



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Mouzourou

**Respondent:** Shoreham Health Shop Ltd

**Heard at:** Bristol (via video)

**On:** 26 January 2022

**Before:** Employment Judge Cuthbert

**Representation:**

Claimant: Mr R Edwards (claimant's partner)

Respondent: Ms S Clarke (counsel)

**JUDGMENT** having been sent to the parties on 28 January 2022, following oral judgment and reasons on 26 January 2022, and written reasons having been requested on behalf of the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the written reasons set out further below are provided:

The judgment had determined as follows:

1. The name of the respondent was amended by consent to Shoreham Health Shop Ltd.
2. The claimant's claim for unlawful deductions from wages was dismissed upon withdrawal.
3. The claimant's claim for unfair dismissal failed and was dismissed.

## REASONS

### Introduction

1. This was a claim by the claimant for constructive unfair dismissal and unlawful deductions from wages, following the claimant's resignation from the respondent, giving one month's notice, on 8 December 2020.

2. The hearing took place via the Video Hearings Service on 26 January 2022, due to the ongoing effects of the COVID pandemic and both parties were content to proceed as such. The claimant was represented by her partner, Mr Edwards and the respondent was represented by Ms Clarke of counsel.
3. At start of the hearing, I directed by consent that the name of the respondent be amended from Best Health Food Shop Ltd to Shoreham Health Shop Ltd. The amendment was made as a result of a TUPE transfer of the claimant's employment from the former company to the latter in April 2020 and I was satisfied that the correct respondent was now named.
4. The claimant's claim for unlawful deductions from wages was withdrawn by the claimant at the start of the hearing and was accordingly dismissed.
5. The claim for constructive unfair dismissal remained and was heard.

### **Issues**

6. I spent some time discussing and clarifying the issues to be decided at the start of the hearing with the parties. These were eventually agreed as follows:
  - a. Was the claimant constructively dismissed, within the meaning of section 95(1)(c) of the Employment Rights Act 1996? The burden was on the claimant to prove:
    - i. that the respondent had committed a serious breach of her contract of employment with the respondent;
    - ii. that she left because of that breach; and
    - iii. that she had not waived the breach.
  - b. The alleged breaches by the respondent were identified and agreed as being:
    - i. the closure by the respondent of a clinic room at its Shoreham shop and the impact which this was said to have had on the claimant's role as consultant for a separate company, which she carried out alongside her employed role for the respondent; and
    - ii. the respondent not agreeing to the claimant's request to change her contract of employment from a one in which she worked on variable days to one in which she worked on set days.
7. If the claimant was constructively dismissed by the respondent pursuant to section 95(1)(c), I would need to go on to consider whether or not that dismissal was fair within the meaning of section 98 of the Employment Rights Act 1996.

## Evidence and Findings of Fact

8. I read witness statements and heard oral evidence from the claimant and from Melanie Beard, the owner of the respondent.
9. I also read a witness statement from Mr Edwards, the claimant's partner. That witness statement essentially set out his own position and observations on the alleged treatment of the claimant by the respondent. He had no direct involvement in the issues in dispute and so he was not cross-examined by the respondent and did not give oral evidence.
10. I had before me a 166-page bundle of documents and references to page numbers below in square brackets [ ] are to that bundle. I noted that a large part of the bundle consisted of the respondent's Employee Handbook (pages [57] – [127]) which had been included in full notwithstanding that most of the content was irrelevant to the issues to be decided.
11. I only made findings of fact where those were required for the proper determination of the issues in this claim. I therefore did not make findings on each and every area where the parties were in dispute with each other where that was not necessary for the proper determination of the complaints before me.

### *The claimant's employment with the respondent*

12. The claimant was employed from 23 August 2018 by the respondent as a Nutrition Store Adviser in the respondent's health food shop in Shoreham. It is one of several shops run by Ms Beard within towns in the area, each operated as a separate limited company.
13. The claimant was offered the role by way of an email from Ms Beard dated 10 August 2018 (pages [36] – [37]). This email stated:

*Dear Constandia*

*Thank you so much for your time yesterday - it was a pleasure to chat to you.*

*We would very much like to offer you the position of Health Shop Advisor with BHFS and Clinician with Glenville Nutrition. As mentioned the role is a dual role with both employed work in the shop and self employed work for the clinic*

*The fees for the clinic will be paid you on a monthly basis and the schedule of fees is set out below. You will be required to send a monthly invoice to Glenville Nutrition for payment of the consultation fees due and the commission will be paid separately.*

*For the work in the shop this will be PAYE but on a variable hours contract to allow for maximum flexibility. The rate of pay for this work is £8.50 per hour (normal holiday and employment benefits*

*apply). As discussed we feel that it is important that clinicians work both in the clinic and the shop as this creates the synergy between the two and provides a full holistic experience to the patient.*

*Before you are able to carry out any clinical work with Glenville Nutrition you will be required to attend training at the head office in Tunbridge Wells with Marilyn and her head Nutritionist as well as from their Clinic Manager who will go through the systems and process for bookings etc. This is usually carried out over 2 days and the cost of this training is paid by us as an investment into your future with us.*

*You will also be asked to sign a self employed contract with them regarding this work and training. We are hoping to get this training completed prior to our event in Shoreham on 15th September so that we can fully promote the clinic then.*

*We find it usually works best to offer set days in the clinic and even better to offer these as two half days to create maximum choice and availability but we can discuss this further.*

*All practitioners are required to attend the 6 weekly practitioner meetings (on a Friday) in Tunbridge Wells as part of their ongoing training and development. These are an important part of the role as a clinician as it helps to create team work and a collaborative working environment as well as support from your peers.*

*As mentioned we are a little over staffed in the shop currently for various reasons but this will soon change and we will then sort you out some shifts. You will be added to our rota system called Rota Cloud (you will receive an invite by email) and then you can see any shifts that you have been put in for. The shop floor is run by Bea our Supervisor and she will train you on how the shop works and I will also come in and train re supplements etc*

*I hope this covers the important points that we discussed. As you know we are looking to grow the clinic over the next 12 months and would like clinicians who are looking to grow with us. We feel that this is a great opportunity for a nutritionist to work with Dr Glenville and also to be part of something new and exciting in Shoreham. We are always looking for ways to improve and expand and all ideas and suggestions on how to do this are welcome!*

*We would love to work with you and hope that you can come on board. Do let me know by email and we can work out dates etc from there.*

*Have a great day and look forward to hearing from you*

*Thanks  
Mel*

*Schedule of Fees*

*For Consultations at the Shoreham Based Clinic, the Consultant will receive: -*

*£25 for each one-hour consultation*

*£20 for each half hour consultation*

*£35 for each one and a half consultation*

*Commission on the Sale of Supplements and Tests to Clients:-*

*15% of the retail price of supplements supplied to Clients by Best Health Food Shop following a recommendation made by the Consultant.*

*5% of the retail price of tests supplied directly from GN undertaken by Clients following a recommendation by the Consultant*

14. A statement of terms and conditions of the claimant's employment with the respondent dated 23 August 2018 was at pages [39] – [43]. This was headed "*Principal Statement of Terms and Conditions – Variable Hours*". It included the following relevant provisions:

***Hours of Work***

*We do not guarantee a fixed or minimum number of hours in any week.*

*You acknowledge there may be weeks in which we cannot provide any work at all. We are under no obligation to provide you with a fixed number of hours each week.*

*Your hours of work are variable, as the needs of the business may require. Hours you work are likely to differ from week to week according to business need. Any hours we do schedule will have due regard to days and/or times you have indicated you will be available.*

*We will provide a rota of your hours for you at a minimum of one month in advance, by way of a rota. The rota is online and can be accessed by all employees.*

*If we schedule hours for you to work, it is our reasonable expectation that you attend. If you cannot attend, you must inform us and follow our absence procedure. If you fail to do so we normally deal with such matters in accordance with our disciplinary procedure.*

15. The claimant was required to give one month's notice of termination. There was also reference to a grievance procedure and the contract stated that if the claimant was dissatisfied with something relating to her work/employment, she must raise the matter in writing and may invoke the respondent's grievance procedure.

*The claimant's consultancy agreement with Glenville Nutrition Ltd*

16. The claimant in due course, as envisaged in the email of 10 August 2018 set out above, entered into a separate, self-employed role as a Nutritional Consultant with a different company, Glenville Nutrition Ltd (GNL). Ms Beard does not own GNL and GNL was (rightly it appeared to me) not a party to the present claim.
17. A “*Consultant Independent Contractor Agreement – relating to self-employment*” between the claimant and GNL dated 12 September 2018 was at pages [45] – [56]. The claimant was expressly stated in that agreement to be a consultant who provided “*nutritional therapy services*” to GNL clients. She was paid per consultation by GNL on a self-employed basis with no obligation upon GNL to provide work to the claimant or upon the claimant to accept work (clause 6(b)). The claimant had no entitlement to be paid by GNL if unable to provide nutritional therapy services for any reason (clause 5(c)). It was not in dispute that the arrangements between the claimant and GNL in practice operated on this basis.
18. There was some fairly close interaction between the respondent and GNL, which appeared to be accurately summarised in the email from Ms Beard at page [36] (above) as a “*synergy*”. In particular:
  - a. the claimant was paid commission by Ms Beard for the respondent’s products which were sold as a result of her consultations with GNL clients; and
  - b. the clinic room where the claimant’s consultations with GNL clients took place was rented by GNL at the back of the respondent’s Shoreham shop.
19. Thus, both the claimant and the respondent benefitted from this relationship between the respondent and GNL; the claimant by way of her self-employed earnings for consultations and commission on products sold to GNL clients by the respondent; and the respondent by way of sales of its products to GNL clients following nutritional consultations and also by way of renting the clinic room to GNL.
20. There appeared, however, to be considerable confusion on the part of the claimant about the two separate contracts, namely her contract of employment with the respondent and her separate self-employment agreement with GNL. The claimant referred on several occasions to what she considered to be a “*dual contract*”. Whilst the claimant did have, in effect, dual or concurrent roles, in broad terms, during the period whilst she was employed in the respondent’s shop, there was only one contract of employment discernible in the evidence before me and that was between the claimant and the respondent.
21. The claimant relied upon two alleged breaches of her contract of employment with the respondent and I made findings of fact as follows relevant to each.

*The closure of the clinic room at the Shoreham Shop*

22. Firstly, the claimant alleged that the closure of the clinic in the shop in which she was employed amounted to a breach of her contract of employment with the respondent. This was on the basis of the impact that this closure had upon her concurrent self-employed role with GNL.
23. Ms Beard owned the shop premises in Shoreham and, as indicated above, she leased the clinic room to GNL for the purposes of nutritional consultations for GNL clients. At the start of the COVID pandemic, she decided to close the clinic room, after carefully considering relevant government guidance in place at the time.
24. The room essentially remained closed as a clinic room, although there was a dispute between the parties about the claimant using the room between July and October 2020 for consultations without authorisation. That dispute was not directly relevant to the issues I needed to decide and so I make no findings as to it, save to note that there was such a dispute.
25. The room in question seemingly remained in use to a limited extent, in effect as a part of the shop, but it was not supposed to be used as a clinic. I accepted Ms Beard's evidence that GNL was informed accordingly that it could not use the room.
26. The claimant was able to have some consultations, as part of her role as a consultant on behalf of GNL, via remote means.
27. The claimant suggested that the number of GNL consultations declined due to the pandemic and the closure of the clinic and her consequent inability to hold face-to-face consultations. There did not seem to be any clear evidence of this before me. For example, page [153] set out the claimant's consultations (face-to-face) in the four months between the start of November 2019 and the end of February 2020 and the claimant undertook nine consultations in that period. In the period between 20 October 2020 and 8 December 2020, around a month-and-a-half (after the dispute about the claimant holding face-to-face consultations came to light and was stopped, and prior to her resignation), the claimant undertook six consultations by remote means. The numbers appeared to be at least broadly comparable. In any event, the claimant's contract of employment with the respondent did not contain any term (express or implied) which obliged the respondent to facilitate the claimant's consultations with GNL clients.
28. The claimant throughout the COVID pandemic continued to work in her employed role as a shop assistant for the respondent.

*The claimant's request to vary her contract of employment*

29. The second allegation by the claimant of a breach of her contract of employment (and the only issue which was referenced in the resignation letter – see below) was about the response by Ms Beard to a request by the claimant to change her contract in respect of her days of work in the shop.

30. The claimant was employed by the respondent at all times on a variable hours contract in the Shoreham shop. The shop was open seven days a week. The claimant worked around 25 hours a week, on a variable basis. There were several other employees (typically two or three during the relevant period) in the shop who worked alongside the claimant at various times, on a rota basis, including some working at weekends required of each of them. It was a small business. The claimant worked on some Saturdays, about one every two or three weeks, and on some Sundays, as did her colleagues.
31. The claimant suggested that there were former employees in the shop who had worked on a fixed hours basis, as opposed to a variable hours basis. She mentioned "Melissa" and "Charlotte".
32. The respondent's evidence was that Melissa had been employed in the Shoreham shop in 2017, had undertaken training to work for GNL as a consultant, but had become pregnant and decided not to continue with the clinical work. She was initially employed on fixed days contract, working Tuesdays, Thursdays and every other Saturday. She had a further period of maternity leave and on her return was only able to work weekends. In May 2020, her contract had been amended to a variable one.
33. Charlotte had been employed at the Worthing shop owned by Ms Beard, which was a different company to the respondent. She had another job when she started and had worked on a fixed day basis.
34. The claimant did suggest that this was an incorrect summary of both of these former employees' positions.
35. As set out above, the claimant's variable hours contract provided that (page [38]): *"we do not guarantee a fixed or minimum number of hours in any week...your hours of work are variable, as the needs of the business may require. Hours you work are likely to differ from week to week according to business need"*.
36. The respondent's Staff Handbook contained the following provisions in relation to work undertaken outside of the respondent's employment (page [71]): *"normally we will not object to other employment, activities or interests as long as you request permission. You must not undertake other employment without approval... we do not allow employment that directly competes or conflicts with our interests..."*
37. On Sunday 6 December 2020 at 20.55, the claimant sent an email to Ms Beard (page [132]) stating:

*Subject: Availability*

*Dear Mel, Emma and Bea*

*I am writing to let you know that I have been offered a place in Brighton to do my private work and having accepted this opportunity, I will be working there on Wednesdays and Saturdays from January 2021.*



*Consequently, with this new development, I am only available to work at BHFS three shifts a week on Mondays, Thursdays and Fridays. I am still available to work on Tuesdays for Glenville Nutrition.*

*I hope that you can accommodate my request as I value my employment at the BHFS and would like to continue our working relationship on this basis, if this is agreeable with you.*

*Kind Regards  
Dandy*

38. Ms Beard carefully considered the claimant's request. She noted that the claimant had not submitted a formal flexible working request. The request gave the respondent just a few weeks' notice of the proposed change. She considered that the respondent would not be able to operationally cover the claimant's requested changes in hours. All of the respondent's employees in the shop were expected to be able to work across seven days a week on a rota basis to avoid unfairness. She concluded that the claimant's request could not be accommodated, which was communicated to the claimant by email on Tuesday 8 December 2020 at 10.51 (page [131]) as follows:

*Dear Dandy*

*Thank you for your email.*

*I am sorry but we are not able to accommodate this request at this time. The nature of your employment and contract states the need for all employees to be flexible, to be able cover other absence and have availability to work across 7 days per week 3 (including weekends and bank holidays). With this new work that you have accepted to undertake, you will no longer be able to work to cover any other days or hours or able to work weekends. It also affects your clinical work for Glenville Nutrition, as this previously incorporated one Saturday per month which you will no longer be able to do. The drop-in clinic work for the shop which we launched last year (once we are able to resume), which was previously on a Wednesday, will also no longer be an option.*

*All other team members at Shoreham are expected to work weekends on a rota basis (both Saturdays and Sundays) which you will no longer be able to do with this new position, which is not practical and also unfair to your colleagues. We do not offer set days and hours in the shop as this does not work for the company and does not allow for the flexibility that the rota needs to ensure that the shop performs effectively.*

*We also have rules in regards to taking other work outside of your employment and this is clearly outlined in your staff handbook but I have provided the relevant clause below:*

### *Outside Interests*

*Normally we will not object to other employment, activities, or interests as long as you request permission. You must not undertake other employment without approval. You must not engage in other activity, paid or unpaid, which interferes with performing your role. If we give you permission, you must notify us of all the hours you work. We need this to make sure there is no infringement of Working Time Regulations. We do not allow employment that directly competes or conflicts with our interests. Anything you propose to do which may adversely reflect on our organisation will not be approved. We reserve the right to withhold consent at our absolute discretion. We make clear at engagement if it is a condition that you do not work for any other organisation. You must not undertake work for others during your working hours and/or use our facilities or materials. You must always obtain specific approval in advance and this will only be agreed in exceptional circumstances. We regard infringements as a serious breach of our rules which can, following investigation, lead to your dismissal. You must not promote any other business to our customers except with our explicit prior permission. This includes your own personal business ventures.*

*We are disappointed that you have chosen not to approach anyone and discuss this other work prior to just accepting it (which as you can see from the staff handbook is an employee requirement), especially as given the affect it would have on the staff rotas and the effective running of the shop, it clearly interferes with you performing your role and could potentially also be seen as directly competing / conflicting with our interests.*

*We feel we have been hugely supportive of you in your employment over the last 2 years, doing our best to increase/decrease your hours as you have requested, putting you on the clinical training with Dr Glenville and providing you with the opportunity of a clinician position with them, paying you supplement commission, setting up the drop-in clinics as well as selling your products in the shops etc all to increase your income. We appreciate that this year has been a trying time for everyone but it has become apparent in the tone of your recent communications that your attitude towards the company appears to have changed and that despite you saying that you value your employment with us, your recent actions and communication do not seem to reflect this*

*To just send a short email telling us that you have decided to go ahead and take other work without understanding the impact or consequences of this on both the company, your employment and your work colleagues is not acceptable.*

*We would have expected this to have been approached very differently and in a more thoughtful way and certainly within company guidelines*

*We are happy to discuss this further, either over the phone or on Zoom as current guidelines make it difficult to meet in person at this time as we need to find a way to effectively move forward that is suitable for everyone.*

*Kind regards  
Melanie Beard*

39. The claimant responded by email the same day, 8 December 2020, 17.30 (page [130]), resigning from her employment, stating:

*Dear Mel*

*It saddens me that my email makes you feel the way it does, because that was not my intention. My intention was to write you a short (because I know you always have a lot to deal with) but heartfelt email, in the hope that we could continue our working relationship, even though my wellbeing work has grown to requiring two dedicated days of my time. I understand that the handbook requires flexibility, but it would've been remiss of me not to at least enquire if this was possible and agreeable with you. I have always been committed to bringing value to the Best Health Food Shop and Glenville Nutrition and I believe I have always done this diligently and with integrity, so I am at a loss as to why you feel upset by my request and feel that I have not informed you of the change of circumstances correctly. I am sincere in my statement that I value working in the Best Health Food Shop and it dismays me that you would think otherwise.*

*As your email has made clear that there is absolutely no possibility of accommodating my request, it is with sadness that I submit this email as my resignation from the Best Health Food Shop. I will miss the Best Health Food Shop and all the staff and customers and I hope you understand my reasons for following the opportunity of growing my holistic wellbeing practice, which I have always been very open and vocal about, because it is my primary passion and my professional work is sorely needed in these trying times.*

*I would like to thank you for providing me with the opportunity of working in the Best Health Food Shop and I will always appreciate the time I have spent there. I send you and everyone at the Best Health Food Shop love and wish you all the best for the future.*

*Warm and fondest regards*

*Dandy*

40. The respondent acknowledged the claimant's resignation in a letter dated 8 December 2020 (page [133]) and wished the claimant every success in her new position. In an email which accompanied the letter, Ms Beard explained to the claimant that she had notified GNL of the claimant's resignation and that, as the GNL clinic work was only available to

nutritionists who worked in the respondent's shop, the claimant's resignation had terminated her contract with GNL.

41. In her witness statement and in her oral evidence before me, the claimant readily accepted that the resignation had been relatively amicable at the time. The relationship between the claimant and Ms Beard then soured, seemingly due to correspondence between them after the resignation, and this deterioration seems in turn to have prompted the claimant to bring her claim. The detail of that deterioration was not relevant to the issues which I needed to determine. I accepted Ms Beard's evidence that she did not decline the claimant's request of 6 December because she was angry or annoyed with the claimant, as was put to her during cross-examination.
42. The claimant resigned on notice, which she worked in the shop as normal, and so her employment ended on 7 January 2021.
43. I considered an email from the Shoreham shop manager, Emma Beard, to the claimant dated 7 January 2021 (page [135]), offering the claimant the opportunity to remain on the respondent's payroll as a temporary employee, to cover ad hoc requests for shifts if the claimant were available (which the claimant declined). I did not find, as was submitted by the claimant, that this offer was equivalent to what the claimant had been seeking in her email of 6 December 2020. I did not consider that it shed any helpful light on the respondent's initial decision in December 2020 not to agree to offer the claimant what in effect would be more fixed shifts, as opposed to variable, and the claimant's response to that decision, which was to promptly resign.

### Relevant Law

44. The statutory basis for constructive dismissal is section 95(1)(c) of the Employment Rights Act 1996:

***95 Circumstances in which an employee is dismissed.***

*(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) —*

*(a) ...*

*(b) ...*

*(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

45. The leading case relating to constructive dismissal is *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, in which it was held that to claim constructive dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, whether or not one of

the events in the course of conduct was serious enough in itself to amount to a repudiatory breach; the final act must add something to the breach even if relatively insignificant; if she does so, and terminates the contract by reason of the employer's conduct, she is constructively dismissed.

46. In a complaint of constructive unfair dismissal, Langstaff P (as he then was) in *Wright v North Ayrshire Council* [2014] ICR 77 at paragraph 2 said “*that involves a tribunal looking to see whether the principles in Western Excavating (ECC) v Sharp [1978] IRLR 27 can be applied*” and sets out four issues to be determined:

1) *that there has been a breach of contract by the employer;*

2) *that the breach is fundamental or is, as it has been put more recently, a breach which indicates that the employer altogether abandons and refuses to perform its side of the contract;*

3) *that the employee has resigned in response to the breach, and that*

4) *before doing so she has not acted so as to affirm the contract notwithstanding the breach.*

47. As subsequently described in *Malik v BCCI SA (in Liq.)* [1997] ICR, employment contracts contain an implied term of mutual trust and confidence, that the parties will not without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust, which should exist between employer and employee. The test for determining whether the employer has acted in breach of that mutual term is a severe one. The conduct must be, such as, to destroy or seriously damage the relationship, and there must have been no reasonable and proper cause for the conduct. While it is unnecessary to make a factual finding as to the respondent's actual (subjective) intention about the contract, a finding should be made as to whether objectively the conduct complained of, was likely to seriously damage the relationship of trust and confidence.

## Conclusions

48. I heard oral closing submission from Ms Clarke on behalf of the respondent and then from Mr Edwards on behalf of the claimant. In summary, Ms Clarke submitted that there was no identifiable breach of contract by the respondent, that the respondent had reasonable and proper cause for the steps it took, and that the claimant had resigned to undertake a new venture. Mr Edwards' submissions summarised the claimant's position about the closure of the clinic room and how she considered this had impacted upon her employment and again made reference to the claimant's position that she was in effect employed under a “*dual contract*”, which I have referenced above.
49. Against the factual and legal background above, I considered whether the claimant had proven that the respondent breached her contract of employment with the respondent, fundamentally or at all.

50. I found that, at all relevant times the claimant was **only** employed by the respondent. Her claim for constructive unfair dismissal was brought (and could only in the circumstances have properly been brought) against the same respondent. There was no claim pursued against GNL arising out of the claimant's consultancy agreement with that company.
51. There were two alleged breaches of the claimant's contract of employment with the respondent which were identified. I considered whether either alleged breach amounted to a breach of an express term of the claimant's contract of employment or alternatively a breach of the implied term of trust and confidence.
52. Firstly, I considered the changes to the clinic room, namely its ongoing closure by Ms Beard, due to COVID, during 2020. Whilst those changes did in effect prevent the claimant holding some face-to-face consultations with her clients in her GNL role (save for a disputed period between July and October 2020 when she did carry out face-to-face consultations), they did **not** amount to a breach of the claimant's contract of employment with the respondent. There was no express term breached and also I found no breach of the implied term of trust and confidence on the basis of the approach in *Malik* above.
53. The claimant worked throughout the same period in her shop assistant role for the respondent, on variable hours, and was paid accordingly on the agreed hourly rate basis. Her contract of employment with the respondent operated normally and in accordance with its terms. It was only her separate self-employment role as a consultant with GNL which was impacted upon by the closure of the clinic room, in that she could not hold face-to-face clinics in the room at the back of the shop. The extent to which it was impacted was disputed and there was a period when the clinics were happening against the respondent's wishes, but those matters did not have a bearing on the claimant's contract of employment with the respondent.
54. I find that the closure of the clinic did not amount to a breach of the claimant's contract of employment with the respondent, fundamental or otherwise.
55. The decision to close the clinic room was taken by Ms Beard in her capacity as the landlord of the shop. It was simply not a decision which had any direct bearing upon the claimant's employment by the respondent as a shop assistant. It was a proper, reasonable and essentially unavoidable decision in the unfortunate circumstances of the pandemic, taken by Ms Beard after carefully considering the government guidance on COVID around face-to-face consultations in clinical settings and whether those could be safely or cost-effectively facilitated and she properly decided that they could not. For the purposes of the *Malik* test, Ms Beard had reasonable and proper cause for her actions.
56. Any issues as to whether or not the claimant could or should have been found an alternative clinic room for her consultations were a matter

between the claimant and GNL, and did not lie with the respondent in the context of its employment relationship with the claimant as a shop assistant.

57. Secondly, I considered the respondent's response to the claimant's request to vary her contract of employment as a shop assistant and whether this amounted to a breach of any express or implied term of the claimant's contract of employment, fundamental or otherwise. I concluded that it did not.
58. The claimant was employed expressly on a variable hours contract throughout her employment and the contract was consistently operated on that basis by the respondent, which needed flexibility in the shop. The fact that there may have been different arrangements which had operated in the past with employees who were employed on different contracts or in different companies was not relevant.
59. The claimant's request was in effect that her contract be substantially and expressly varied so as to remove the flexibility, so that in effect she would be working on fixed or limited days, excluding Saturdays in particular.
60. I accepted Ms Beard's evidence that this proposed change would have been to the respondent's detriment, as it would have placed greater demands on other staff in the small shop, who would have needed to be deployed around the claimant's unavailability. The respondent set out in detail in Ms Beard's emailed response to the claimant's request on 8 December why it was not willing to agree to that variation request, but indicated that it would be willing to discuss the situation with the claimant. Again, for the purposes of the *Malik* test, Ms Beard had reasonable and proper cause for her response to the claimant's request.
61. The claimant accepted in cross examination that this was a polite and reasonable response to her request by Ms Beard but nonetheless she promptly resigned without further discussion on the issue.
62. In declining to agree to vary the claimant's employment contract from the express terms set out within it as to her variable hours, based upon which that contract had operated during the previous two years or so, I found that the respondent did **not** breach any express or implied term of the claimant's contract of employment as a shop assistant, fundamentally or otherwise.
63. I accepted the respondent's submission that events and communications after the claimant's resignation could not have any bearing on the claimant's decision to resign and in particular what was in her mind when she did so. The claimant also accepted in cross examination that what happened after she resigned could not have played any part in her decision to resign.
64. Even if there had been a breach of contract, I accepted the respondent's submission that the reason why the claimant resigned from her employment with the respondent was primarily because she found a new

venture in Brighton; when she realised that the respondent was unlikely to agree to her working fixed days in the shop to accommodate that venture, so she decided to leave. The claimant's resignation was not due to any breach of contract by the respondent.

65. As such, I found that claimant had not proven that she was constructively dismissed by the respondent. My judgment was therefore that her claim for unfair dismissal failed and was accordingly dismissed.

Employment Judge Cuthbert  
Date: 25 February 2022

Reasons sent to parties: 3 March 2022

FOR THE TRIBUNAL OFFICE