EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Sherwood**

Respondents: **(1) Lorraine Pegler t/a Bar 21**
(2) William Wynn

Heard at: **Bristol (by video)** **On:** **29 April 2022**

Before: Employment Judge Le Grys

Appearances
For the Claimant: In person
For Respondent 1: Mr Alan Williams (solicitor)
For Respondent 2: No attendance or representation

JUDGMENT having been sent to the parties on **30 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

Introduction

1. The Claimant, Mrs Jacqueline Sherwood, was employed by the First Respondent, Lorraine Pegler t/a Bar 21, as a manager from 23 February 2020 until her employment ended on 25 September 2021.

2. The Claimant claims for breach of contract in respect of a failure to pay a notice period. She additionally claims for leave accrued but untaken on termination.

3. The First Respondent contested the claim. It denied that the Claimant is owed any monies in respect of either notice pay or holiday pay. The Second Respondent did not attend and was not represented.

4. The Claimant appeared before the Tribunal in person and gave sworn evidence. The First Respondent was represented by Mr Alan Williams, solicitor, who called sworn evidence from Lorraine Peglar. I considered the evidence in an 83 page bundle of documents provided by the Claimant, and an additional 60 page bundle of documents provided by the First

Respondent, as well as an additional 6 page witness statement of Lorraine Pegler.

Preliminary Matters

5. At the beginning of the hearing, before I heard any evidence, I had to deal with several preliminary issues.

Second Respondent

6. The claim form stated that the Claimant was employed by the First Respondent, but also named Mr William Wynn as the Second Respondent. There was no ACAS conciliation number in respect of the Second Respondent. The Claimant was asked to clarify the basis on which he had been included, as it appeared to the Tribunal that the claim should have been rejected, given the lack of conciliation.

7. The Claimant stated that the First and Second Respondent worked together and that the Second Respondent effectively constructively dismissed her, and so she wanted his name to be included within the proceedings. She accepted that she was employed by the First Respondent at all times. She accepted that he could not be included without an ACAS conciliation number but said that she wanted his name to be before the Tribunal.

8. As it was accepted that the Claimant was employed by the First Respondent and there had been no conciliation with the Second Respondent, the claim was dismissed as the Tribunal did not have jurisdiction to hear it.

9. The First Respondent shall be referred to simply as the Respondent for the remainder of this document.

Application for Strike Out

10. The Respondent applied for the Claims to be rejected in accordance with Rule 12 of the Employment Tribunal Rules ("the Rules"). This was on the basis that the Early Conciliation Certificate named the Respondent as 'Lorraine Pegler', but it should have been 'Lorraine Pegler t/a Bar 21'.

11. The Respondent also applied to strike out the claim under Rule 37 of the Employment Tribunal Rules of Procedure on two grounds:

    a. That the correct Respondent was Lorraine Pegler t/a Bar 21 and the Tribunal had no jurisdiction to hear a claim against an individual;
    b. That the claim in respect of holiday pay was out of time.

12. I discussed these matters with Mr Williams, and stated as an initial view:

    a. That it appeared that the procedural requirements had been met insomuch as the claim form and ACAS certificate matched. An argument that these details related to the wrong Respondent appeared to be a different issue to whether the formalities had been complied with at all;

b. That the question of whether the Respondent was 'Lorraine Pegler' or 'Lorraine Pegler t/a Bar 21' appeared to be somewhat technical given that the Claim was always effectively against the same Respondent, all material had been sent to that Respondent and the Respondent had always replied, and the evidence remained exactly the same. It would therefore seem that a straightforward amendment to the name would solve any issue and it was not obvious that this would cause any prejudice;
c. In relation to time, that this may be a matter for evidence but as the claim related to holiday untaken but accrued on termination the relevant date appeared to be the Effective Date of Termination (EDT) rather than the date the holiday was not taken.

13. Mr Williams conceded the issue in respect of procedural requirements and suggested that this may have been somewhat "overzealous litigation". He was happy to concede the point in respect of an amendment to the Respondent's name. He accepted that the claim was in time if the relevant date was the EDT.

14. The Claimant agreed that the correct Respondent should be "Lorraine Pegler t/a Bar 21" and said that she hadn't been sure which name to put on the form.

15. I therefore decided that the applications should be refused. The procedural requirements had been complied with as the details on the claim form and the conciliation certificate matched. There was no prejudice caused in allowing an amendment to the name of the Respondent company, all parties being aware throughout as to the nature and detail of the claim, and the Respondent having engaged from the outset. The name of the Respondent was therefore amended by consent. The issue in respect of time limits was one properly addressed in evidence and submissions, if in fact it remained an issue at all.

Issues for the Tribunal to Decide

16. Having dealt with these preliminary matters, I agreed with the parties the list of issues for me to decide.

Breach of contact

16.1 Was the Claimant directly dismissed by the Respondent without notice?

16.2 If the Claimant was not directly dismissed by the Respondent, did she resign in such circumstances that the resignation should be construed as a dismissal?

Holiday pay

16.3 In relation to holiday pay from 2020, did this carry forward into the next leave year and therefore remain accrued but untaken on dismissal?

16.4 In relation to all remaining holiday pay, did the Respondent fail to pay the Claimant for annual leave that she had accrued but not taken when employment ended?

17. It was agreed that, if I found in favour of the Claimant in respect of notice pay, the amount due would be £2,000. It was also agreed that the leave year started in April.

18. It was further agreed that 11 days leave had accrued in the final leave year and had not been taken. The amount due was accepted as £1,100. The Respondent's position in respect of this was that there had been an authorised deduction from wages as a result of the Claimant's failure to work her notice period.

The Facts

19. The Claimant was employed by the Respondent as a manager in Bar 21 from 23 Feb 2020 to 25 September 2021. Bar 21 occupied the same premises as Café 21, which was run by William Wynn. While the Claimant was employed by the Respondent, she did do occasional overtime for Mr Wynn. She was paid for this by the Respondent, who was then reimbursed by Mr Wynn.

20. Within a few weeks of her employment the businesses were closed as a result of the pandemic and the Claimant was furloughed. She did continue to do some work, however, including helping with admin and Covid grant applications.

21. The Claimant's contract specified that she was entitled to 6 weeks leave per year, and, while it did not appear to be specified anywhere, all parties agreed that the leave year ran from April. The contract was silent on the question of carry forward of untaken leave.

22. The Claimant stated that she was asked by the Respondent not to take her booked holidays at the end of the year as they were hoping to re-open for Christmas parties. She further stated that the Respondent specifically asked her to move her leave entitlement to the following year. The Respondent did not accept that any such conversation took place, and denied that there had been any agreement to carry forward leave.

23. I was referred to a note (page 60-61 of the Claimant's bundle), which was in the Claimant's handwriting. She stated that this related to her leave, and that there were ticks on it that proved the agreement to carry leave forward. The Respondent did not accept this, saying that the note was prepared by the Claimant and was unsigned and undated.

24. In my judgment the note does not assist in resolving the dispute, having been drafted by the Claimant and containing nothing that can be objectively given the meaning she asserts without relying on her own interpretation. I therefore attach little weight to it. Given the silence of the contract on the

point and the absence of verifiable contemporaneous records I do not find as fact that there had been an agreement to carry forward leave.

25. The Claimant was increasingly unhappy in her role because of arguments between Ms Pegler and Mr Wynn, which frequently took place within the hearing of customers. Around 22 September 2021 the Claimant saw Ms Pegler upset after a particularly big argument, and she told the Claimant that she intended to close the bar. The Claimant was worried as a result. The Claimant was, however, told by Ms Pegler the following day that she was going to stay.

26. The Claimant felt that she needed to consider looking for another job. She applied for a position and was offered an interview, informing the Respondent when she next went into work. She intended to remain working for the Claimant, however, if she was unsuccessful in her interview. It was agreed that the Claimant and Respondent were good friends at this time, and I take account of the fact that the Claimant remained sufficiently comfortable with the Respondent to inform her of the upcoming interview. The relationship between the Claimant and Respondent remained positive.

27. I therefore find that the Claimant was unhappy with the situation and was exploring other employment options but that, prior to the incident on 25 September 2021, had not resolved to leave.

28. On 25 September 2021 a verbal disagreement took place between the Claimant and Mr Wynn. This disagreement started in the café kitchen before the parties moved to a private flat. I accept that Mr Wynn was angry as the Claimant had told Ms Pegler of her intentions to go for a job interview. The argument upset the Claimant, and she immediately left work following it and did not return.

29. I do not find, however, that the words *"leave and never come back"* where used, nor do I find that the Respondent played a significant role in this disagreement. There are inconsistencies between the Claimant's witness statement, claim form and the emails sent in the immediate aftermath as to what was said, and there are significant inconsistencies as to the extent to which the Respondent participated (if at all).

30. I further note that it was never accepted by the Respondent (including in the emails immediately following the incident) that such language was used, and the emails instead suggest surprise at the Claimant's decision to leave. In emails exchanged between the two Ms Pegler told the Claimant that she remained on the rota for work, and could return to work her notice period if she wished. Furthermore, while the Claimant suggests that the nature of the argument was such that she was unable to return to the location, she did return to operate her own business (a kiosk) which was located immediately outside.

31. I therefore find that there was an argument with a third party which upset the Claimant, and that this was the point at which she decided she wished to resign. I do not find, however, that this decision was based on the conduct of the Respondent.

32. In relation to holiday pay in 2021, the Respondent was unable to give much information about this and said that it was effectively left for the accountant to sort out. The Respondent's representative conceded in closing that 11 days would have been accrued by termination of employment, and that £1,100 was the correct figure. However, it was suggested that this could be properly deducted from the fact that C did not work her notice period.

Relevant Law

33. Where there is an express contractual term as to notice then this will apply, provided that it is not less than the period of notice required by s.86 Employment Rights Act 1996. In this case the contract stated:

> *"Notice. In the 1st 12 weeks of employment, either the employer or employee can give 1 weeks notice, after which 4 weeks notice on either side will be required."*.

34. It was therefore common ground in this case that the required notice (from either side) was four weeks. If notice was not given then the Claimant will be entitled to claim the notice pay as damages for breach of contract.

Constructive unfair dismissal

35. Whether the Claimant was dismissed was in issue. Section 95(1)(c) Employment Rights Act 1996 states:

> *(1) … an employee is dismissed by his employer if...*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

36. In *Malik and Mahmud v BCCI* [1997] ICR 606 the House of Lords formulated the implied term as to trust and confidence as being an obligation that the employer shall not:

> *"Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

37. Not every action by an employer which can properly give rise to a complaint by an employee amounts to a breach of trust and confidence; the formulation given in *Malik* recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In *Frenkel Topping Limited v King* UKEAT/0106/15/LA the EAT cautioned about the dangers of setting the bar too low, and that acting in an unreasonable manner is not sufficient. The strength of the implied term is shown by the fact that it is only breached if the employer demonstrates objectively by its behaviour that it is abandoning and altogether refusing to perform the contract.

38. A breach of trust and confidence might arise not because of a single event but because of a serious of events. The 'last straw' does not itself have to be a repudiation of the contract, but should be capable of contributing to a series of events which cumulatively amount to such a breach (see *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481, CA). However, the fact that an employee continued to work after a series of events that did amount to a fundamental breach will not of itself constitute affirmation of contract and waiver of the breach(es) caused by the earlier conduct, and the employee may be able to rely upon those earlier matters, even if the last straw is not itself a breach or capable of contributing to one (see *Kaur v Leeds Teaching Hospitals NHS Trust* [2019] ICR 1, CA; and *Williams v Governors of Alderman Davies Church in Wales Primary School* [2020] IRLR 589). The approach to be taken is thus normally to ask:

    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, amounted to a repudiatory breach of trust and confidence?
    e. Did the employee resign in response (or partly in response) to that breach?

Holiday pay

39. In relation to holiday pay, employees are entitled to be paid in lieu of accrued but untaken holiday on termination of employment under Regulation 14 Working Time Regulations 1998. This sum is payable whether under his contract or otherwise (s.27(1)(a) Employment Rights Act 1996).

40. The general rule under the Regulations is that the employee is only entitled to be paid in lieu of holiday accrued but untaken in the final leave year (Regulation 13(9)(a)).

41. The Working Time (Coronavirus)(Amendment) Regulations 2020 SI 2020/365 introduced a temporary relaxation of this general rule. Under Regulation 13(10), where it was 'not reasonably practicable' for the worker to take some or all of their leave in the relevant leave year as a result of the effects of Covid-19, then they were entitled to carry forward such untaken leave.

Discussion and Conclusions

42. Applying the facts as I have found to the issues identified at the outset, I do not find that the Claimant was directly dismissed by the Respondent. The Claimant's employer was the Respondent, and all wages were paid by her. The Respondent did not tell the Claimant to leave work and can be seen in emails to say that she didn't consider the Claimant to be dismissed. While

Mr Wynn and the Respondent worked closely together, he was not authorised to dismiss the Claimant on behalf of the Respondent. I am therefore not satisfied that the Claimant was directly dismissed by her employer.

43. In relation to whether the Claimant was instead constructively dismissed, it is not suggested, nor do I find, that the incidents prior to 25 September 2021 resulted in a fundamental breach of contract. The arguments that did take place were between Ms Pegler and Mr Wynn and did not involve the Claimant. While I accept that they did make her unhappy, the relationship with the Respondent remained positive and the intention was to continue working for her if she was unsuccessful in her interview.

44. The incident of 25 September 2021 was the point at which the Claimant decided that she no longer wished to work for the Respondent. While Mr Wynn was not the Claimant's employer, I am satisfied that he worked so closely with the Respondent that it would be very difficult, if not impossible, for the Claimant to continuing working if Mr Wynn did not want her there.

45. The question is therefore whether the verbal disagreement between Mr Wynn and the Claimant in the terms I have found was sufficient to amount to a breach of the implied condition of trust and confidence, such that the Claimant was entitled to resign.

46. I am not satisfied that it was. The incident took place largely in private, and primarily involved Mr Wynn rather than the Respondent. I have not found that the Claimant was told to leave and never come back. Any participation of the Respondent was limited, who also made clear to the Claimant that she did not consider her to have been dismissed. While the Claimant stated that the behaviour of Mr Wynn was such that she felt unable to return to the location, she continued working immediately outside. Taking this all into account I am not satisfied that a single verbal argument between the Claimant and a third party, however close to the Respondent, broke down the previously good relationship between the Claimant and Respondent to such an extent that she was entitled to resign on the back of it.

47. I therefore find that the Claimant chose to leave following the argument with Mr Wynn, rather than that there was a breach of the implied term of trust and confidence by the Respondent. For this reason, I do not find that the Claimant was constructively dismissed, and the claim for notice pay must fail.

48. In relation to holiday pay, the contract makes no provision for the carry forward of leave. The question is therefore one of fact as to whether there was a separate oral agreement to carry leave forward such as to amount to an additional contractual term, or alternatively to bring the Claimant within an exception to the usual rule under the Working Time Regulations that leave cannot be carried forward.

49. In light of my findings above I am not satisfied that such an agreement was made, or that the Claimant had been unable to take her leave during the relevant leave year. This aspect of the claim therefore does not succeed.

50. In relation to holiday pay from 2021, it was ultimately accepted that the Claimant had accrued 11 days leave in her final leave year, which was untaken and unpaid at the time she left employment. While it is suggested that the outstanding sums could be offset against an unworked notice period, the Respondent was unable to identify any authority that would allow an employer to make a deduction in respect of wages that were not in fact payable.

51. This was therefore an unauthorised deduction, and this aspect of the case succeeds. The Respondent is ordered to pay Claimant the sum of £1,100 in accrued but unpaid holiday pay on termination of employment.

Employment Judge Le Grys
Date: 24 June 2022

Sent to the parties: 28 June 2022

FOR THE TRIBUNAL OFFICE