



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs P Timlin

**Respondent:** Synergy (GB) Ltd

**Heard at:** London South

**On:** 24<sup>th</sup> August 2022

**Before:** Employment Judge Reed

**Representation**

Claimant: In person

Respondent: David Taylor, Director

## RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well-founded and is therefore dismissed.
2. The complaint that the Respondent failed to pay a statutory redundancy payment is not well-founded and is therefore dismissed.
3. The complaint of breach of contract / wrongful dismissal is not well-founded and is therefore dismissed.
4. The complaint that there was a failure to pay compensation related to annual leave in accordance with regulation 14 of the Working Time Regulations 1998 is well-founded. The Respondent is ordered to pay the Claimant compensation of £2,263.82.

## REASONS

**Claims and issues**

1. Mrs Timlin has brought claims for unfair dismissal, statutory redundancy pay, breach of contract / wrongful dismissal (on the basis that she claimed that she had been dismissed without appropriate notice) and a failure to pay

compensation related to annual leave in accordance with regulation 14 of the Working Time Regulation 1998.

2. Neither party was legally represented and we did not formulate a formal list of issues. At the beginning of the hearing, however, there was a general discussion of the issues in the case. It was agreed that the central issue in relation to the unfair dismissal and wrongful dismissal claim was whether Mrs Timlin has been dismissed, either directly by Synergy or constructively by resigning in response to a repudiatory breach of contract.
3. If Mrs Timlin had been dismissed, Mr Taylor pragmatically accepted that she would have been unfairly and wrongfully dismissed, since no appropriate procedure would have been followed and no notice had been given.
4. Similarly, in relation to the statutory redundancy claim, dismissal would be a key issue, since Mrs Timlin could only succeed if she had been dismissed. I would then need to consider the reason for dismissal and, in particular, whether it fell within the statutory definition of redundancy.
5. At the beginning of the hearing both parties agreed that the holiday pay claim was a claim that Mrs Timlin had not been paid compensation relating to entitled to leave under regulation 14 of the Working Time Regulations 1998.

#### **Procedure, documents and evidence heard**

6. The parties provided me with an agreed bundle, containing the pleadings, contract of employment, Mrs Timlin's schedule of loss and correspondence between the parties by email and text.
7. I heard evidence from both Mrs Timlin and Mr Taylor. Neither had prepared a witness statement for this hearing. At the beginning of the hearing we agreed that I would ask them both general questions based on the ET1 / ET3 and the documents to elicit their initial evidence before the other party began cross-examination.

#### **Findings of fact**

8. Based on the above evidence, I have reached the following findings of fact on the balance of probabilities.
9. Synergy is a company providing paper products, such as till receipt and credit card rolls, to the retail and hospitality industries.
10. Mrs Timlin had worked for Synergy since 2013. At all times relevant to this claim she was a salesperson, selling products by phone.
11. It is common ground that, like many businesses, Synergy was profoundly impacted by the covid pandemic. In March 2020 Mrs Timlin, along with most other employees, was placed on furlough.

*Return to the office in August 2020*

12. Mrs Timlin remained on furlough until August 2020. On or around the 16<sup>th</sup> or 17<sup>th</sup> August 2020 she received a phone call from Synergy requesting that she return on Monday 24<sup>th</sup> August 2020, which she did.
13. There is some dispute about what happened upon her return. Mrs Timlin told me that Mr Taylor had welcomed her back, but had then told her and a colleague that, if they did not hit their targets, someone would have to go.
14. In relation to the targets, Mrs Timlin says that before covid the salespeople all had targets for their sales. These were written on a board in the office and they were expected to make the target. She said that, before covid, when someone did not achieve their target there would be a conversation with Mr Taylor and he would say that the figures were not up to scratch. These conversations would not always happen at the time; they sometimes happened a few months later.
15. There had been occasions, before covid, when Mrs Timlin had not achieved her target. Other salespeople would also fail to meet the targets from time to time. Mrs Timlin agreed that she had not been disciplined in relation to targets at any time.
16. Mr Taylor's account of the targets was that, prior to covid, there was a monthly target which was broken down into a daily rate. He said that when someone did not make the target there would be a supportive conversation to try to help them improve. He said that nobody had ever been disciplined or dismissed for failing to hit their target.
17. Mrs Timlin said that, on the third day – Wednesday 26<sup>th</sup> August 2020 – Mr Taylor asked her to accompany him to the hut where staff took coffee breaks. He said 'I have to let you go', although he also said that he would carry on with the furlough payments. He then wished her well and helped her to take her personal belongings out to her car. Mrs Timlin says that she was the only employee sent home in this way.
18. Mr Taylor's account of this period is rather different. He says that there was no discussion of targets. Indeed, he said that, following covid, Synergy has not operated without any targets for sales, since the sales environment had become too changeable and uncertain even in 2022. He says that there was definitely no sales target placed on Mrs Timlin in August 2020.
19. Rather, he says, that it became clear within a few days of staff returning from furlough, that it was not practical for the business to return to normal operation at that time. Their customers had been significantly disrupted by lockdown and the other responses to covid. Most customers had not used significant amounts of Synergy's products since March 2020, because they had been subject to the lockdown. Most had not yet returned to normal trading. There was, simply put, an extremely limited market for Synergy's products. He therefore made the decision that Synergy should aim to operate on a skeleton staff, returning most of its employees to furlough, and wait for the situation to improve.

20. In this context, Mr Taylor said, he had made the decision to return Mrs Timlin to furlough. He said he suggested this to her and there was an amicable conversation. He said that he thought she understood the difficult circumstances. He said he did not recall whether he used the words 'I have to let you go' or something like them; although if he did they would have been in the context of returning her to furlough rather than in the context of a dismissal or redundancy.
21. Mr Taylor accepted that he had chosen to return Mrs Timlin to furlough while keeping one of her colleagues in the office. He said that this was because the colleague was better placed to deal with the business on their own, since they had wider experienced of multiple brands, while Mrs Timlin had worked on only one band. He said it that this was not a matter of Mrs Timlin lacking capability or being bad at her job – he said that she was a valued employer with satisfactory performance. He said that he wasn't sure if anyone else had been sent home on the 26<sup>th</sup> August, but other employees had been put back on furlough within a few days.
22. Mr Taylor accepted that Mrs Timlin took some of her belongings with her at this point, but said that this was because nobody was sure how long the covid situation would last.
23. It is common ground that Mrs Timlin returned home and received furlough payments through April 2021.
24. During her evidence I asked Mrs Timlin whether, at this stage, she believed that she was still employed. She said that while she was receiving furlough payments she believed she remained an employee. She also believed there was a possibility that she would return to work. If she had she been called back into the office during this period she said that she would have felt she was obliged to return.
25. On balance, I prefer Mr Taylor's evidence in relation to the possibility of a conversation around targets at this time. Mrs Timlin's account is of a fairly aggressive statement around targets immediately upon return from furlough. This is a significant contrast with both her evidence and Mr Taylor's that previously targets were approached in a much more relaxed way, with conversations about a shortfall sometimes being delayed by a month or more.
26. I consider that Mr Taylor's account of seeking to return the business to normal, but finding that in all the circumstances this was not practical is a plausible and convincing one.
27. I accept, in this context, that Mr Taylor did not seek to dismiss Mrs Timlin at this stage. It is possible that he said something like 'I have to let you go', which in different circumstances might have been reasonably taken as a dismissal. He did so, however, in the context of placing Mrs Timlin back on furlough and promising that those payments would continue. In that context, it would not have been reasonable for Mrs Timlin to believe she was being dismissed.
28. Mrs Timlin's evidence confirms this account. In particular her belief that she would continue to receive furlough payments, might well return to work and

would be obliged to do so if requested confirm Mr Taylor's account that he had not dismissed her at this time.

29. Although Mrs Timlin has later suggested that she was or might have been dismissed at this point, she also accepted that this belief was formed later, in light of subsequent events.

*End of furlough payments*

30. Mrs Timlin told me that she had a phone call from the Respondent in March 2021 indicating that the furlough payments would stop.
31. While on furlough Mrs Timlin had also started another job, working for a software machines company in admin / sales. She had begun this role in September 2020. She was working there three days a week.
32. It is common ground that the furlough payments came to an end from April 2021. The last payment was on 30<sup>th</sup> April 2021. Since Mrs Timlin was paid monthly at the end of the month, the first non-payment will have occurred at the end of May.

*Communication following end of furlough payments*

33. After the March phone call the parties dropped out of contact with each other. Mr Taylor told me that this was because he had a problem with his phone and lost his contacts, including Mrs Timlin's number. He had always dealt with Mrs Timlin by phone and did not have an email address for her. He accepted that Mrs Timlin had previously provided an email and postal address, but said these were missing from Synergy's payroll system when he looked for them. Although her address was available to him on the hard copy of her employment contract he said he did not think of that at the time. Mrs Timlin also did not contact anyone at Synergy in April or May.
34. This meant that when other employees were told to come back to work from May 2021 Mrs Timlin was not. She remained absent from the Respondent's business after the furlough payments had ceased.
35. On the 7<sup>th</sup> June 2021 Mrs Timlin emailed Mr Taylor as follows:

Hello David

I see the furlough payments have stopped. Do I take it that I am now made redundant? if so can you confirm from what date (I assume 1<sup>st</sup> May 2021)

Regards

Pauline Timlin

36. In her evidence, Mrs Timlin said that at this stage she was seeking to get her P45 / P60 and to clarify what date she had been made redundant.

37. It is agreed that Mr Taylor did not receive this email, because it was sent to an incorrect address. On the 9<sup>th</sup> June 2021 Mrs Timlin emailed a colleague asking for the correct email address or her email to be forwarded on. She then forwarded the email to the correct address herself on the 11<sup>th</sup> June.
38. Mr Taylor replied later the same day requesting that Mrs Timlin send him her number, since he had lost the numbers on his phone. He also went to her house, which was close to the Respondent's premises, although Mrs Timlin was not there at the time.
39. A little more than an hour later he also emailed her to say 'Have tried to contact you in numerous ways without success now request you visit the office at your earliest opportunity'.
40. It is agreed that Mrs Timlin and Mr Taylor spoke by phone on the 11<sup>th</sup> June 2021. Mrs Timlin's evidence was that Mr Taylor told her that she should be coming back into work and asked her to come in the following Monday 14<sup>th</sup> June 2021. She said that she responded that she no longer worked for Synergy since Mr Taylor had told her that she had to go in August. She described Mr Taylor as not really responding to these comments and simply repeating that he wanted her to come in. She said that her feeling was that the reason he wanted her to come back in was that she had used the word redundancy in her email and that he didn't want her to have been made redundant, since the proper procedure for redundancy hadn't been followed. She accepted, however, that this wasn't mentioned during the phone call.
41. Mrs Timlin said that, in the end, she said facetiously that she would come back in on Monday having not heard from anyone since August. She said that she did not mean this seriously and she thought the facetious nature of the comment was clear, although she couldn't comment on how Mr Taylor took it. She said that he did not reply to this and the conversation ended.
42. Mr Taylor said that, from his point of view, he explained that people had returned to work and requested that Mrs Timlin did the same. He asked her to come in on Monday and she agreed – he did not take it as a facetious remark at the time.
43. I accept Mrs Timlin's evidence that she was spoking facetiously during this call, because it is consistent with her subsequent emails and the evidence she gave before me. I do not think this was apparent to Mr Taylor. At this stage, he saw no reason that Mrs Timlin would think that she had been dismissed in August and he did not see anything particularly untoward in the lack of contact, since Mrs Timlin had been furloughed.
44. Following their conversation Mr Taylor then wrote an email at 4.22pm as follows:

Hi Pauline,

Thank you for calling into the office after the request.

As discussed we are looking forward to seeing you 9am Monday 14<sup>th</sup> June in the office as agreed.

David Taylor

45. Mrs Timlin wrote an email at 16.38 as follows:

Hi Dave,

I have not received May's furlough payment can you please arrange the payment to be made to my account today and if you can confirm this,

Regards,

Pauline

46. I accept Mrs Timlin's evidence that she had probably not read Mr Taylor's email when she sent her email. Mr Taylor replied a few minutes later saying that he had left the office for the weekend, but that outstanding issues could be resolved when Mrs Timlin came to the office on Monday.

47. Mrs Timlin then replied, at 10.35pm as follows:

Hi Dave,

On the basis of how on my last day at work where you told me that you had to let me go,

You have not paid me since April and no word from you regarding my P45 & P60 until I contacted your today.

I don't feel you are entitled to request me to return to work on Monday,

I would rather we have a fact to face meet maybe for a coffee in Morrison's

I have obligations next week but will be available next Friday 18<sup>th</sup>

Kind regards,

Pauline

48. Mr Taylor replied on Saturday 12<sup>th</sup> June 2021:

Hi Pauline

As we are short staff and you are still employed albeit on furlough I must request that you return work Monday as requested

Kindest Regards

David Taylor

49. Mrs Timlin replied that evening:

Hi Dave,

I'm a little confused during our phone conversation yesterday I mentioned my p45 & P60 you told me to come into the office to collect them,

Furlough stopped in April and you have not contacted me other than the call to say furlough will end in April,

Prior to that was my last day at work back in August last year when I said goodbye to everyone you even carried me effects to my car.

I'm sorry Dave i simply don't believe you are short staffed.

I am free to meet you outside of work next Friday,

Kind regards,

Pauline

50. On Monday 14<sup>th</sup> June 2021 Mrs Timlin did not attend the office. Mr Taylor telephoned her, but did not get through. Mrs Timlin wrote the following email at 1.13pm:

Hi Dave,

I can see you have called me earlier,

I am unable to take or make calls,

As I said previously in my emails I will be available on Friday,

Hope to see you then,

Can you please confirm if you are free to meet outside of your premises,

Kind regards,

Pauline

51. Mr Taylor replied at 2.03pm:

Pauline,

I have tried to contact you today by phone and in person without success!

As already notified Synergy was expecting to see you at 9am this morning to resume your employment within the office, and was disappointed by your absence

I am unable to meet with you outside of office hours or the environment due to being short staffed in the office and would again request that you return to work with immediate effect as previously requested.



I have noted that in your previous email that you stated : you simply don't believe me that synergy is short staffed!

I take from this comment that you believe you can attend your employment as and when you see fit! and not when requested.

David

52. Mrs Timlin replied at 6.19pm:

Hello David

I acknowledge receipt of your email and note the contents but would remind you that you made me redundant last August so am somewhat puzzled by your request that I now turn up for work not having heard from you for months.

If you are unwilling to meet outside of work I must request you only contact me from today.

I formally request that my P45 and P60 from last year be forwarded by post along with your proposal for redundancy pay, outstanding holiday pay, outstanding pension contributions and payment in lieu of notice. I must also remind you of the redundancy protocol that you failed to follow.

Please only reply by email so we both have a record should this not be resolved amicably.

Regards

Pauline Timlin

53. Mr Taylor replied at 9.08pm:

Hello Pauline

Thank you for your response.

In order to confirm the current status, I would like to reiterate that you have not been formally made redundant and should you wish to return to your position within synergy you are more than welcome and entitled.

As you are aware you have been receiving furlough payments throughout lockdown as per current government guidance.

I fully understand that through this period you may have reevaluated your employment and may no longer wish to fulfil your position within synergy.

Should this be the case and you no longer wish to fulfil your position within synergy I am sure that an amicable resolution can be found.

I would request that you contact me directly in order to resolve this issue immediately so that we can fulfil the position which is a matter of urgency.

Kindest Regards

David Taylor

54. Mrs Timlin then emailed Mr Taylor on the 15<sup>th</sup> June 2021 at 6.50pm:

Hello David

Thank you for your email but I must clarify my position and remind you of how we got to this stage.

Back in April 2020 you furloughed me due to the corona virus. You then telephoned me in early August 2020 to return to work – but only on a part time basis. This I did but on the third day (Wednesday) you called me into the hut and informed me that you ‘had to let me go’ (your words) but that you would continue the furlough payments. I then proceeded to collect all my personal effects, took my photos down and you even helped carry my fan to the car. You were with me when I said a final goodbye to everyone. I heard nothing more until sometime around March 2021 you rang me on my mobile to let me know you were stopping the furlough from April to save money as every little bit counts. Furlough payments stopped in April as you indicated. That is the only contact I have had.

I sent an email to both you and Dan a week or so back in early June looking for my P45 and P60 but did not get a reply. I rang your work to get your correct email address and sent another request. A point of note I was told when I enquired as to how the business was going I was informed ‘it was dead’.

Now i still consider I was made redundant either in August 2020 or in April 2021 and either way you should honour you obligations in that respect.

Kind regards

Pauline

55. Mr Taylor did not reply and Mrs Timlin sent a further email on the 21<sup>st</sup> June chasing a response. She also suggested she would approach the employment tribunal and said she was still willing to meet outside the workplace.

56. Mr Taylor replied to this email as follows:

Evening Pauline

Synergy hasn't raised / produced a P45 as you as still employed.

Should you wish to resign from your position within the company please confirm this in writing and I will except your resignation and produce a P45 immediately.

Should you wish to discuss this or any other matter you are more than willing to come to the office.

Kindest Regards

David Taylor

## Conclusions

57. The question of how the employment contract between the parties came to an end is central to this case. It is therefore convenient to begin there.

58. For an employee to be unfairly dismissed it is necessary that they be dismissed, within the definition provided by s95 of the Employment Rights Act 1996:

### 95 Circumstances in which an employee is dismissed

- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
  - a. the contract under which he is employed is terminated by the employer (whether with or without notice),
  - b. he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
  - 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.

59. For an employee to be entitled to a statutory redundancy payment they must also have been dismissed. This is dealt with in s136 Employment Rights Act 1996, which is, in all relevant respects, identical to s95.

60. A dismissal is also required for Mrs Timlin to succeed in her breach of contract / wrongful dismissal claim. This is because her breach of contract claim is that she has been dismissed in breach of contract, specifically the contractual requirement to give her notice of dismissal.

61. Mrs Timlin was not employed under a limited-term contract (more commonly referred to as a fixed term contract) and so the provisions relating to the expiry of such contracts are not relevant.

62. I have therefore considered whether there has been a dismissal either a) in the form of a termination by Synergy or b) whether she terminated the contract in circumstances where she was entitled to do so without notice by reason of Synergy's conduct (referred to as a constructive dismissal).

63. It is agreed that Mrs Timlin was an employee of Synergy. It is also clear that, by the time of the hearing that employment relationship had ended. Much of the factual background is not disputed, since it is contained in the email correspondence between Mrs Timlin and Mr Taylor. But the parties do not agree how the employment ended. Mrs Timlin argues that she was dismissed,

either when she was sent home in August 2020, at the point that furlough payments ceased or at some point during her email correspondence with Mr Taylor.

64. Mr Taylor denies this. At times he suggested that, so far as he was concerned, Mrs Timlin remained an employee. In the alternative he says that, if the relationship had ended it was as a result of Mrs Timlin effectively resigning through her refusal to return to work.
65. In guiding my overall approach, the Court of Appeal's guidance in *Martin v Glynwed Distribution Ltd* [1983] IRLR 198 is relevant. There the Court of Appeal said:

Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, 'Who *really* terminated the contract of employment?' If the answer is the employer, there was a dismissal ... If the answer is the employee, a further question may then arise, namely, 'Did he do so in circumstances such that he was entitled to do so without notice by reason of the employer's conduct?' If the answer is 'Yes', then the employer is nevertheless to be treated as if he had dismissed the employee, notwithstanding that it was the employee who terminated the contract.

*Was Mrs Timlin dismissed by Synergy?*

66. The first question for me is whether Mrs Timlin was dismissed by Synergy.
67. In considering this question I have born in mind a) that where communication of a dismissal is potentially ambiguous I must consider how the situation would have been understood by a reasonable person in those circumstances (*Southern v Franks Charlesly & Co* [1981] IRLR 278) and b) that a dismissal can be communicated through actions as well as words (*East London NHS Foundation Trust v O'Conner* [2020] IRLR 16).
68. In relation to the conversations in August 2020 and Mrs Timlin being sent home on furlough, I have concluded that this was not a dismissal. Taking the conversation as a whole it is clear that Mrs Timlin was being placed on furlough, but continued as an employee. In the circumstances, what Mr Taylor said could not have reasonably been understood as being a dismissal and neither party understood it in that way at the time.
69. I have accepted both Mrs Timlin's evidence and Mr Taylor's evidence in this regard. Both agreed that, at the time, they viewed the employment relationship as continuing, that they expected Mrs Timlin to continue to be paid under the furlough relationships and anticipated her return. Mrs Timlin's evidence that, while she was being paid furlough money, she would have felt obliged to return had she been asked is particularly important in showing her state of mind at this time.
70. I have also considered whether, in all the circumstances, ceasing to pay Mrs Timlin furlough pay in April might have amounted to a dismissal. I have concluded that it did not.

71. In the right circumstances, particularly where the strong probability of dismissal had been foreshadowed, stopping pay might well be capable of communicating a dismissal. Here there was no such intimation. Mrs Timlin had been sent home on furlough, but there was no suggestion that the only plausible end to furlough would be dismissal. Quite the reverse, Mrs Timlin had already been recalled from furlough once and had gone on furlough with the expectation that she might well return to work. It is also notable that in her email of the 7<sup>th</sup> June she did not suggest that she had definitely been dismissed, but rather raised it as a question.
72. Similarly, I do not think the delay in contacting Mrs Timlin after the furlough payments ceased is capable of being reasonably interpreted as a dismissal. The relatively short delay (slightly more than a month) in circumstances where Mrs Timlin had been absent from the workplace since August the previous year would not have been interpreted by a reasonable employee as amounting to a dismissal.
73. I therefore turn to the communications between Mrs Timlin and Mr Taylor in 2021. Nothing in these is capable of amounting to a dismissal of Mrs Timlin. At all stages Mr Taylor continued to insist that Mrs Timlin had not been dismissed and should therefore return to work or, if she did not wish to do so, resign. There is nothing either in the phone call on the 11<sup>th</sup> June or the later emails that a reasonable employee could take as being a dismissal.
74. It follows from all of this that Mrs Timlin was not directly dismissed by the Respondent.
75. I do accept that Mrs Timlin has honestly reached the view that she had been dismissed, either in August 2020 or when furlough payments stopped in April. But I have concluded she is mistaken. Properly considered Mr Taylor simply never did anything that could be reasonably interpreted as ending the employment contract.

*Was Mrs Timlin constructively dismissed?*

76. I turn therefore to consider the possibility that Mrs Timlin resigned in a way that amounted to constructive dismissal. Constructive dismissal is a legal doctrine whereby a resignation may amount to a dismissal for certain purposes (for example in relation to unfair dismissal pursuant to s95(1)(c) Employment Rights Act 1996 and in relation to a statutory redundancy payment pursuant to s136(1)(c) Employment Rights Act 1996).
77. For there to be a constructive dismissal, the following circumstances must exist:
- a. The Employer must have committed a repudiatory breach of contract (that is a significant breach going to the root of the contract).
  - b. The Employee must have resigned in response to the breach
  - c. The Employee must not have waived the breach / affirmed the contract prior to resigning (this means that must not have indicated that they intended to continue their employment despite the breach, either

through excessive delay or some action that indicated acceptance of the changed basis of the employment)

78. In the circumstances of this case, the sensible starting point in applying this test is to consider whether Mrs Timlin resigned from her employment.
79. In considering that question I remind myself that the same principles apply to communication of a resignation as do to the communication of a dismissal. If communication is ambiguous I must consider how the circumstances would be understood by a reasonable employer and I bear in mind that resignation may be communicated by actions as well as words.
80. Reading the correspondence as a whole, I am satisfied that Mrs Timlin did resign. She did so in her email of 15<sup>th</sup> June 2021. In it she made it clear that she was not willing to return to the workplace and that she regarded herself as having been dismissed already. She also requested her P45 and P60. It was at this stage, I have concluded, that she had made it unambiguously clear that she regarded her employment as having ended.
81. I have considered whether this might have occurred the day before in Mrs Timlin's email of the 14<sup>th</sup> June. I have concluded, however, that read in context this was insufficient to amount to a dismissal. It is clear from the emails up to this point that there was some confusion or disagreement about what had happened and the status of Mrs Timlin's employment. I also bear in mind that, at this stage, Mr Taylor did not interpret Mrs Timlin's email as a resignation.
82. By the 15<sup>th</sup> June email, however, Mr Taylor had set out in direct terms that he did consider Mrs Timlin's employment to be ongoing, despite what she said about events in the previous August. It is that context that Mrs Timlin's reply must be read. In that email she responded to Mr Taylor's account and set out why she considered herself to have been dismissed.
83. I accept that Mrs Timlin did not view herself as resigning. I accept that she had reached the understanding that she had been dismissed the previous August and was seeking to communicate that position to Mr Taylor and to persuade him of that.
84. But for the reasons that I have set out above, she was mistaken. In the circumstances therefore, her clear and unambiguous statements that she regarded the employment as having ended were sufficient to amount to a resignation. I return to the question set by the Court of Appeal in *Martin*: Who, in these circumstances, brought the contract to an end? Mrs Timlin did. She did so by refusing to return to work while expressing her clear view that she had already been dismissed.
85. Having decided that Mrs Timlin did resign I turn to consider whether she did so in response to a repudiatory breach of contract by Synergy.
86. Mrs Timlin did not identify a specific breach of contract in her claim or submissions. I would not, however, have necessarily expected her to do so. She was acting as a litigant in person and her primary case was that she had been dismissed by Mr Taylor.

87. I have therefore had regard to all the evidence of both Mrs Timlin and Mr Taylor and considered whether any of the material before me suggests a breach of contract that might support a constructive dismissal.
88. I have identified two matters that might arguably be relied upon as being a breach of contract.
89. First, Synergy did not pay Mrs Timlin during May, having ceased her furlough payments. Ordinarily a failure to pay an employee the wages due under their contract would be likely to amount to a breach of contract. In this case, however, I concluded that there was no breach, because Mrs Timlin was not ready, willing and able to perform the work required by the contract during this time. Although she knew that that furlough payments were coming to an end she had not made any effort to get in touch with Synergy to discuss a return to work at any stage during May. Further she had begun new work which meant she was not in a position to return to work for Synergy.
90. Even if I had concluded that Synergy was contractually obliged to pay Mrs Timlin during this period I would have concluded that the breach was not sufficient serious to be a repudiatory breach. For there to be a repudiatory breach an employer must be 'guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows 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' (see *Western Excavation (ECC) Ltd v Sharp* [1978] IRLR 27). Taking account of the fact that Mrs Timlin had been on furlough, was not working and had taken no steps to return to work or seek clarification about the position I do not think the failure to pay would meet this test.
91. Second, I have considered whether Mr Taylor's failure to more actively seek to get in touch with Mrs Timlin at the point her furlough was ending might have amounted to a breach of the implied term of trust and confidence.
92. The implied term of trust and confidence is a term implied into a contract of employment that an employer 'will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee' (see *Malik v BCCI* [1988] ICR 606 and *Baldwin v Brighton and Hove City Council* [2007] IRLR 232).
93. I have concluded that it did not. With hindsight, Mr Taylor could have done more to try to get in touch with Mrs Timlin before she emailed him in June. He could have found her address on her contract; he could have visited her house (as he did later) or made enquiries with her colleagues. It is, however, easy to be wise after the event. His actions may have fallen short of the ideal, but they do not approach the much more serious threshold of being calculated or likely to seriously damage the relationship of trust and confidence between employer and employee.
94. It follows from this that Mrs Timlin's resignation was not in response to a repudiatory breach of contract by Synergy and she was therefore not constructively dismissed.

*Consequences for the unfair dismissal, wrongful dismissal, and statutory redundancy pay claims*

95. Since I have concluded that Mrs Timlin was not dismissed or constructively dismissed by Synergy, it follows that her claims for unfair dismissal, wrongful dismissal and statutory redundancy pay cannot succeed and must be dismissed.

*Findings in relation to holiday pay*

96. References to regulations in this part of my reasons are references to the Working Time Regulations 1998.

97. Mrs Timlin was entitled to 5.6 weeks holiday per year (see regulations 13 and 13A). Since she worked 5 days a week this is equivalent to 28 days holiday per year. It was agreed that Mrs Timlin was paid £1,500 per month and that it is on that basis that any compensation in relation to holiday pay must be calculated. For the purposes of my calculations I multiply this by 12 to reach an annual salary of £18,000 a year. I then divide by 52 to reach £346.15 a week. This is divided by 5 to reach £69.23 a day.

98. It was also agreed that Mrs Timlin's holiday year began on 1<sup>st</sup> January and ended on 31<sup>st</sup> December each year as set out in her contract.

99. When Mrs Timlin's employment came to an end she was potentially entitled to receive compensation relating to annual leave in accordance with regulation 14. This, in broad terms, provides that when an employment contract has come to an end an employee should receive a payment in relation to accrued but untaken leave.

100. It is agreed that Mrs Timlin was not paid anything in relation to her holiday pay when her employment ended.

101. In order to determine whether Mrs Timlin was entitled to any payment under regulation 14 I must determine what, if any, leave she was entitled to when her employment ceased. In these circumstances I must consider both the 2021 leave year (when employment ceased) and the 2020 leave year (because regulation 13(10) permits employees to carry annual leave forward, where it was not reasonably practicable to take leave as a result of the effects of coronavirus).

102. Mrs Timlin's evidence was that in 2020 she would not have worked on the 1<sup>st</sup> January, which was bank holiday. She also recalled taking a day's holiday in February or March. Mr Taylor agreed that Mrs Timlin would have been on annual leave on the 1<sup>st</sup> January. He did not recall any other leave. On this point I prefer Mrs Timlin's evidence. She is more likely to have an accurate recollection of her leave than Mr Taylor since it directly concerned her. I therefore conclude that she took 2 days of annual leave in 2020 before going on furlough.



103. Since Mrs Timlin was placed on furlough in March she did not take further annual leave during 2020. Mr Taylor's evidence was that, in the fortnight before Mrs Timlin's furlough, he had suggested to staff that they could take holiday if they wished. Mrs Taylor did not recall this and did not in any event take any leave.
104. In relation to annual leave during 2020 I conclude that regulation 13(10) applies. It was not practicable for Mrs Timlin to take her remaining 2020 entitlement to paid annual leave because of the effects of coronavirus. It was reasonable not to have taken more leave earlier in the year regardless of Mr Taylor's suggestion immediately shortly before furlough. It was still early in the holiday year. Mr Taylor's suggestion was at short notice and nobody, at that stage, knew how the situation would develop. It was then impractical for Mrs Timlin to take annual leave while she was on furlough and, with the exception of a few days in August, she remained on furlough for the rest of the year.
105. It follows from this that Mrs Timlin was entitled to carry forward the leave she was entitled to under regulation 13. Regulation 13(10) applies only to the 4 weeks annual leave entitlement contained in Regulation 13. It does not apply to the additional 1.6 annual leave entitlement contained in Regulation 13A. I therefore conclude that Mrs Timlin carried forward 20 days of annual leave forward from 2020 to 2021.
106. It is common ground that Mrs Timlin did not take any annual leave during 2021 since she was on furlough. I have concluded that her employment came to an end on the 15<sup>th</sup> June 2021.
107. Applying regulation 14 I have to consider two tranches of annual leave.
108. First, in relation to the 26 days carried forward from 2020 Mrs Timlin was entitled to a payment calculated in accordance with regulation 14(5). This is a payment in lieu equal to the money Mrs Timlin would have been paid during the period of untaken leave. This is 20 days x £69.23 = £1,384.6
109. Second, in relation to her 2021 annual leave entitlement Mrs Timlin is entitled to a payment calculated in accordance with regulation 14(3)(b), which is calculated as follows:

$$(A \times B) - C$$

Where:

A is the period of annual leave she was entitled to (i.e. 28 days)

B is the proportion of the leave year that had expired before her employment ceased (i.e. 1<sup>st</sup> January to 15<sup>th</sup> June: 166 days / 365 days)

C is the period of annual leave she had taken during that leave year (i.e. 0)

That is  $(28 \times 166/365) - 0 = 12.7$  days

$$12.7 \times \text{£}69.23 = \text{£}879.22$$

110. In total, therefore, Mrs Timlin was entitled to be paid  $\text{£}1,384.6 + \text{£}879.22 = \text{£}2,263.82$  in respect of annual leave when her employment ended. Since it is accepted that she was not, I uphold her complaint in this regard.

Employment Judge Reed  
Date 14<sup>th</sup> October 2022