I find there were not.

In that regard:

Was there a contractual term which dealt with the issue of carrying over leave?

84. The respondent's evidence was there was a discretionary practice of potentially carrying over a maximum of 5 day's leave from a previous year if a written request was received. The claimant accepted no such written request was made, but asserted there was a verbal agreement.

85. I prefer the evidence of the respondent on this issue. I conclude that there was no written contract of employment that catered for the carry over of leave and, on balance, I also conclude there was no verbal agreement between the parties that leave could be carried over.

86. The claimant's evidence on the issue was vague regarding when, where and in what circumstances any such conversation modifying the contract to that effect took place. I also accept the evidence of Miss Davies and Miss Hough that staff would effectively cover for each other in respect of holidays, and that holidays would be taken "*as and when*". They did not corroborate any specific agreement or practice with any staff member regarding the carry over of future holidays at some unspecified time on the basis of a conversation. I conclude such an agreement would be inconsistent with the *ad hoc* and flexible nature of the arrangements that I find were in place. The claimant has not established on the balance of probabilities that there was any such modification.

87. To the extent that holidays and holiday pay may or may not have been reflected in the wage slips, I conclude this was evidence of *ad hoc* arrangements, poor record keeping and a general lack of organisation within the business as a whole, rather than necessarily a reflection of the true position (as equally reflected by the lack of any employment particulars being provided to the claimant).

Was the claimant prevented by the respondent from taking paid holiday in 2018/19?

88. On the evidence I have heard I conclude that she was not. The claimant's evidence regarding the sickness of other staff members preventing her taking holidays was simply not borne out by the evidence of Angela Davies and Rebecca Hough, both if whom corroborated the respondent's evidence. Miss Hough especially was adamant that she had not taken anything like as many days off as the claimant had asserted during the relevant period. I accept her evidence on this point. She is plainly best placed to know when she herself was and was not absent with sickness. The claimant has not established on the balance of probabilities that she was prevented from taking leave.

How many days remain unpaid?

89. The respondent frankly conceded in his evidence that that he did owe the claimant a total of 7 days' holiday pay. On the evidence I have heard, I find this to be the case.

What is the relevant rate of pay?

90. The parties agreed the relevant rate of pay to be £57.60 per day, net.

Conclusion on Holiday Pay

91. The claimant's claim for Holiday Pay therefore succeeds to the extent of 7 day's pay. The respondent is ordered to pay the claimant the sum of **£403.20 net** (calculated as 7 x the agreed daily rate of £57.60).

Failure to provide Written Particulars

92. There was no dispute by the respondent that the claimant was not provided with written particulars of employment. I have also now found that the claimant has now succeed in terms of at least part of her claim i.e. with respect to her claim for holiday pay, as outlined above.

93. Given that the claimant was employed for a period of almost 5 years, I find this to be a serious oversight. In the circumstances I award the claimant's 4 week's pay. The respondent is ordered to pay the claimant the sum of **£1,152.08** (calculated as 4 x the agreed rate of weekly pay at £288.02 per week).

The Costs Application

94. At the conclusion of the evidence and submissions on the principal liability issues, Mr Cliff, on behalf of the respondent, made an application for costs in respect of the adjourned hearing of 3 September 2021. A schedule of costs was provided in that regard. The sum claimed was **£4,724**. Mr Cliff confirmed that the application was made pursuant to rule **76(2)** of **The Employment Tribunal Rules.** The claimant opposed the application. I heard submissions on the issue from both sides.

95. Mr Cliff submitted that the claimant had asserted at the previous hearing on 3 September 2021 that she had only become aware of the fact that the respondent was legally represented by counsel two days prior to the hearing. Her application to adjourn on that date, effectively, was made on the basis she was taken by surprise that the respondent was legally represented and wished to investigate the possibility of obtaining her own representation.

96. Mr Cliff pointed to a variety of emails sent prior to this date that, he contended, made absolutely clear that counsel would be attending on behalf of the respondent on 3 September 2020. He also submitted that the claimant's assertion on the last occasion (to the effect that the claimant had thought neither side was permitted to have legal representation) was clearly incorrect as the claimant herself had stated that at one stage she had sought some legal advice on an earlier occasion. Mr Cliff relied on particular on an email dated 25 August 2021, an email the claimant confirmed that she had received. That email read:

"*We kindly wish to update the Tribunal and the claimant that counsel will be instructed on behalf of the respondent for the trial on 3 September 2021."*

97. The claimant Miss Alexander stated that the context of that email was that it was one of a series, up to nine in number, that she had received, dealing with various issues which do not concern me the purposes of resolving this application, including potential settlement of the claim. Her account was that she quite wrongly thought that they related to another potential claim that was to be brought against her by the respondent at the conclusion of this hearing.

98. At the hearing on 3 September 2021, the claimant Miss Alexander's account was that she has sought some legal advice in the interim, but had erroneously thought she was not permitted to engage the services of lawyers to act on her behalf in the proceedings. The source of that confusion appears to be her recollection of an exchange at the conclusion the hearing on 13 July 2021 to the effect that the case would be decided on the basis of the documents and evidence of the individuals already identified and furnished to the Tribunal and not any new material. Whilst this was designed to stop the further proliferation of documents and issues, the claimant thought this meant she was not permitted to instruct a lawyer. The claimant reiterated these matters in submissions on 28 October 2021.

99. Following the respective submissions at the conclusion of the evidence on 28 October 2021, I then received a document via email on the 18 November 2021 drafted by the respondent. The document was dated 10 November 2021 and sought to make further submissions with respect to the issue of the costs application.

100. I thereafter ensured that this document drafted by the respondent was provided to the claimant and invited any further submissions with respect to that document be made in witing to me prior to reaching a decision on the issue. In the event, save for some brief emails dealing with other issues, none of substance were forthcoming.

101. As per the instruction of the respondent, given the contents of that document, I explicitly did not consider it until after I had already made my decision on the principal issue of liability. The document made various submissions regarding the respective financial position of the parties, offers to settle and the respective prejudice to each side of the various adjournments and postponements that had occurred.

The Law and Relevant Factors

102. As the Court of Appeal reiterated in *Yerrakalva v Barnsley Metropolitan Borough Council and nor 2012 ICR 420, CA*, costs in the employment tribunal are still the exception rather than the rule. The the Tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts. An employment tribunal has the power to make a costs order based upon a party's conduct during the proceedings. The conduct of the parties — both the paying party and the receiving party — may also be relevant to the assessment of the amount of costs to be awarded.

103. Further, the amount of loss incurred by a party will not necessarily be determinative, since a Tribunal may take into account other factors, such as the means and the conduct of the parties. As noted by the EAT in *Howman v Queen Elizabeth Hospital Kings Lynn EAT 0509/12*, any tribunal when having regard to a party's ability to pay needs to balance that factor against the need to compensate the other party who has unreasonably been put to expense. The former does not necessarily trump the latter, but it may do so.

104. In *Jilley v Birmingham and Solihull Mental Health NHS Trust and ors EAT 0584/06* it was held that, if a tribunal decides not to take into account a party's ability to pay after having been asked to do so, it should say why. If it does decide to take into account ability to pay, it should set out its findings on the matter, say what impact these have had on its decision whether to award costs or on the amount of costs, and explain why.

105. The fact that a party is unrepresented can also be a relevant consideration in deciding whether to award costs against him or her. Furthermore, the EAT observed, even if the threshold tests for an order for costs are met, the tribunal has discretion whether to make an order, which will be exercised having regard to all the circumstances. In its view, '*it is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice*'; *AQ Ltd v Holden 2012 IRLR 648, EAT.*

106. In *Mardner v Gardner and ors EAT 0483/13* the EAT stated that the receiving party's means are not normally a factor to be taken into account in assessing whether a costs award should be made.

107. In terms of rejection of settlement offers, *Kopel v Safeway Stores plc 2003 IRLR 753, EAT*, the EAT held that the rule in *Calderbank* has no place in employment tribunal jurisdiction. In that case, a tribunal's decision to award costs of £5,000 against the claimant had been influenced by the fact that she had earlier rejected a settlement offer made 'without prejudice save as to costs'

(known as a '*Calderbank* offer') during the proceedings. On appeal, the EAT clarified that a tribunal claimant will not necessarily be liable for costs where they reject a *Calderbank* offer and is eventually awarded less than that offer, or even nothing at all. However, a claimant's refusal of such an offer was a factor that a tribunal could take into account in deciding whether to award costs.

Decision on Costs

108. It is plain from the various authorities and the ET Rules themselves that the Tribunal has a discretion as to whether to award costs. That discretion must be exercised judicially and having regard to all relevant factors.

109. On 3 September 2021 I gave full oral reasons for granting the claimant's adjournment request. Amongst other things, I noted that she was unrepresented and that in both her life and work experience as a hairdresser, she had no experience of employment tribunal proceedings, law or procedure.

110. Whilst the meaning and purpose of inter-party correspondence may be obvious to a lawyer, the same cannot always be said of a litigant in person. I was satisfied on that occasion, and indeed I am satisfied now, having revisited the matter afresh for the very different purposes of this costs application, that the claimant genuinely misunderstood the position regarding the intention of the respondent to be represented by counsel at the hearing on 3 September 2021. Given the number of emails she said she had received, I also accept her account and find that it was not unreasonable that she may have been genuinely confused as to what particular claim each piece of correspondence related to.

111. Further, I also noted and I remind myself that the only reason for the first adjournment in the case on 13 July 2020 was solely and exclusively due to technical difficulties on the part of the respondent. Had the matter proceeded on that date, as indeed it should have done, it is worthy of note that both sides would have been unrepresented as was originally the position. It is also worthy of note that the respondent's witnesses were not in attendance on that first occasion. No adverse consequences flowed to the respondent as a result of that first adjournment, notwithstanding the fact that the difficulties were (arguably) entirely of the respondent's own making and (on any view) absolutely no fault of the claimant.

112. To that extent alone therefore, whilst it was submitted by the respondent that the claimant suffered no prejudice from the first adjournment, the respondent conversely benefitted significantly from that first adjournment. This was by firstly, having an opportunity to secure professional legal representation at all, when previously both sides had been unrepresented, and, secondly, by having an opportunity to secure the attendance of witnesses who, ultimately, gave very important evidence on the respondent's behalf. In terms of that latter point, it is unquestionably the case that the weight afforded to the evidence of Miss Davis and Miss Hough increased significantly as a result of the fact they were in attendance and gave live evidence, as opposed to being simply read. It is also plain from an analysis of the above reasons, with regard to liability, that their evidence was of some importance in that determination.

113. Whilst in the event the claimant remained unrepresented at the final hearing, having heard from the claimant, I am satisfied the only reason for this was simply due to the fact that she felt the cost of securing full representation was prohibitive. Whilst she plainly has capital assets in terms of her house, there was no challenge to her assertion that she had to borrow £900 from friends and family for the limited amount of legal advice she did receive in the interim. She would not have incurred that expense but for the fact the respondent was, after 3 September 2021, now legally represented. In that regard, despite the invitation of the respondent to do so, I do not hold that fact (i.e. the fact she was unrepresented at the final hearing) against the claimant in deciding this application.

114. Whilst I have considered the expense to the respondent, and indeed the various offers to settle and other matters urged by the respondent, in my view these are outweighed by the unrepresented status of the claimant, the conduct of the parties and the particular circumstances and history of this case.

115. I conclude that there was nothing in terms of the claimant's conduct on 3 September 2021 that would justify the making of a costs order against her, particularly given the fact the claimant was unrepresented, and also given the particular circumstances and history of the case. It is inescapable that the claimant's application to adjourn the second hearing would not have arisen had it not been for the adjournment of the first hearing due to the conduct and at the behest of the respondent. I also note that whilst the claimant's primary case of unfair constructive dismissal ultimately failed, she partially succeeded in terms of claims for holiday pay and also in terms of an award for lack of written employment particulars.

116. In all the circumstances therefore, and taking account of all relevant factors, I exercise my discretion such that **I refuse the respondent's application for costs.** Given those findings, I do not then need to go on to consider to the claimant's ability to pay any costs order, or indeed whether the amount claimed on behalf of the respondent is proportionate.

Employment Judge Rawlinson
28 November 2021

Judgment and Reasons sent to parties on:
10 December 2021

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2417982/2020**

Name of case: **Miss V Alexander** v **Carl Keogh**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 10 December 2021

"the calculation day" is: 11 December 2021

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.