EMPLOYMENT TRIBUNALS

Claimant: Irene Maisie Dora Cleave

Respondent: Ron Hurst, trading as the Old Thatch Inn

Heard at: **Bristol Via CVP** **On:** **15th and 16th March 2022**

Before: **Employment Judge Lang**

Representation
Claimant: Mr. H Cross Solicitor
Respondent: Mr. Hurst in person

JUDGMENT having been sent to the parties on 19th May 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant is Irene Maisie Dora Cleave, her preferred name is Dora and at times that is how she has been referred to within the evidence. The Respondent is Roy Hurst, trading as The Old Thatch Inn (hereafter referred to as "the Old Thatch").

2. The matter came before me on 15th and 16th March 2022 for a full merits hearing to determine the claims made by Ms. Cleave. Ms. Cleave has been represented by solicitor Mr. Cross. Mr. Hurst has represented himself. The hearing took place via the VHS platform and save some minor interference and dropping out the hearing has been effective. When there were connection issues the hearing was paused and the evidence which had been given and missed was repeated.

3. I am grateful to the way which all parties have conducted themselves during this hearing.

4. I have read the agreed court bundle prepared in readiness for this hearing. I have also had the benefit of the written and oral evidence from the following witnesses:
   a) Louise Williams
   b) Amanda Bradley
   c) Finlay Scott
   d) Dora Cleave (the Claimant)
   e) Roy Hurst (the Respondent).

The Claims

5. By way of her ET1 dated 28th September 2020 Ms. Cleave has brought claims for unfair dismissal by way of constructive dismissal. She also brings claims for breach of contract for unpaid wages and notice pay, together with a claim for unpaid holiday pay.

6. Mr. Hurst has within his ET3 response document, dated 28th December 2020, denied the claim for unfair constructive dismissal, breach of contract of unpaid wages and notice pay claim. Mr. Hurst, to his credit, has accepted in his written and his oral evidence that holiday pay is owing to Ms. Cleave. There is a slight dispute as to how this should be calculated.

Issues

7. The issues I had to consider were agreed at the last hearing and confirmed at the start of the hearing before me. They are annexed to this Judgment.

Fact Finding

8. Having heard and considered all the evidence I turn to the findings of fact which I have made.

9. The Respondent operates a public house known as The Old Thatch Inn as a sole trader. He purchased The Old Thatch Inn on 21st October 2019. Most, although not all, the Employees of previous owners were subject to a TUPE transfer to Mr. Hurst.

Ms. Cleave was one of those subject to a TUPE transfer. The notice period for the employer to give her was 2 months.

10. Ms. Cleave was originally employed by the previous owners of the Old Thatch. I have a copy of the contract of employment [75-77]. That document records, and I find her start date was 4th March 2018. I have not had to consider whether Ms. Cleave was an employee as this was considered at a previous hearing, and therefore for the purpose of this hearing it is accepted she is an employee. Ms. Cleave's gross weekly pay was £486.05, her net being £436.64 (both averaged over 12months prior to furlough).

11. There has been considerable time spent discussing Ms. Cleave's job title. The contract of employment specifies her appointment was as a bar manager [75]. The contention at times has been that her role was either a general manager or front of house manager. Mr. Hurst in his evidence was clear that Ms. Cleave was a bar manager. He distinguished this from a general manger because he as owner has general control, and the chef managed the kitchen. Ms. Cleave accepted these positions within her evidence when asked about it by Mr. Hurst. The point being that if she was a general manager others wouldn't be managing these areas. I find that Ms. Cleave was employed as a bar manager. However, for reasons I will address later in my reasons I find that she did undertake management level tasks and was given responsibility for them.

12. Ms. Cleave's contract of employment provides that her employment is "casual" [75 at 2]. Mr. Hurst has told me that he believes that Ms. Cleave was a casual, or zero hours, employee. Paragraph 3 of her contract of employment provides that: *the employee does not need to provide any notice if she wishes to leave. The employer must give 2 months' notice.*

13. Pages 75-76 at paragraph 6, details the following in respect of required hours of work:

    Your required hours of work: You have informed Marshall's Pubs Ltd that; you are happy to work whatever hours the business requires up to a maximum of 60 Hours.

You understand that you will be required to work a fair share of evenings, weekends and public holidays in order to spread unsocial commitments equally between yourself and your colleagues.

14. Ms. Cleave told me, and I accept, that she did not understand the true meaning of a zero hours contract. She tells me the role she undertook did not match that of a casual worker and that she was a full-time employee working between 40 – 60 hours per week.

15. The evidence of Ms. Cleave was that from the start of her employment with the previous owners she worked 40-60 hours per week. She has provided her bank statements in support of that contention. These statements show payments that correlate with the hours she worked. I also heard the evidence of Ms. Williams, Ms. Bradley and Mr. Scott. They all told me that under the previous owners Ms. Cleave worked long hours. Whilst naturally they were only able to give an estimation of the hours Ms. Cleave worked, Ms. Cleave's bank statements for the relevant period show the sums paid to her by the previous owners, which while they vary in amount, show consistently high payments. That is consistent with Ms. Cleave's evidence, and that of the witnesses as to the number of hours she worked.

16. Once Mr. Hurst had taken ownership of the Old Thatch, Ms. Cleave's position is that she continued to work a high number of hours. Mr. Hurst has provided a helpful spreadsheet where he has averaged the hours which Ms. Cleave worked for him. That spreadsheet shows that for the period of 21st October 2019 to 22nd March 2020 she worked an average of 51.17 hours per week.

17. Having considered the witness evidence, bank statements provided, and the spreadsheet I find that Ms. Cleave would regularly work between 40-60 hours per week. I accept that this was a range, and her hours would vary depending on whether she needed to step in for others. When she did it would be at the higher end, when not her hours were at the lower end. I find that the level and consistency of work was the same throughout the previous owner's ownership as well as Mr. Hurst's. That is until 22nd March 2020 when the country was subject to restrictions due to coronavirus pandemic.

18. I find there was and obligation on Ms. Cleave to accept work. I find, as accepted in the, Ms. Cleave arranged the rotas and effectively chose her own hours, but there was an expectation for these to be full time. I also find that to begin with these rotas were prepared on shorter notice, but towards March 2020 they were being prepared a month in advance. However, in evidence Mr. Hurst confirmed that if Ms. Cleave wished to take a holiday she had to give 4 weeks' notice as per her contract. This was explored further, and he told me that if the required notice was given and arrangements could be made for cover by himself or another then Ms. Cleave could take holiday. When asked if a shorter period of notice was given, i.e., what would happen if Ms. Cleave said that she could not work the following week and cover could not be arranged he told me she could not go. This was regardless of whether rotas had been drawn up a month in advance or on shorter notice. I find there was therefore an obligation for Ms. Cleave to accept the work which she was offered, and that work as I have found above was the equivalent of full-time hours.

19. In contrast, I find, as Mr. Hurst told me, there were two waitresses who were also subject to what have been referred to as casual contracts. It is correct to say that they worked more limited hours. However, if they were unable to work one of their shifts, arrangements would be made, and the Old Thatch would "*make do*". I asked if he could see the difference between Ms. Cleave and these waitresses and to his credit Mr. Hurst told me that he could, however, he considered the difference between them was because Ms Cleave was the bar manager. Therefore, I find her role meant she did not have the flexibility which would be expected of a casual employee if that was the nature of her employment.

20. I therefore find that there was an obligation on Ms. Cleave to accept the work which she was offered, and that there is a clear distinction between members of staff whose hours were more casual and herself in the approach taken when arranging work and holidays.

21. Mr. Hurst also told me, again with complete frankness, that Ms. Cleave could not work for other organizations without permission, this was because, as he put it that he would not want her to work for a competitor.

22. I find, again as accepted, that Ms. Cleave undertook a range of management tasks, they included:

    i. Arranging rotas.
    ii. Managing the bar staff.
    iii. Interviewing.
    iv. On occasion cashing up
    v. Banking with the previous owners.
    vi. On occasions assisting with pricing.

    I accept that there were occasions when Mr. Hurst would also do these tasks. I do, however, find that from the evidence I have heard from both Ms. Cleave, Mr. Hurst and Ms. Cleave's previous colleagues, that Ms. Cleave's role was a management role, albeit I accept that this was of the bar area.

23. I find that from the point that Mr. Hurst took over ownership of the Old Thatch to 22nd March 2022 he and Ms. Cleave had a good working relationship. He told me, and I find, that had it not been for the pandemic Ms. Cleave would likely still be working with him. I find Mr. Hurst held, and still holds, Ms. Cleave in high regard and valued her as an employee. I do not accept the assertion of Ms. Cleave that prior to March 2020 there was hostility, as she put it, from Mr. Hurst to herself. I do not make a finding of hostility, I do not consider this assertion is consistent with the evidence I have heard and read, nor the findings I have already made about Mr. Hurst's view of Ms. Cleave.

24. In March 2020 because of the coronavirus pandemic and the first wave of government restrictions, the country was placed into lockdown. The Old Thatch had to close its doors, and the staff members were subsequently placed on furlough. I accept that there was some delay in these arrangements being made. Most, although not all, members of staff were placed on furlough.

25. I find those delays were not due Mr. Hurst acting in a hostile manner as is alleged. It is clear from the messages and emails I have read that he was making efforts and taking steps to implement the furlough scheme. He considered those steps went above and beyond those required given he considered to be the nature of the contracts,

namely he considered they were casual. I do however find that Ms. Cleave was, as was Mr. Hurst, worried about their own financial futures given the uncertainty faced because of the pandemic. Those feelings are entirely reasonable.

26. On 28th June 2020 Mr. Hurst held a socially distanced meeting with his chef shortly followed by a meeting with Ms. Cleave about the reopening of the Old Thatch Inn. I find Mr. Hurst met with those two individuals to begin with because they were significant management figures at the Old Thatch, and he sought their involvement in the reopening. It was only after this discussion had taken place that he met with other members of staff.

27. Following the meeting there were a series of messages exchanged between Ms. Cleave and Mr. Hurst. On 28th June she questioned when the Old Thatch would be opening as from her meeting, she considered that it would be on 4th July [69]. Mr. Hurst promptly replied [69] 4 minutes later confirming that it would be open, and that in that he said this was the first time he had confirmed the reopening date to anyone. I accept that evidence and find that message was the first time he confirmed the Old Thatch would reopen and that was to Ms. Cleave. I accept that there was uncertainty caused by it not being clear as what continued restrictions would be in place. It is clear from the messages [65] dated 12th June that following a government announcement a reopening on 4th July was a possibility, but Mr. Hurst was waiting for the further guidance.

28. There is dispute as to whether Ms. Cleave would be on the rota or not. Mr. Hurst tells me that he told her she would not be at this time. Ms. Cleave told me that while she expected, and would have accepted, a reduction of hours, she did not expect that she would not feature on the rota at all. Initially she states she would have expected 5-10 hours, however, she told me that this was a joke and on reflection she expected perhaps 20-30 hours. However, I note that on 24th June 2020 [67] Ms. Cleave sent a message asking if she could be furloughed for a further period of time. On 3rd July 2020 [71] she comments that she presumes she is furloughed because of a lack of correspondence. Mr. Hurst then responded [71-72] that he made it clear that she may not be on the rota, and then comments that she is a casual employee. I find on balance that Mr. Hurst did indicate that Ms. Cleave may not be on the rota to begin with, this

is consistent with the messages which were sent at the time and the request to be remain on furlough.

29. I find that from June 2020 Mr. Hurst took Ms. Cleave off furlough as with the other members of staff. He confirmed this was the case in his evidence stating that he felt it was the fair thing to do for everyone. I accept his evidence that he did so because of the additional costs which he would incur as a result of changes in the furlough scheme. This I find was the last time Ms. Cleave was paid.

30. On 4th July 2020 the Old Thatch reopened, although subject to the restriction at that time. Ms. Cleave did not return to work at that stage, and there were messages between her and Mr. Hurst. Mr. Hurst accepted he did not respond to them all, because he told me he was working long hours and he does not spend all the time on computers. I accept Mr. Hurst's explanation that the reason he did not bring Ms. Cleave back to work was because she was more expensive than other members of staff. I accept that he thought that was permissible under the wording of the contract. He has told me on several occasions during the hearing that it is what the contract says. I accept that is what he believed to be the case.

31. At some point in July 2020, it is said that HMRC issued a P45 for Ms. Cleave. It was suggested that this was on the instruction of Mr. Hurst. There is no evidence this was the case, Mr. Hurst indicated that he has not done so, and still at the date of the hearing had not done so. I accept that evidence. There is no evidence which would enable me to make a finding he had acted in this manner.

32. About a week after the re-opening Mr. Hurst hired new people. He did so because they were cheaper to employ than Ms. Cleave. Ms. Cleave then raised a grievance by way of an email dated 9th September 2020 [58-59]. Mr. Hurst responded to that email at 13.54. He did not investigate the grievance raised but referred Ms. Cleave to previous correspondence, on the reopening of the Old Thatch and what he considered her employment status to be.

33. On 10th September Ms. Cleave at 17.56 responded that she considered herself to be dismissed. I find that was a resignation. Mr. Hurst responded on 17th September 2020

again referring Ms. Cleave to the correspondence and noting that he did not consider she was dismissed. I find that Ms. Cleave resigned due to her being taken off furlough, not having been paid since June 2021 and not having been placed on the rota coupled with the fact that new members of staff have been hired.

34. Given the reality of what was happening I find she was a full-time employee working an average of 51 hours per week. I find that the was the true nature of her employment. I find it unlikely, on the balance of probabilities that a bar manager undertaking the role Ms. Cleave was performing and given her responsibilities would be a casual worker. She was obliged to accept work, she could not substitute others to do the work (unless covering on the rota), she could not work for other organisations or competitors without permission.

35. I find that, as accepted, Ms. Cleave did not take any holiday from Mr. Hurst taking over the pub to the date her employment ended. I find, in accordance with the evidence of Mr. Hurst that Ms. Cleave's holiday year ran from 21st October to the following year.

The Law

36. I remind myself that when applying the burden of proof, the standard is the balance of probabilities, that is to say what is more likely than not.

Unfair Dismissal by way of constructive dismissal

37. I remind myself that in a claim for constructive dismissal the burden of proof rests upon the Claimant.

38. As with any unfair dismissal the starting point is section 94(1) of the Employment Rights Act 1996. That provides that *an employee has the right not to be unfairly dismissed by his employer.*

39. Section 95 of the Employment Rights Act 1996 provides for circumstances in which an employee is dismissed. Subsection (1) (c) provides the following:

(1) For the purposes of this Part an employee is dismissed by his employer if (and subject to subsection 2 only if)-…
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances which he is entitled to terminate it without notice by reason of the employer's conduct.

40. Within **Western Excavating (ECC) Ltd -v- Sharp [1978] ICR 221, CA** Lord Denning imported the common law concept of a repudiatory breach of contract into section 95(1)(c) of the Employment Right Act 1996. As Lord Denning MR. stated:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

41. Before I can consider whether there has been an actual breach (or an anticipatory breach as may be the case) I must identify what the terms of the employment contract are, both in respect of express and implied terms. It is argued that there is a breach of the implied term of trust and confidence. The case of **Malik and Mahmud -v- BCCI [1997] ICR 606** formulated the proposition of the implied term and set out that an employer shall not:
"Without reasonable and proper cause, conducted itself in a manner calculated [or] *likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee."*

I remind myself that as per **Malik** the test to be applied is an objective one and I must consider all the circumstances of the case.

42. Whilst here there are alleged individual breaches, both express and implied, which are relied on, as they are within a series of events, often referred to as the last straw test. I remind myself of the decision in **London Borough of Waltham Forest -v- Omilaju [2005] IRLR 35** where it was confirmed if the last straw was completely innocuous

or trivial, and none of the preceding matters amount to a fundamental breach of contract, the claim will fail. The last straw must contribute to the breach of trust and confidence. In **Kaur -v- Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** Underhill LJ proposed that the tribunal should ask itself the following questions:

a. 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?
b. Has he or she affirmed the contract since that act?
c. If not, was that act (or omission) by itself a repudiatory breach of contract?
d. If not, was it nevertheless a part … of a course of conduct comprising several acts and omissions which, viewed cumulatively, amount to a (repudiatory) breach of the **Malik** term?
e. Did the employee resign in response (or partly) in response to that breach?

43. If there has been a breach of an express or implied term, I must consider whether or not the breach is a fundamental one. **Morrow v Safeway Stores Plc [2002] IRLR 9 EAT** confirmed that any breach of the implied term of trust and confidence is inevitably a fundamental breach. Whether a breach, other than of the implied term of trust and confidence, is fundamental is a question of fact dependent on the facts of each case and I must consider the impact on the employee. The Employment Appeal tribunal in **Leeds Dental Team Ltd v Rose 2014 ICR 94 EAT**, confirmed the test is an objective one, and the decision of **Bliss v South East Thames Regional Health Authority 1987 ICR 700 CA,** confirmed that whether or not the employer intended to end the contract of employment does not make a difference as to whether a breach is fundamental.

44. If there has been a breach of the contract, I remind myself that the employee must terminate the contract because the breach, and the burden rests upon the employee to show that they have terminated the contract. **Wright -v- North Ayrshire Council [2014] IRLR 4** outlines that it does not have to be the only reason for the resignation.

45. In the event that there has been a breach, I must consider whether or not the employee has affirmed the contract after the breach. If the employee waits for too long a period or does something to accept the breach, they will lose the right to resign. This was

outlined in **Chindove -v- William Morrisons Supermarkets PLC UKEAT/0201/13/BA** where Langstaff P stated:

"We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally, by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do."

46. Therefore, when considering this claim of constructive dismissal, I must consider whether there has been a repudiatory, or fundamental breach of contract by the Respondent. If there has been such a breach, I must go on to consider if the employee has resigned because of that breach. Thirdly, I must consider whether there has been any affirmation of that breach, or to put it another way a delay by the employee such that she has accepted the breach of contract.

47. If I conclude that there has been a dismissal, I must then go on to consider whether the dismissal was fair in accordance with section 95 Employment Rights Act 1996. The fact that there is a constructive dismissal does not mean that it is an unfair one as per **Savoia v Chiltern Herb Farms Ltd 1982 IRLR 166, CA.**

Casual or full-time employee?

48. I must consider whether or not the employment contract is one of a casual employee, commonly referred to as a zero hours employee, or some other form of contract. The Supreme Court's decision in **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC,** has emphasised the tribunals' role to look beyond the contractual documentation that describes an employment relationship and consider the reality of the situation when determining employment status. These principles were considered by the Supreme Court in **Uber BV and Ors v Aslam and ors [2021] ICR 657, SC,** although that dealt with the status of drivers and if they had worker status. The nature of the employment contact is therefore a question of interpretation to be decided on the facts. There are numerous reported cases where the tribunal has considered whether a contract was a zero hours contract or more.

Claim for outstanding holiday pay

49. The Working Time Regulations 1998 set out a statutory minimum period of holiday, and in the event that holiday is not taken in the leave year when an employment ends, for payments to be made in lieu. Regulation 13 and 13A provides for a statutory minimum of 5.6 weeks per annum. The starting date is the date the employment commenced unless there is a written relevant agreement between the employee and the employer provides for a different leave year.

50. In the event that the sums are outstanding the employee may bring a claim for breach of contract or pursuant to regulation 14 of the Working Time Regulations. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions of sections 221-224 ERA, with some modifications in calculating a weeks' pay an average of pay over the previous 52 weeks is taken. In accordance with a series of cases including the Court of Appeal's judgment in **British Gas Trading Ltd v Lock and anor 2017 ICR 1,** all elements of a worker's normal remuneration, not just basic wages, must be taken into account when calculating holiday pay for the basic four weeks' leave derived from European Law but not the additional 1.6 weeks leave which is purely domestic in origin. The Court of Appeal in **Harpur Trust v Brazel (Unison intervening) [2019] EWCA Civ 1402**, confirmed that when calculating the sums appropriate calculation is 5.6 weeks as per the Working Time Regulations and not a calculation of 12.07% as commonly used.

Beach of contact

51. Pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 the tribunal had jurisdiction to consider claims for a breach of contract. This includes wrongful dismissal, in other words, a claim where the Claimant has been dismissed without notice, as is argued here. I must consider what the term of the contact is before considering where there has been a breach of that term.

52. A breach of contract claim may also consider a breach to pay wages owed. Alternatively, I can consider this claim pursuant to section 13(1) Employment Right Act 1996, which provides the right of a deduction not to be suffered coupled with section 23 of the act which gives the worker the right to present the claim. **Bear Scotland v Fulton [2015] IRLR 15** provides that there must be a "sufficient

frequency of repetition" for any series of deductions to be made in accordance with a claim pursuant to section 23 (3) Employment Rights Act 1966.

Conclusions

53. I turn to my conclusions with regards to the findings which I have made and the agreed list of issues.

Unfair dismissal

54. Ms. Cleave was a full-time employee working an average of 51 hours per week. The fact that on occasions her hours varied I do not consider changes her employment status. I accept that it should be treated as a full-time employment with any additional hours being overtime. Her work prior to lockdown consistently covered between 40-60 hours, she was obliged to accept the work regardless as to when the rota was drawn, she could not turn down work unless it was an approved holiday. If it was not approved, she had to accept work. She could not provide someone else to do her role, she could not complete other work. I am clear that notwithstanding the wording of the contract that Ms. Cleave was a full-time employee.

55. I conclude that there was a fundamental breach of both the express term relating to pay and the implied term of mutual trust and confidence. The last time Ms. Cleave received any pay before her resignation was June 2021, whereas prior to furlough she was receiving consistent payments. That is a fundamental breach in its own right. It had the effect of meaning Ms. Cleave's income ceased.

56. I do not agree that Mr. Hurst failed to inform Ms. Cleave as to the reopening of the Old Thatch Inn on 4th July 2022. I do not accept Ms. Cleave's evidence on this. As I have found, I accept Mr. Hurst did tell her the Old Thatch Inn was reopening, that she may not be on the rota initially and that is supported by the text messages set out. I do not consider this allegation has resulted in a breach of trust and confidence.

57. Did Mr. Hurst stop Ms. Cleave's pay from 29th June 2020? Yes, this is accepted. I find that Ms. Cleave was an employee, that she was entitled to her pay and her pay was stopped as of 29th June when her furlough was brought to an end.

58. Did Mr. Hurst re-open the Old Thatch Inn on 4th July 2020 without reengaging the Claimant from furlough? Yes, again it is accepted, and I have found that Mr. Hurst reopened the Old Thatch on 4th July 2020. He did not re-engage Ms. Cleave and did this in the mistaken belief that was permissible as he thought she was a casual employee as per the wording of his contract.

59. Did Mr. Hurst inform HMRC that the Claimant's employment had ended which resulted in the issuing of her P45? No, there is no evidence that Mr. Hurst informed HMRC, he would generate a P45, and I accepted his evidence that he has still not generated one today.

60. Did the Respondent inform the Claimant in a text message exchange at the end of July 2020 that he intended to reengage the cheapest staff? Yes, I have found that Mr. Hurst told her he would bring back the cheapest staff. He hired new staff because they were cheaper than Ms. Cleave and he explained that in his evidence.

61. Did the Respondent fail to deal reasonably or appropriately with the Claimant's grievance of 9th September 2022? Yes. Mr. Hurst failed to take any steps in respect of the grievance, he did not investigate he did not meet Ms. Cleave he took no action save refer her back to his previous correspondence.

62. Given my conclusions as set out above, whilst I do not consider that the behaviour of Mr. Hurst was calculated in my judgment he has behaved in a way which has, and was, likely to damage the trust and confidence between Ms. Cleave and Mr. Hurst. He stopped her income, he did not place her on the rota, he brought back cheaper members of staff and hired new staff who were cheaper, and he failed to deal with her grievance. In my judgment these actions independently let alone when taken together clearly destroyed the trust and confidence between the two, leading to a breach of the implied term of trust and confidence. A breach of the implied term is regarded in law as being a fundamental breach.

63. Did the Respondent have a reasonable and proper cause for behaving in this manner? I do not consider that Mr. Hurst did have reasonable and proper cause for behaving in

the manner he did. He did so because he thought she was a casual employee, and he was seeking to save cost. However, because of the conclusion I have reached on the true nature of the Claimant's employment status, in my judgment it cannot follow that he was reasonable in his actions.

64. I am clear that the Claimant resigned because of the breaches which have been identified. That is consistent with the evidence, her grievance and her email which I have considered to be her resignation.

65. The withholding of pay, and failure to bring Ms. Cleave back from furlough goes to the root of any employment contract. That in itself is in my judgment a fundamental breach. When combined with that fact that Mr. Hurst brought back cheaper staff and hired new staff because they were cheaper and taking as a whole in my judgment means that the breaches were so serious that Ms. Cleave was entitled to treat the contract as being at an end. There was no delay in Ms. Cleave acting, she entered into correspondence, she issued a grievance when that was not dealt with, she resigned.

66. In my judgment the breaches of contract were the reason for Ms. Cleave's resignation and was a constructive unfair dismissal. I am satisfied that it amounts to a dismissal for the purpose of section 95 (1) (c) Employment Rights Act 1996.In my judgment the dismissal was not fair, within the meaning of section 98 (4) Employment Rights Act 1996 for the reasons I have outlined above.

Breach of contract

67. I conclude that the Claimant did regularly work between 40 and 60 hours per week for the period of February 2018 to March 2020. Ms. Cleave's gross weekly pay was £486.05, her net being £436.64 (both averaged over 12months prior to furlough). I have concluded that she was a full-time employee who received regular payments. I do not consider that the reality of her circumstances were such that she was a zero hours employee. She was therefore in my judgment entitled to payment for the period of 29th June 2020 to the date of her resignation on 10th September 2020. I consider the appropriate figure must be based on average weekly figure. That amounts to £4,860.50 gross. The period from 29th June 2020 to 10th September 2020 is 10 weeks. The period covered is therefore 10 x £486.05 which equates to **£4,860.50 gross.**

68. The Claimant's notice period was 2 months. Ms. Cleave was not paid her notice period. I have found that there was an unfair dismissal by way of constructive dismissal. Ms. Cleave is entitled to her notice period as there was no reason to dismiss her without notice. For the notice period claim I therefore award her two months' pay as breach of contract as she is entitled to, that amounts to the sum of £4,212.43, gross. It is calculated as follows: £486.05 (gross weekly wage) x 52 = £25,274.60 per annum. Divided by 12, gives a monthly figure x 2 gives **£4,212.43 gross.**

Holiday Pay

69. It is accepted that there is holiday pay owing. Mr. Hurst's evidence was that the holiday leave year started on 21st October and that was unchallenged. There is no evidence that there was an agreement for leave to be carried over. It is accepted no holiday has been taken in the holiday year. The relevant period is therefore from 21st October 2020 to 10th September 2021. That is a total of 324 days. It equates to 88% of the holiday year. 88% of 5.6 weeks amounts to 4.9 weeks leave which Ms. Cleave is entitled to.

70. I am satisfied the appropriate weekly wage is the 12 months averaged prior to furlough, on a net basis this is £436.64. That multiplied by 4.9 provides for the total sum of **£2,139.54** for the outstanding holiday.

REASONS FOR REMEDY

1. Following my judgment in respect of the full merits hearing I proceeded to hear evidence from Ms. Cleave and Mr. Hurst, followed by submissions in respect of the disputed element of remedy, in respect of the unfair dismissal the other claims having been set out above.

2. I gave some preliminary observations in respect of the question of remedy however, made clear that I not heard full argument or made my decision at that stage. Having given the parties to consider those arguments I heard brief evidence from Ms. Cleave and Mr. Hurst in respect of remedy, followed by submissions.

Agreed elements

3. It is agreed that the basic award for Ms. Cleaves unfair dismissal is **£972.10.**

4. It is agreed that the sum of **£300** for loss of statutory rights is appropriate.

Additional Findings

5. I have had regard to the findings of fact which I have made in the full merits hearing as set out within these written reasons, as well as the evidence given in both elements of the hearing over the two days the hearing was before me. In addition, it was necessary for me to make some further additional findings in respect of remedy.

6. I find that Ms. Cleave has made many efforts to I find alternate employment and so to mitigate her loss. I am satisfied that she has acted reasonably and mitigated her loss from the period of dismissal and has secured employment.

7. I accept and find that the coronavirus pandemic had a significant impact on the hospitality sector. That was accepted by both Ms. Cleave and Mr. Hurst in their evidence and it is well known. Specifically, I accept and find that it had a significant impact on the Old Thatch, and it created uncertainty for both the Respondent and Ms. Cleave, albeit in different ways. I accept Mr. Hurst's evidence on the struggles and uncertainty he faced as the owner of the Old Thatch Inn. I accept and I find part of his rationale on putting no member of staff on furlough after brought off in Summer 2020 was the increasing financial costs of the job retention scheme which he as an employer would face. I accept his evidence that this was not only the additional costs due to a change in the scheme meaning a higher employer contribution, but also contribution to national insurance and holiday being incurred.

8. I find that from the point in June 2020 where members of staff (save the chef who was furloughed for a slightly longer period) were brought back from Furlough he did not furlough any other members of staff. I am not told of any dismissals or redundancies which took place after this date.

9. I find and accept that Ms. Cleave secured other employment but lost that at times due to the changing restrictions in place meaning staff would be placed on furlough schemes. I accepted and find that her employment which commenced in November 2020 was as a temporary worker and I accept her evidence that as a result of this she was not eligible for the furlough scheme when new restrictions were put in place in January 2021 and as a result, she lost this job as a result.

The Law

10. I have reminded myself of the statutory provisions contained within sections 118 -127 Employment Rights Act 1996. In particular I remind myself of section 123 (1) which provides that:

Subject to the provisions of this section and sections 124,] 124A and 126] the amount of the compensatory award shall be such an amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

11. I must consider what loss the Claimant has suffered as a consequence of being dismissed. The starting point, when considering this factor is that it is the net figure, as this is the sum which would be received.

12. The burden is on the Claimant to provide the loss as emphasised in **Adda International Ltd v Curcio 1976 ICR 407 ET**. When considering the appropriate level of compensatory award as was highlighted in **Garage Equipment Maintenance Co Ltd v Holloway EAT 582/94** I am permitted to take a broad brush approach. However, I must of course, as per **Norton Tool Ltd v Tewson 1972 ICR 501, NIRC** make any decision judicially and on the basis of principle and must give reasoning in sufficient detail to how the principles on which I have proceeded.

13. The losses awarded must flow from the unfair dismissal and be attributable to the actions of the employer. The purpose is to compensate the Claimant for the losses sustained, it is not designed to penalise the employer.

14. I have had regard to the House of Lords decision in **Polkey v AE Dayton Services Ltd 1988 ICR 142 HL** which permits a tribunal to make a percentage reduction to reflect that the chance that an employee would have been dismissed had a proper procedure taken place.

Conclusions

15. The remaining issue is what the appropriate compensatory award for Ms. Cleave's unfair dismissal is. Within the schedule of loss Ms. Cleave claims the sum of £30,374.26.

16. My first consideration is what the starting point is at what point should the assessment for the loss commence. It has been suggested that the starting point would be 10th September 2020, that being the date of termination. I disagree, and in my judgment the starting point is 10th November 2020. My reason for this I have already made an award for notice pay, which covers a two month period, as was claimed by the Claimant. The purpose of such an award is to compensate Ms. Cleave for the period she would have been paid for had the dismissal not occurred. That notice period covers the period of 10th September 2020 to 10th November 2020. If therefore I were to compensate Ms. Cleave for that period as part of her compensatory award, having already made the award for notice, in my judgment that would be a double recovery.

17. Having considered when the period of loss commences, it appears appropriate for me to consider whether or not this is a case where a *Polkey* reduction should be made. This is not a point raised by Mr. Hurst explicitly but has been covered by Mr. Cross in his submissions. I do not consider that it is such a case where it would be appropriate to make a *Polkey* reduction. There is no evidence of any redundancies nor dismissals. The evidence of Mr. Hurst, as I previously found, was that if it had not been for the pandemic Ms. Cleave would still be working with him. It appears to me that no redundancy process was contemplated, let alone started. Given the complete absence in contemplation of a dismissal process, in my judgment it is far too remote for me to be satisfied that Ms. Cleave would have been dismissed had a fair process been followed and as such I do not make any *Polkey* reduction.

18. In turning to the award, I make, I must make an award which I consider to be just and equitable, or as I put it during the hearing fair. I must consider all the circumstances of the case. As it has been touched on in the hearing, I make plain that I cannot look at whether or not Mr. Hurst has an ability to pay the sums ordered and that has not factored into my decision.

19. In my judgment when considering what is just and equitable, I must take account of the uncertainty in the hospitality sector but in particular the uncertainty for the Old Thatch, and my findings on that. On the other hand, I must weigh in the fact that I have found that Ms. Cleave was unfairly dismissed by way of constructive dismissal. That was of no fault of her own and I have made no findings that she has contributed to her dismissal in any way.

20. The level of appropriate award is a balancing exercise, and, in this case, it is a delicate one. There have been periods of time where Ms. Cleave has lost her other jobs, again of no fault of her own but because of the government restrictions. It would not be right for me to stop the clock, as it were, at that juncture, because as Mr. Cross emphasises had Ms. Cleave not been unfairly dismissed she would have been eligible for furlough at The Old Thatch, she was not at her new employers as she was a temporary worker who fell outside of the scope of the scheme. The loss in my judgment therefore continues.

21. In my judgment I must consider if I should make any award post 10th November 2020 (the date the notice period ended) given my findings as to the uncertainty in the hospitality sector and the findings I have made in respect of the financial uncertainty of the Old Thatch Inn and the reasons why furlough came to an end for those employees. Alternatively, should I award the full amount as claimed, or finally should I make some other award?

22. In my judgment it would not be just or equitable for me to award the full amounts claimed for the compensatory award. The reasons I have arrived at for that conclusion are firstly the uncertainty financially for the Old Thatch, and the hospitality sector in general. Whilst I have not made any Polkey reduction, I do not consider it would be right for me to ignore that uncertainty and my findings on that. Nor do I consider by

taking that into account I am making a Polkey reduction. Had Ms. Cleave continued in her employment with the Old Thatch, she told me she would have expected some reduction of her hours as I previously found. I am not satisfied that she would have received her full payments from any furlough because of the additional costs to the Respondent and my findings on his view on that. Furthermore, the furlough scheme changed in the amount payable and therefore it is not simply a matter of considering that the Claimant would have received 80% of her wages for the relevant period.

23. Equally, I am not persuaded that it would be just or equitable to make an award of nothing for the period after 10th November 2020. I have already found that had it not been for Ms. Cleave's dismissal she would likely have continued in her role, it would therefore not be right for her to be left with no compensation for this period.

24. In my judgment the appropriate period for me to consider is from 10th November 2020 until the period where she had secured her second period of employment, that being 23rd April 2021. The reason I have chosen that period is that on 23rd April 2021 Ms. Cleave's further employment commenced, there was a further period of easing of lockdown restrictions and in her earlier employment she was only a casual worker and I have accepted her evidence on that. The net effect is that Ms. Cleave then was not eligible for furlough in January 2021.

25. I do not agree however, that it is simply a matter of me making an award for the whole period of 10th November 2020 to 23rd April 2021. I do not consider that would be right. The reason for this conclusion is that there was an additional period of lockdown in January 2021. The scheme would not have provided an income of 100% of her wages. I have accepted Mr. Hurst's evidence that he would unlikely have utilised that scheme due to cost, so it seems I must bear that in mind in reaching my conclusion. I must also consider the Claimant's own evidence, and my earlier finding, that she would have accepted some reduction in her hours of work.

26. In my judgment I should consider two periods. The first from 10th November to 8th January. At that time the Claimant lost her new employment due to the lockdown and not being eligible for furlough. For that period, I award 100% of her gross weekly wage. The reason I have used the gross weekly wage rather than the net is because

from the payslips I have I can see that Mc Cleave's taxable income for the tax year fell below the tax threshold. In other words, she has not utilised her personal allowance and in my judgment in this case the gross figure is appropriate to consider reflecting that.

27. From 8th January 2021 to 23rd April 2021, that award should be reduced and award 50% of the loss. Again, I use the gross figure for the reasons given. The reason I award 50% rather than 80% which was the sum covered on her earlier furlough is because it would be wrong in my judgment to ignore my findings as to whether Ms. Cleave would have been placed on furlough given the additional costs for Mr. Hurst and my acceptance of his evidence on that, if she was what the income would be. I must have to weigh that in the changes to the scheme on the sums covered, i.e., it was not 80% for the whole period. I do not consider my consideration of these factors is the same as making a *Polkey* deduction. Additionally, I need to consider my finding that Ms. Cleave would have accepted a reduction in her hours, but not a total cessation of hours as happened. To reflect these factors in my judgment an award of 50% of the amount claimed for that period is a just and equitable sum.

28. It is contended by Mr. Hurst and accepted within Ms. Cleave's document that I should give credit for the universal credit and the payments[1] received for work so there is no double recovery. I accept that proposition and it should be discounted by those sums.

Calculation

29. I therefore calculate the compensatory element of Ms. Cleave's award as follows. For the period of 10th November 2020 until 8th January 2021, that is a period of 8 weeks. 8 x 486.05 (gross weekly wage) amounts to £3,888.40.

30. For the period of 8th January 2021 to 23rd April 2021 that amounts to a period of 15 weeks. 15 x 486.05 totals £7,290.75. That divided by 2 to award 50% for the period amounts to £3,645.38.

[1] Please note I have since reconsidered the deduction in universal credit as this element of my decision did not accord with the 1996 Recoupment Regulations. I have given written reasons for that reconsideration separately.

31. The total loss for the period is therefore £7,533.78.

32. I accept that this amount should be reduced by the sums received for employment on the relevant period as accepted by the Claimant that is £2,805.59. As also agreed, I accept it should be reduced by the sum of £1,084.01 for universal credits received[2].

33. The total amount is therefore **£3,644.18**.

34. The Claimant contends for an ACAS uplift of 25%. I have found that the grievance procedure was not followed, as no action was taken in respect of it. Mr. Hurst contends for a lower sum, he has indicated that another Judge had given an indication he thought was reasonable, I do not know the sum of that however, in any event I do not consider I would be bound by such an indication. I accept that there is a failure to follow the ACAS code of practice in respect of the grievance. I accept that Mr. Hurst is a sole trader. I have discretion as to whether I award anything and if I do make an award what level that should be. I do not consider the award should be at 25%. Given my findings on Mr. Hurst's belief of the employment status and he was permitted to do what he did, although I have found that was wrong. I consider the appropriate uplift is 10%. That equates to **£364.42.**

Costs

35. Mr. Cross has made an application for costs of an aborted hearing when the matter was listed in October 2021 which was not effective. At that hearing an order was made for Mr. Hurst to provide a positive PCT test. I have had sight of the letter sent by the Claimant to the tribunal which sets out the arguments on costs and strike out. I also heard evidence yesterday on the matters in issue and have heard brief submissions. In addition, Mr. Hurst told me he was only aware of the directions to provide a positive PCR when he would have tested negatively.

36. The application therefore relates to the wasted costs of the hearing listed before Judge Roper in October 2021. The circumstances leading to that hearing were that Mr. Hurst indicated he was unwell and provided a positive lateral flow test and he indicated he was not well enough to attend. That hearing was therefore not effective, but Judge

[2] Ibid

Roper made some directions which included provision for Mr. Hurst to provide evidence of a positive PCR. He did not provide that PCR result and as a result Mr. Cross on behalf of the Claimant made application to strike out the defence as well as seek an order for costs.

37. The application to strike out was not granted by Judge Roper on paper but the issue of costs was left open to this hearing if it was to be pursued. I heard evidence yesterday from Mr. Hurst on what happened. He told me, and what I find, is he was unwell and find he called 119 as he told me and undertook a lateral flow test, and it was positive. I accept the next day took a further which was negative, but he tells me he did not undertake a PCR or another test on basis that he was unwell, and he was staying at home. He tells me that stayed at home for a period of two weeks. Mr. Cross has drawn my attention to a Facebook post which indicated that Mr. Hurst was in a pub the day after the hearing was due to start with a friend and I am invited to find he was therefore well enough to attend hearing. Mr. Cross properly cross-examined Mr. Hurst on these issues.

38. I accept what Mr. Hurst tells me in respect of that picture. He tells me he did post the picture after he was ill but taken week before. That is only evidence as to where he was, around the time of the aborted hearing in October 2021. Mr. Hurst in my view has been a credible witness. It is unfortunate, and I can see why Ms. Cleave is concerned that he then deleted the photo if what he said was genuine. However, it seems to me bearing in mind I found he is a credible witness I do not find he has mislead me I accept his evidence. I do not find that hearing aborted as a result of his conduct. I accept he was ill, there was an unfortunate series of events when he posted th photo and he did not undertake PCR sought. I have had regards to the submission of Mr. Cross provided in writing and orally as well as points in cross examination yesterday. I decline to make an order to costs and I have had regards to tests to be applied. I do not need to consider if Mr. Hurst did in fact have coronavirus, I know the next day he had a negative test, but he tells me he was unwell and accept his evidence. Refuse application on costs.

39. A second application is made for costs. I did not have the time to properly hear nor consider that application and if it is to be pursued the Claimant should notify the tribunal and seek a costs hearing.

Employment Judge Lang
Date 28 April 2022

Reasons sent to parties: 9 May 2022

FOR THE TRIBUNAL OFFICE

Annex

Agreed List of Issues