EMPLOYMENT TRIBUNALS

Claimant/Respondent: **Mrs N Dack**

Respondent/Claimant: **Mr P Bleach trading as Rendezvous Cafe**

Heard: By CVP **On: 2 to 4 March 2022**

Before:
Employment Judge JM Wade

Representation
Claimant: Mr G Williams (Community the Union)
Respondent: In person

Note: A summary of the reasons provided below were provided orally in an extempore Judgment delivered on 4 March 2022, the written record of which was sent to the parties on 9 March 2022. A written request for written reasons was received from the respondent on 11 March 2022. The reasons below, corrected for error and elegance of expression, are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 4 March 2022 are repeated below:

JUDGMENT

1 The claimant's complaints of constructive unfair and wrongful dismissal are dismissed.
2 The respondent's counterclaim is dismissed.
3 The claimant's complaint of unlawful deductions from wages is dismissed, save in respect of an attendance at work on 12 October 2020.
4 The claimant's complaint of accrued holiday pay on the termination of employment succeeds.

5 The respondent shall pay to the claimant the sum of **£395.85** (seven days' gross pay).

6 The award above is increased by two weeks' pay and the respondent shall pay a further **£615.76** to the claimant because he had not provided the claimant with a statement of employment particulars.

7 The recoupment regulations do not apply to the awards above.

REASONS

Introduction

1. The claimant brought the complaints above, assisted by her union throughout. The respondent acted as a litigant in person, having conducted advocacy in a former life.
2. I heard oral evidence from the claimant and her union representative, the respondent and his wife,. I also watched CCTV of a meeting between them all, for which there was no sound. I had a helpful file of documents. The main claim was constructive dismissal – both wrongful and unfair. There were also breach of contract claims by both parties and unlawful deductions from wages/holiday pay complaints from the claimant.

Issues

3. The issues were set out in detail in case management orders sent to the parties on 9 November 2021. The main issues to determine were the terms of the claimant's contract of employment, and whether they had been breached in the manner alleged in the particulars of claim; or whether the claimant had been in breach of her contract by failing to attend work after a period of leave and whether this had been the cause of any loss or damage to the respondent. The claimant's allegations included that there were implied terms of her contract as follows: to pay wages when the employee is ready and willing to work; to provide work; not to treat an employee arbitrarily, capriciously or inequitably in matters of remuneration; and to maintain the implied term of trust and confidence. As matters of principle and in ordinary circumstances, these terms are uncontroversial.
4. The alleged breach of the implied term of trust and confidence involved asking whether any of the alleged conduct was without reasonable and proper cause, and calculated or likely to destroy or seriously damage trust and confidence. The Tribunal also had to determine whether the claimant resigned in response to such conduct.

Findings

5. The claimant commenced her employment at the Rendezvous Café in Scarborough (pages 56 to 61) in April 2008. When she commenced her employment she was 18. The café was then operated by a husband and wife partnership, trading as the café and their son took over at some point due to

the illness of his parents. The claimant became his partner and in due course his wife.

6. In each subsequent year from commencing employment in April 2008 until she resigned, she was an employee of the café. There are HMRC records of annual pay which I consider are good enough to establish her employment. Pay and HMRC declarations of employment are only one factor, but in the round, having heard her oral evidence about her circumstances, on which she was robustly challenged, I accept her evidence that she was employed throughout: it was also more than likely than not in all the circumstances.

7. On 18 July 2018 the café was sold to the respondent for around £50,000. That was, in essence, an asset sale including the goodwill. Its location is such that the respondent considered it to have great potential. Its mission is "good value home cooking". There was no written contract of employment or particulars provided to the claimant at that time by the respondent, but she was agreed to be the full time cook.

8. I find that there was in place a contract of employment with the respondent implied by custom and practice. In lay terms, a custom and practice contract arises when both parties would say, "yes of course", if you asked them whether a contract, or particular terms, were in place by virtue of long standing conduct. I find those terms to be: the claimant was engaged to work as a cook, 37 and a half hours a week, five days a week with Sundays and Tuesdays off, working from 9 to 5 at minimum wage for hours worked, with statutory minimum holidays and a holiday year of 1 April to 31 March. Those were the essential and "lived" terms of the contract between the parties. The written contract of employment put before the Tribunal by the claimant was not in place before, or at the time of, the transfer of the café from the claimant's husband to the respondent.

9. I make that finding against because so many factors point against against the presence of a written contract. Firstly, the contract was not provided to the respondent during the sale process. Secondly, the pleading on behalf of the claimant positively asserts that she was not provided with a contract of employment (paragraph 3). Thirdly, none of its terms are pleaded (by professional representatives) - and there was no amendment to plead them. Fourthly, it was a contract which, had it been known to the claimant, would have been disclosed to her representative before these proceedings, and not later in disclosure. It was not provided at any point when the parties were falling into dispute about its terms (in circumstances where it would have been helpful for the claimant to find and refer to it). Fifthly, certainly by the time of the disciplinary hearing, if the claimant had a contract recording an obligation to work only 20 hours, it would have been provided, given that she was seeking to work fewer hours. Finally, the claimant's resignation letter says, "I do not have a written statement and you did not address this when you took over". To me that seems conclusive that the document was not known to the claimant throughout employment and indeed at any stage before it was disclosed in these proceedings.

10. The claimant said that she found that contract in a drawer by chance. That may well be right, but I do not accept that it had her details on it at the time that she found it, nor that if it did, she had any knowledge of it or had agreed to it at any time in the past.

11. In 2019 the claimant was asked not to take holiday in the six weeks' school holidays, because that was the café's busiest time. She observed that request in 2019. She was a very reliable employee, always attending work. She also had an evening job at the social club opposite the café from 2018. Her communications with Mrs Day (the respondent's wife) were very friendly and very effective. Mrs Day did the cooking on the claimant's days off , if the café was open. They had a very open and understanding relationship. Mrs Day and the respondent appreciated that the change in ownership of the café created some difficulty because the claimant had, in effect, been her own boss previously - she and her partner had run the business together.

12. That very strong relationship between the protagonists proved to be valuable when the pandemic struck. The only sensible reading of the text messages between them at that time, right up until the end of September 2020, is that matters were dealt with in an entirely good natured way. The claimant encouraged the respondent to pay bills first, rather than paying her. She was appreciative when the respondent facilitated furlough, which she formally commenced on 15 April 2020. It took a little time for the monies to come through to enable her to be paid.

13. Looking at the claimant's payment records it is plain that she earned far more as the respondent's employee in the tax year 2019/ to 4 April 2020, than she had as her husband's employee. That involves comparing page 237 with the HMRC records at 351 and 350. She was paid normally and weekly until the end of March 2020 by the respondent. Her first furlough payment was 11 May, with a backdated payment on 26 May to cover a period in April when she was not paid. Ordinarily, failing to pay an employee for the work they have done or when they are ready and willing to work is either a breach of an express term of their contract, or a breach of an implied term; but it is very clear from the communications between the parties that both understood no work could be done (nor for lockdown reasons was the claimant available), and payment was conditional on the furlough scheme. In those circumstances it is neither a breach of the express term, to pay for hours worked, nor is it a breach of the implied term, nor of the implied term of trust and confidence. The pay delay was with reasonable and proper cause: self evidently that was the case when the café was closed by law.

14. Before lock down, pay slips were brought to the café for staff. The claimant frequently left hers there, as she did not need them because she was very able to look at her HMRC record online and her bank accounts online. On one occasion she copied her HMRC record to the respondent to be helpful to him. The claimant is not an uninformed member of staff. She is somebody who has run her own business and she understands fully HMRC/PAYE matters and the impact on her affairs of pay and taxes.

15. I accept Mrs Day's evidence on this: pay slips were there, in the café, for the claimant to collect. There is no reason why they would not have been, but for whatever reason, from September 2019 onwards, the claimant did not collect them, and on occasions chose to dispose of them in the bin at the cafe. That does not mean they were not provided to her.

16. This case has raised interesting points, in the sense that the furlough scheme largely addressed arguments about contracts of employment being frustrated

by the pandemic. In lay terms, frustration is the coming to an end of a contract when its purpose cannot be achieved because of unforeseen external forces, for which nobody could have provided.

17. In this case, like others, the contract of employment did continue and it continued with trust and confidence maintained, but with no obligation to work and no obligation to pay, other than through the furlough scheme. No pleaded complaint is made until a meeting with Mrs Day in July, albeit in her resignation letter the claimant complains about additional matters.

18. The events leading to, or causing the claimant's resignation, in reality arose from July 2020. Mrs Day and the claimant exchanged messages about the café re-opening in early August. That was in the context of the Eat Out to Help Out Scheme, which was being widely trailed and of course domestic coastal resorts were likely to be busy at that time. The café was keen to open.

19. The claimant then met Mrs Day for a very good natured catch up later in July. That went well until the claimant was asked to confirm her return to work and she said, in effect, that she could not return in August because she had no childcare, but also because she had booked a foreign holiday. She was asked by Mrs Day to cancel that holiday. Things did become strained, because of the previous agreement that holidays were not taken in peak periods. The claimant left the café saying in blunt terms she would not do that (ie cancel her holiday). There was swearing on both sides on that occasion, and I accept that there was some limited rise in tension. The claimant was in the wrong, booking a holiday without telling the respondent of her leave dates, when she knew she would be needed.

20. In a message that followed from Mrs Day after their disagreement, it was clear the falling out was water under the bridge; the claimant was considered a very good cook, was very dependable and had very good skills. She was needed. She was asked to confirm the days that she could return to work. She said she could not return to work until after her daughter was back at school in September, and she asked for furlough to continue. Mr Bleach said that he would check with the accountant and he did so. He told the claimant that he could not claim furlough after re-opening because she was needed to work. The claimant reiterated that it was just that she could not get childcare until 8 September and could not therefore work until then. The respondent said that the best he could offer was unpaid leave and the claimant asked if she did that, could she have her holiday pay to "tide her over" and that was agreed without hesitation. I find there was an agreement to vary the contract once more, for a short career break, or sabbatical, until 8 September, to enable the claimant's employment to continue but without the obligation to work, until she could resolve her childcare difficulties, principally through a return to school.

21. The claimant received full holiday pay for two August weeks, one week paid on or around 14 August, and one on 28 August. She received two weeks' pay in total at her full rate (rather than the furlough rate). In fact she was away for 14 days, or at least that was the number of working days that would have been required to take as holiday for the travel that she had booked. That is perhaps why she did not provide the dates of her holiday when asked to do so by the respondent. Had she been paid for 14 days' full pay, and her employment had ended at that point, her holiday entitlement would have been in deficit.

22. The last communication on 28 August between the respondent and the claimant was confirming payment of holiday pay. There was then no contact from the claimant until 31 September 2020. She did not attend work on 8 September, or the 9th, and she was not in contact with the respondent at all. That was in the context that she had been seeking to set up a new nail business in the summer, and also, that she returned to work from furlough for her other employer, the club opposite the café, at this time. The respondent knew that she was returning to the social club work in the evenings because he saw her.

23. The claimant then apologised in a text on 30 September for not being in touch. That gives an insight into the real sense of how the parties felt about matters at the time. The claimant had, throughout that time, been working in the evenings. She also said in the text of 30 September that she had not heard from the respondent,… "so does this mean I'm not wanted" is the gist of the message. There was a delay in reply. On 5 October there was a response in which the respondent expressed his frustration, and said that he had assumed that the claimant had decided to cease her employment and there was some argument by text about that. The claimant said the respondent had not sent her her P45, so how could he take that view, and he replied, that her P45 would be available shortly and the subject was closed. That was on 5 October. Clearly, the claimant's failure to attend work or be in touch throughout September, when the schools had returned, had soured the relationship.

24. The claimant's pleaded case does not assert this exchange as a matter she considered to be a breach of the implied term of trust and confidence, or that it was an express dismissal of her, by saying, "your P45 will be available shortly". It was followed very swiftly afterwards by an invitation from the respondent to a disciplinary hearing, setting out disciplinary charges to the claimant in full.

25. At this point in the chain of events the respondent had retreated from a dismissal of the claimant for her absence and lack of contact for the month of September, following advice. The letter inviting the clamant to a meeting did say, however, having set out the chain of events at some length: "Consequently I believe that your behaviour amounts to gross misconduct".

26. The claimant alleges that this comment was sufficient to destroy trust and confidence, or that it would contribute to that: "the respondent having made it clear he had already reached a decision prior to the disciplinary hearing that the claimant was guilty of gross misconduct".

27. This is a very small employer where there were reasonable grounds to believe that the claimant has been absent without leave or good reason between 8 September and her being in contact on 30 September. There was a fair hearing sought to be held by the invitation to the meeting, in accordance with the principles of the ACAS code, with facility for a representative to be present.

28. In that context, a small employer saying he believes the matters amount to gross misconduct is not, of itself, objectively likely to destroy or seriously damage trust and confidence, when he had reasonable cause for that belief. It would have been preferable not to say so in such clear terms, because objectively it could give the impression there would be no open mind at the meeting. With other matters, it could be likely to destroy or seriously damage

trust and confidence, but that could depend on how the meeting was conducted, in fact.

29. The invitation was to attend a meeting on 9 October. The claimant identified that her union representative could not attend on that day and so the meeting was put back until 12 October.

30. Whatever view might have been expressed in the respondent's previous P45 text message, he had decided to conduct a hearing in accordance with the ACAS code to hear, effectively, an absent without leave charge. There were reasonable grounds to treat events as a disciplinary matter, in these circumstances. Or to put matters another way, there was reasonable and proper cause to do so. The agreement that had been made was for unpaid leave until 8 September.

31. There is then some dispute about how the meeting with the claimant, Mrs Wells her union representative, the respondent and Mrs Day, was conducted and I was assisted in the following findings by the CCTV recording. The meeting took place with the ACAS code on the table in front of all of the parties. The real discussion time lasted less than 20 minutes, with the remainder of about an hour spent either in adjournment with the parties apart, or using the private office on site at the café for the claimant and her representative to confer, or indeed for the respondent and the claimant's trade union representative to confer. Mrs Wells took notes and so did Mrs Day, to a slightly lesser extent. There was a point when Mrs Wells was seeking to understand with the claimant what hours she could do, and indeed the respondent was seeking to understand what hours could be done, whether that was 16 or otherwise and on what days they could be done.

32. Mrs Wells' notes of that hearing are not controversial. I find that she did her best to keep an accurate record and that they are a sensible summary but they are just that, a summary. They are not verbatim.

33. Mr Bleach at one point asked the claimant what had happened, when there was a discussion of whether she could come back, and how and whether she could work, saying something like, previously she had gone through snow and ice to get to work, indicating how reliable she had been in the past. She referred to her own mental health as the reason that she had not been able to come to work. The respondent reacted to that saying something like," mental health.. I can tell you about my issues.. I almost died twice". The comment caused Mrs Wells to intervene because she considered that the respondent was "judging", in some way, the claimant's mental health. There was a break at that point. It was the limit of any raised voice from the respondent during that meeting.

34. The claimant's resignation letter is very clear that it was this comment which resulted in a characterisation of the respondent as aggressive in that meeting. Objectively speaking, that may well have been a comment which would have been unwanted, and could have been put differently, but it was said against a background of a previously very supportive mutual relationship, in which there was clear concern for the claimant's well being expressed, and there was clear previous good relations between the parties. It was also said in the context of the effect of ill health, and the pandemic, on the respondent, which had been substantial. Of itself, it is not, in my judgment sufficient to destroy trust and

confidence, even if it could be said to be without reasonable and proper cause. It might be something that might contribute to it, but of itself, in the context of an otherwise short and regulated meeting, it is not sufficient to entitle the claimant to treat her contract as repudiated – that is, to take from the comments that the respondent would not be bound by the contract of employment. The parties were seeking to have a genuine engagement about how to get the claimant back to work.

35. I therefore take into account the cumulative effect - the comment about his own mortality and the claimant's mental health – and the belief in gross misconduct in the letter. The context was a regulated disciplinary hearing being convened, and taking its course in an ordinary and civilised way. On balance I do not find that these two matters were sufficient, objectively, to destroy or seriously damage trust and confidence, treating them as without reasonable and proper cause.

36. I also take into account of course that there was no protest or allegation of aggression made in the subsequent emails or in the notes from the claimant's trade union representative, until the resignation letter. On my findings there clearly was no aggression manifested. The context includes the respondent's decision to adjourn the hearing to enable the claimant to consult her GP when she became upset, and the words used: "but go and see your GP and be honest with them" - were clearly seeking to support the claimant to deal with any mental health issues that she was experiencing at the time, and which had not, until that meeting, been made known to the respondent in clear terms, although there had been some previous mention of the claimant taking tablets in messages.

37. There was also discussion in that meeting about who should have contacted who in September. Mrs Wells' notes are clear about that (pages 167 to 169). Objectively, an employer's duty of care is to provide a safe system of work. It is not wider than that. It does not extend to checking up on employees at all times, whether they are supposed to be at work or not, and when they can be seen to be working elsewhere, ostensibly happily. Some employers would have made contact, but most employers expect to be provided with a reason if a member of staff does not come to work. All the more so, when it is clear that they are well enough to attend work because they are attending another employer. The respondent's decision not to contact the claimant had reasonable and proper cause.

38. The respondent during the meeting said that he would have contacted another employee to see if they were ok, but he also gave the context in the meeting, , namely, the claimant visibly attending work elsewhere. In the round I do not find the comment about contacting other employees to be a matter without reasonable and proper cause, which sensibly and objectively could destroy or seriously damage trust and confidence. That was an utterly innocuous comment, albeit the claimant found it upsetting. The claimant was asked in that meeting if she could work Sundays, and her reply was, possibly, and the last comment that was recorded in the notes of Mrs Wells, was, .."we need to see if you can work at all to get this resolved ", and the respondent gave advice, as above, about the claimant seeing her GP.

39. It will be apparent from these findings that I do not consider that the respondent's conduct during the October meeting was sufficient to destroy trust and confidence.

40. At its conclusion was agreed the respondent read some draft findings including that the parties would reconvene on 26 October, and that unpaid leave would continue until then. Mrs Wells recorded that in her notes and the respondent later sent her his provisional findings in writing, which included that unpaid leave would continue "without benefits", by which was meant without holiday pay. Mrs Wells had the opportunity to make representations after the meeting and to correct matters with which she did not agree, and she did so on 23 October. At that time there was no protest about continuing the agreement for unpaid leave, nor any suggestion that this had not been agreed until 26 October, when the parties could discuss the claimant's return to work again. At no stage had the claimant provided a fit note to say she was not fit for work. Potential mental ill health was only raised as a reason for absence at the meeting on 12 October. There was no suggestion from Mrs Wells in her email of 23 October that a continued agreement for unpaid leave was not appropriate, pending medical advice.

41. Mrs Wells and the claimant appeared to have forgotten on 23 October, and when drafting the resignation letter, **when** the arrangement to re-convene on 26 October was made, but Mrs Wells' contemporaneous notes settled it. The date was fixed at the time – it was not fixed to disadvantage the claimant as the resignation letter suggests and Mrs Wells did not raise her holiday at the time. It later transpired it was half term and she was not available and she did, on 23 October make that point and seek an alternative date, the response to which was to put back the resumed meeting to 2 November. The plan was to come back together to see what the claimant's GP had said, what hours she might be able to work, and how to take matters forward. There was no express dismissal of the claimant in the 12 October meeting or subsequently and no disciplinary finding about the disciplinary matter that had been raised.

42. Before 2 November the claimant contacted Mrs Wells and said, in effect, that she could not go back to work because the relationship had broken down and she could not face the 2 November meeting. That was how the claimant felt about matters. The union and the claimant drafted her resignation letter and it was sent on 2 November. It read as follows (with numbers added):

    Dear Mr Bleach

    Resignation

    1) I'm writing to resign from my employment with immediate effect. I believe that I have been constructively dismissed.

    2)Whilst I was on furlough I had to keep asking when I was going to be paid, which is unacceptable. You have regularly failed to provide itemised pay slips, as required by law.

    3)I do not have a written statement of terms and conditions of employment as required by section 1 of The Employment Rights Act 1996 and you did not address this when you took the business over as you could and should have done.

4) Following text exchanges with Catherine about my return date, as I had childcare issues, it was agreed that I would take unused holiday and then unpaid leave. The meeting in July was unnecessarily heated.

5)Regulations [13 and 13A] Working Time Regulations mean that contrary to what you have said I accrued holiday during the period that I was on "unpaid leave."

6) Because I had not heard from you I contacted you on 30 September 2020 asking if I was required, and this resulted in you inviting me to a disciplinary hearing. In your invitation letter of 5 October 2020 you say that "I believe your behavior amounts to gross misconduct" and yet you are the person conducting the meeting.

7)It has already been said in text messages "your P45 will be available to you shortly", you left me with no choice but to assume that you had decided to cease your employment and that remains my view".

8)As you know I suffer problems with my mental health, which I had referred to in my text messages, and when the meeting was adjourned. You replied to that text saying "bit busy, I'll respond later" on the Wednesday, and by the Friday I had to text you again because you hadn't responded.

9)You admitted to my trade union representative Nicola Wells during the disciplinary hearing that if it had been another member of staff who had not turned up to work you would phone them, but did not get in touch with me.

10)You put me on unpaid leave until 26 October when you adjourned the disciplinary meeting to allow me to see my GP. That was in effect an unpaid suspension and if it was for medical reasons, as you suggest when you talk about only having "limited experience in mental health proceedings", then I should have at least been put on to statutory sick pay. In the event that my mental health problems amount to disability under the Equality Act 2020, I believe your actions on 12 October 2020 may amount to disability discrimination.

11)You were very aggressive in the meeting when we discussed my mental health, which required Mrs Wells to intervene. I believe that this may amount to the torte of unlawful harassment related to disability.

12)You adjourned the meeting to a date when my trade union representative was on holiday, and when she asked you to arrange a mutual convenient date week commencing 2 November 2020 you instead insisted on a meeting at 5pm today without taking into account whether Mrs Wells was available and without having contacted Mr Williams at Community Union in her absence, as she had requested.

13) Your conduct during the meeting was the final straw. There is a breach of the implied term of mutual trust and confidence which must exist between parties to a contract of employment, including the implied term that the parties shall treat each other with sufficient courtesy and consideration so as to enable the employment relationship to be carried on and the implied term that the employer shall not without reasonable cause conduct themselves in a way which is calculated or likely to seriously damage or destroy trust and confidence.

14) For the avoidance of doubt I shall not be attending the adjourned disciplinary meeting later today.

43. The 2 November meeting did not therefore take place.

Conclusions

44. A choice to resign in the circumstances I have found is not the same as a dismissal - the respondent engaging in conduct without reasonable and proper cause calculated or likely to destroy trust and confidence – breaching the claimant's contract – in the way she pleads, entitling her to resign.

45. I am very grateful to Mr Williams for setting out the law that applies to constructive unfair dismissal and it is reflected in the questions the Tribunal asks itself. It is of course a common law test, albeit Section 95 of the Employment Rights Act permits notice to be given.

46. To summarise, the claimant has not established a dismissal. For completeness, taking the matters that are raised in the resignation letter:

47. *Whilst I was on furlough I had to keep asking when I was going to be paid* – this is not a fair characterisation of events. My findings above deal entirely with that.

48. *Failure to provide itemised pay statements* – there was no such failure. I have dealt with that in my findings of fact.

49. *I do not have a written statement of terms and conditions of employment.* This is a correct statement of fact. It did not inform the claimant's decision to resign at all, because clearly she knew she did not have written particulars and did not raise it at all during employment. Similarly she did not have a contract in her previous employment for her husband. It was not something pleaded as causing her to resign.

50. "*It was agreed that I would take unused holiday and then unpaid leave*". In her own words the claimant has identified the agreement that I also have found was made between the parties for a career break in circumstances where childcare was not available until the school holidays were over.

51. *The meeting in July being unnecessarily heated*. There was some limited swearing, as I have described it, on both sides in that meeting; the alleged breach was Mrs Day being "hostile". Mrs Day had reasonable and proper cause to be unhappy because the claimant was in the wrong for booking a holiday without asking for leave or providing the dates. In the context of a previous relationship which was warm and informal, this was not conduct by Mrs Day breaching the implied term.

52. A*ccrual of holiday pay during agreed unpaid leave.* As far as the Working Time Regulations are concerned, that is a matter I address to determine the claimant's holiday pay claim. It was not pleaded to be a breach causing resignation, and as a matter of fact holiday pay was not in the claimant's mind causing her to resign. She did not raise the payment of holiday pay at all during her period of unpaid leave

53. To say, as she does, "because I had not heard from you I contacted you ", is not reflective of the contemporaneous text messages at all. I have indicated that in my judgment the claimant was due to be at work by 8 September. That was the limit of the agreement. The respondent had reasonable and proper

cause for not contacting her because he knew that she was well enough and working at the club.

54. The respondent saying the claimant had engaged in behaviour amounting to gross misconduct in the hearing invitation letter is addressed above.

55. Similarly the P45 text message exchange and other exchanges. My findings address this, but in short, the claimant omits the context in which the communications happened, and this is part of the background to the pleaded breaches.

56. Being put on unpaid leave/suspending the claimant without pay for the period 12.10.20 to 2.11.20 – this requires a return to the chronology.

57. Equality Act complaints, mentioned in the resignation letter paragraph, did not feature in the pleaded issues, but for the assertion that, "you were very aggressive in the meeting when we discussed my mental health which required Mrs Wells to intervene" misrepresents what happened and I have reached conclusions about it above. The assertion of being very aggressive is without foundation.

58. The next paragraph again is misrepresenting what occurred.

59.

60. There was, then, an adjournment to 26 October which was then found to be inconvenient to Mrs Wells and then a further date was provided of 2 November.

61. I have made a finding that

62. On most of my findings you will now appreciate that I consider the respondent had reasonable and proper cause, certainly on the matters set out in the resignation letter. As far as the pleaded case is concerned there are a number of additional matters in effect dealing with them in a way that they are put in the pleading requiring the claimant to return to work after furlough at a time when she was not able to manage childcare. Well a contract of employment involves being paid for work done. Those have to be terms in a contract of employment otherwise you haven't got a contract of employment. If somebody is unable to or finds themselves in childcare difficulties in an emergency situation there are provisions and protection from employees having paid time off to deal with that and the provision is to arrange or make alternative arrangements. This was not the situation. This was a long lasting inability to have childcare and the respondent had good cause to want the claimant back at work. It needed its cook and it was a limited opportunity during the pandemic to capitalise on the Eat out to Help Out Scheme. So yes the respondent required the claimant to come back to work. Was that without reasonable and proper cause? No. Did it without reasonable and proper cause fail to permit her to remain absent on furlough until 8 September? Well that is putting the same proposition another way round. Furlough was an arrangement as we know to support employment in appropriate circumstances. It wasn't a right and the respondent had good reason for needing the claimant at work and they made and arranged an alternative arrangement which was effectively a short career break to enable the claimant to get through to the beginning of the return to school for her daughter. It follows that whilst she was absent she wasn't entitled to be paid wages on the agreement that I have found and I have dealt with the requiring

her to attend a disciplinary hearing. There were grounds to convene that hearing. I have indicated that it is plain from the way in which it was conducted that the outcome was not pre-judged. It was an unfortunate way to express matters in the disciplinary invitation but in context that wasn't sufficient of itself to destroy trust and confidence. I found that the hearing wasn't conducted in an aggressive at all and I found that in effect there was an agreement to continue the career break effectively the short career break until they could discuss matters again on the 26th and understand whether the claimant was in fact well enough to come back to work and the hours that she would be able to offer if she could come back to work.

63. So for all those reasons it would be apparent that the constructive and unfair dismissal complaints fail. It is probably convenient if I deal with the counter claim at the same time. This was a claim about the claimant failing to attend work and I have found an agreement in effect which absolves her from that responsibility for a limited period of time. Notwithstanding that there was also a wholesale failure to prove any loss even if I have found a breach of her duty to attend work and in those circumstances that complaint is dismissed. Also that is the respondent's counter claim is dismissed.

64. The unlawful deduction from wages complaint is essentially standing or failing on my finding as to whether there was an agreement to have an unpaid sabbatical effectively or a mini career break and I found that there was in circumstances which suited in effect both parties in difficult circumstances. And so that complaint is dismissed.

65. The claimant's complaint about holiday pay of course engages the Working Time Regulations and it also requires me to consider whether the agreement that I've found from the initial text message exchange ie the best that I can offer is unpaid leave and the claimant saying if I can take my holidays can I do the unpaid leave? That is an agreement to vary the contract of employment. I cannot find that the parties also agreed at that time that there would be no accrue of Working Time Regulation holiday pay because if one had asked the party (a) they didn't address their minds to it. I accept that by the disciplinary hearing on 12 October that the respondent had addressed his mind to it, perhaps he had taken some advice by that which is why it is expressed as without benefit but I don't find that for the initial period it could be said to be agreed. In that respect the claim for holiday pay between 8 September and 12 October which was outstanding on the termination of employment on 2 November, in my mind that is well founded because there wasn't an agreement that it would be without benefit. In that context I am content that there was an agreement to extend the unpaid leave but that given that the protest in relation to that came relatively quickly in the form of the resignation letter I don't consider that the claimant had agreed to waive her holiday entitlement in that period from 12 October and so it seems to me on a contractual analysis that there hasn't been an agreement that there shouldn't be accrue of holiday pay. Applying the Working Time Regulations I do think the right analogy is the career break scenario and if there had been express agreement (by express agreement I mean if the parties had addressed their minds to it in a text message saying is that with or without holiday pay? Yes its without holiday pay or no its with holiday pay) then that would be good enough in my mind to suspend the entitlement to holiday pay. The respondent has rest

its mind to it and for those reasons they haven't agreed it in that sense and so I am erring on the side of caution and considering that the Working Time Regulations continue to apply because the employment itself continues and hasn't been suspended.

66. I'm conscious that that could be analysed in a different way but that's where I've come to and so it seems to me that the holiday pay complaint has to succeed. I did indicate that I might need to hear from the parties in terms of remedy. That of course would depend on the findings that I made and the conclusions that I reached but given that I have reached a conclusion that the claimant is entitled to her holiday pay on the termination of her employment which Mr Williams has calculated at 6.31 days and I also have included in my findings that the claimant was ready and available to work to this extent that she attended her disciplinary hearing and that was time for which she was entitled to be paid in effect, that that would take her to that very limited extent. She is entitled to be paid and that would take the sums due to her to seven days pay. I have been able to perform a calculation using the schedule of loss. Seven days gross pay is £395.85 and so I give Judgment for that sum. I also of course have to consider having made an award and the claim having succeeded to some extent whether to uplift that award in respect of the failure to give the claimant a written statement of terms and conditions and albeit the only circumstances in which I would not award two weeks' pay as if there are exceptional circumstances to do so and I have considered whether my finding in relation to the employment contract that was before me, that is I don't accept it is an exceptional circumstance to not award a two week uplift. I have considered that in the circumstances it isn't and that I will uplift the claimant's award by two weeks' pay which is £615.76.

67. So just to summarise the constructive unfair dismissal complaint, the wrongful dismissal complaint and the employer's counter claim are dismissed. The claimant's unlawful deduction in wages and holiday pay complaints succeed to the extent that I have described and the respondent must pay to her £395.85 which is seven days' gross pay and I uplift that sum by £615.76 in respect of a failure to provide written particulars of employment. I appreciate that I haven't given either of the parties the opportunity to address me on how I should exercise my discretion in that respect but in those circumstances it seems to me that the parties are well served by using their time this afternoon in a different way and indeed the Tribunal's time is better spent in a different way.

68. It is convenient to set out that letter in its entirety (with added paragraph numbers) because its portrayal of events reveals the extent to which the claimant's case was highly selective in its factual assertions:

Employment Judge Wade

Date: 7 June 2022