EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Moore	**v**	Menzies Aviation (UK) Limited

Heard at: Bury St Edmunds (by CVP) **On:** 16 & 17 February 2023

Before: Employment Judge Laidler

Appearances
For the Claimant: In person.
For the Respondent: Mr J Boyd, Counsel

RESERVED JUDGMENT

1. Claim 1 – there was no unauthorised deduction for the period 10 March to 30 May 2021, a period when the claimant was abroad and/or not available for work.

2. Claim 2 – the claimant has not established either the period for which the alleged deductions were made or the precise amount of the deductions. The claim has not been established and is dismissed.

3. There was no breach of the express or implied terms of the contract entitling the claimant to resign and claim constructive dismissal. The claim of unfair dismissal fails and is dismissed.

REASONS

1. The claimant has brought three claims which have been consolidated and heard together at this Hearing:

   Case number 3312040/2021 – unauthorised deduction from wages

   Case number 3320810/2021 – unauthorised deduction from wages.

   Case number 3323235/2021 – constructive unfair dismissal.

The issues

2. The issues in the three cases were clarified at a Case Management hearing on 22 June 2022 and the list of those issues appeared in the bundle at page 97. These were referred to throughout this hearing and are as follows: –

Claim 1 – furlough payments (10 March 2021 to 30 May 2021)

1. Was the claimant entitled to be paid for the above even though he was abroad? The claimant says he was, the respondent says he was not as he was not available for work.

2. If so, how much should he have been paid i.e., how much was deducted, unauthorised, from his wages.

Claim 2 – deduction from June 2021 wages (£282.30)

3. Was £282.20 deducted in July 2021 from the claimant's June wages, i.e. was he paid £282.30 less than he should have been?

4. if so, was this authorised?

    a. was any deduction required or authorised by statute?
    b. was any deduction required or authorised by a written term of the contract?
    c. did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
    d. did the claimant agree in writing to the deduction before it was made?

Claim 3 – constructive unfair dismissal.

5. was the claimant dismissed?

    a. did the respondent do the following things:

        i Make unfounded allegations etc against the claimant

            1. On 22nd July the claimant says he received a note from his manager Nathan Wood alleging he had failed to attend work on 13th and 20th July
            2. He claims he was unreasonably threatened about this. *The claimant withdrew this point in cross examination.*

        ii Wrongly threaten the claimant with investigative meetings and disciplinary action and ignore his correspondence regarding his alleged failure to attend training.

        iii Make unauthorised deductions from the claimant's wages:

1. Per claims 1 and 2 above
2. For him not attending work on the day he had in fact attended

iv Fail to deal with the claimant's repeated enquiries about the £282 (see claim 2)

v Failed to deal with his repeated requests to the HR manager Michelle Pekris about what the claimant says was the aggressive approach taken by the respondent to him in all of the above issues.

b. Did that breach the implied term of trust and confidence? The Tribunal will need to decide: –

i. Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent and
ii. whether it had reasonable and proper cause for doing so.

c. Was the breach a fundamental one? The respondent concedes that a breach of the implied term of trust and confidence will be fundamental.

d. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

e. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that he chose to keep the contract alive even after the breach.

6. If the claimant was dismissed, what was the reason or principal reason for dismissal i.e., what was the reason for the breach of contract?

f. Was the reason or principal reason for dismissal that the claimant was asserting statutory rights? If so, the claimant will be regarded as unfairly dismissed

7. If not

g. Was it a potentially fair reason?

h. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

8. If the claimant was unfairly dismissed what remedy is he entitled to? (The claimant does not seek reinstatement/re-engagement)

3. At this hearing the tribunal had a bundle of documents of 286 pages plus an additional bundle of 28 pages. It heard evidence from the claimant and from the following on behalf of the respondent: –

   Michelle Pekris
   Nathan Wood
   Richard Parker

4. From the evidence heard the tribunal finds the following facts.

The facts

5. The claimant commenced employment on 4 March 2019 as a passenger service agent with the respondent based at Luton airport. He was employed for 20 hours a week.

6. As a result of the first national lockdown caused by the Coronavirus Pandemic the claimant was laid off on 23 March 2020. In a letter dated 1 April 2020 the position regarding furlough was confirmed to him (page 123). He was to be paid 80% of his pay up to a maximum of £2,500 per month. The letter made it clear that the respondent did not know how long the current situation was going to last. The claimant was told to assume that he was furloughed until further notice. The respondent would endeavour to give colleagues as much notice as possible before asking them to return to duty but "we will inevitably be required to react at potential short notice. I would advise you to keep up to date with latest government advice through recognised credible news sources".

7. In a document that the tribunal saw at page 124 of the bundle were 'Frequently Asked Questions and Answers'. This covered various eventualities including the situation of an employee stuck abroad due to the virus on a personal trip but not themselves sick. This document made it clear that in that situation the employee would be treated as on unpaid leave or there would be a need to use annual leave to cover the absence. The claimant does not recall seeing this document. The tribunal is satisfied from the evidence heard from the respondent that it was on the Teams App which the respondent set up to use for all communication with employees during the pandemic. The claimant attended regular meetings on Teams.

8. The claimant returned to work for a brief period in August 2020 (page 128).

9. By letter of 17 September 2020 (page 129) the claimant was advised that his role was at risk of redundancy following an announcement that had been made the previous day. As a result of the impact felt across the entire aviation industry caused by the pandemic there had been a significant reduction in operation across all UK airports. Although the respondent knew that flights would start to operate again they were also fully aware that volumes would not return to the levels seen in 2019 for years to come. Regrettably that had a

significant and ongoing impact on the work at Luton Airport where the claimant was employed.

10. The letter went onto advise that the company would now be entering into a formal collective consultation process which would last for a minimum of 45 days.

11. The claimant attended his individual consultation meeting on 14 October 2020. (Document A3). It was confirmed that the initial scoring had been completed against the criteria discussed with the trade union and employee representatives. The basis on which employees "may" be selected for redundancy at the end of the consultation period was explained. The notes of the meeting made it clear that "no final decision on this has been made at this stage and we are still exploring options for mitigating redundancy numbers. If they do end up being selected for redundancy at the end of the consultation period then they will have another meeting with us to confirm".

12. At the end of the document was a calculation as to what the claimant's redundancy pay would be but it was expressly stated "this is for illustration purposes only and does not mean the employees role has been confirmed as redundant".

13. The consultation meeting notes were sent to the claimant on 22 October 2020 (page 132). The claimant replied on 29 October 2020 stating he was happy to accept the notes as a record of what was discussed and realised that "unless things change dramatically in the short term I am likely to be made redundant". He expressed his gratitude at having had the opportunity to work for the respondent and then stated: –

> "My plan right now is to travel to join my wife in Brazil: I shall leave this weekend and I plan to stay there until early 2021. I'm unsure right now whether we'll settle overseas but if the business were to pick up next spring I would be very keen to apply for my former role. To be honest this seems to be a very remote possibility, but I nonetheless hope you'll keep me in mind".

14. The reply that the claimant was sent on the same day by Michelle Pekris made it very clear that: –

> Just to confirm, the redundancy process has not yet finished and no final decisions have been made. You are still employed by Menzies and if you were to travel abroad and we require you to return to work in November you will be classed as AWOL and the AWOL process will be followed which could lead to disciplinary action."

15. The tribunal did not see a reply from the claimant to that letter.

16. The claimant reluctantly accepted the proposition put to him in cross examination that to travel to Brazil was 'a gamble' given the potential need to return to work at short notice, whilst maintaining that when he left the UK to so travel Brazil was 'one of the safest places on earth'.

17. On 29 October 2020 (page 133) the claimant was sent a letter about the ending of the Furlough Scheme and the start of the Job Support Scheme from 1 November 2020 which it was understood would run for 6 months until 30 April 2021. The letter stated they could not guarantee that they would avoid the need for current or future redundancies nor that any particular colleague would be placed on the Job Support Scheme. They were currently awaiting an update from their main client on next steps in terms of utilising the Job Support Scheme and expected an update that week. Further information was provided as to how the Job Support Scheme would work.

18. The next communication to the Luton team was a Briefing Note of 4 November 2020 (p135). This confirmed that the COVID - 19 situation was worsening day by day with further cancellations being implemented by customers. On 3 November the respondent's main client had confirmed there would be no commercial flying from Luton during lockdown and the last day of operations would be 8 November 2020. They had been in contact with the union to discuss the way forward to respond to this reduced demand and uncertainty.

19. The claimant was provided with a further update on 9 November 2020 following the government's intention to extend the furlough scheme on 31 October 2020 (page 137). The letter went on to explain how the respondent intended to use the flexible furlough scheme and to seek the claimant's agreement to the terms proposed in the body of the letter. The respondent did not require the claimant, who was already on furlough, to return to the workplace for the time being and he would remain on furlough until further notice. The letter set out terms that would apply to the claimant during the Further Furlough Period. In particular clauses 6 and 7 of the letter stated as follows: –

> 6. While you will not be required or permitted to perform any work for the company, except when expressly notified by the company in accordance with the terms of this letter, you must remain available for the company to contact you throughout the further furlough period. Please ensure that you have that we have up-to-date contact details for you and notify your local HR team of any changes.
>
> 7. The Further Furlough Period is intended to be a temporary arrangement. The company will carry out regular reviews at least on a monthly basis. The company may terminate the Further Furlough Period at any time and require you to return to work on your usual working hours by sending you a letter to confirm the same.

20. By letter of 26 November 2020 (page 140) the claimant was personally advised that he was no longer at risk of redundancy, and he remained in post on his current terms and conditions. By this time however the claimant had already travelled to Brazil leaving on 1 November 2020 to join his wife and family.

21. The next contact the claimant had with the respondent was his letter of 9 March 2021 to Michelle. In this he asked to have a talk to her at some time. He confirmed that he and his wife were currently overseas and were making plans to return to the UK. He stated he was keen to "schedule our plans in

line with Menzies likely requirement for me to return within the next few weeks and I'd like to review our intentions with you".

22. Michelle replied on 10 March reminding the claimant that whilst on furlough he must remain available for work in the UK. Due to being out of the country they would now have to remove him from furlough and put him on unpaid leave until he returned to the UK. He could request to book holiday for this if he had any left. She asked him to confirm when he planned to return to the UK as Nathan Wood was currently working on planning.

23. The claimant replied on 16 March 2021 (p146) providing a lot more detail to the respondent which had not previously been provided. He explained how his wife Maria is a Brazilian national. She and the claimant own commercial property in Amazonas and most of their family continue to live there. Manaus was extremely badly affected by the coronavirus pandemic in early 2020 and during the prolonged local lockdown all their property leases were terminated. One of these had been in place for over 10 years and a small sales business they ran subsequently closed in December. By Christmas 2020 it had become clear that COVID was once again on the rise. The city had been placed under lockdown with a military curfew and restrictions on non-essential movement by early January. Numerous family members and friends had been affected by the virus. The claimant stated he was delighted to know that his at risk status was rescinded late the previous year and he was keen to return to work. He wished to have a discussion with Michelle or one of the management team with "the objective of agreeing a mutually agreeable date for our return which will meet the requirements of the business whilst allowing Maria and I to complete our affairs here and clear the necessary quarantine conditions when we return to Europe".

24. Michelle replied on 25 March (page 145) that "unfortunately whilst you remain out of the UK we will not be able to have you remain on furlough due to you being unavailable for work. This is the same approach we have followed for all stations in the UK, and we must remain consistent throughout".

25. The claimant replied on 31 March 2021 giving a further update on the situation in Brazil (page 144). The claimant and his wife had been accepted on an emergency vaccination programme and the claimant had received his first vaccination. They were making plans to return but were unwilling to do this until they had both been vaccinated. The claimant expressed his disappointment that his furlough payment had been stopped stating he had kept in touch with the company, updated his training online, participated in weekly calls and made it clear that he was "contactable and responsive". He went on "I also recognise my implied obligation to return to work when there is a business requirement to do so given a reasonable period of notice. Right now, it would appear that a return to anything like full capacity working is a pretty long way off." He concluded by stating that he and his wife were doing everything they could to ensure returned to the UK by the first week of May and he would update Michelle on progress should she wish him to do so.

26. Michelle replied on 9 April 2021 (page 144) that although she appreciated him confirming his current circumstances it would be unfair to others who had found themselves in the same position and were not put on furlough. She emphasised that the other option was to take some annual leave from his current entitlement.

27. By email of 25 March 2021 Nathan Wood sent out rosters for 28 March to 30 April 2021. These showed the claimant as rostered for the 5, 6 & 7 April 2021. Mr Wood explained that these were operational shifts but to also help staff re - familiarise themselves with work. They were trying to give most staff such shifts so that the respondent was prepared if flight numbers increased.

28. The claimant replied to Nathan Wood that as he had explained to Michelle he and his wife were currently stranded overseas in difficult circumstances. He was optimistic of being back in the UK by the first week in May. Nathan Wood replied that the claimant would be shown as unpaid for those shifts since he was out the country and not eligible for furlough payments. They needed some specific dates as to when he was planning to return to the UK otherwise his absence would be classified as unauthorised.

29. The claimant raised a grievance about the decision to end the payments to him under the furlough scheme. By a letter of the 21 April 2021, he was invited to a grievance hearing on 26 April 2021 to be conducted by Microsoft Teams.

30. The outcome was given to the claimant by letter of 7 May 2021 from Richard Parker (page 167). He did not uphold the claimant's claim to be entitled to furlough pay whilst he was abroad. The claimant had been advised on 25 March by Nathan Wood that he was required to attend work for some shifts. The claimant had responded stating he was stuck overseas and therefore could not attend work as requested. Referring to the respondent's guidance that had been posted on its Teams channel the circumstances were such that this would be treated as unpaid leave, or the employee could use annual leave entitlement.

31. Another aspect of the claimant's grievance had been that there was not a requirement for him to be back at work. Whilst the volumes were still low Mr Parker made it clear that the requirement to work was born out of the need to ensure that everyone returned to work feeling safe and secure in the knowledge that they are still able to perform their role successfully. To achieve that end a programme of phased return was introduced as detailed in Nathan Woods email of 25 March 2021. It was stressed to the claimant it was not his decision as to whether there was a sufficient requirement for him to work but it was for the employer to determine which it had.

32. Regarding the respondent's letter issued on 9 November 2020 confirming the claimant's status as a furloughed employee Mr Parker confirmed that at that time the respondent had no knowledge of the claimant's travel abroad and no annual leave had been applied for in relation to that trip. Had they known at that time they would not have been able to confirm the claimant's status as furloughed whilst he was out of the country and unable to attend work.

33. Whilst Mr Parker was sympathetic to the claimant's personal circumstances the claimant had taken the risk of travelling out of the country during the pandemic. The result of the trip had meant that he was stuck there and whilst the lack the flights home due to the worsening COVID situation was no fault of his own, the choice to go abroad at a precarious time was.

34. The claimant appealed the grievance outcome and that was also not upheld.

35. By email of 24 May 2021 (page 182) the claimant was asked to confirm whether he had now returned safely to the UK as they wanted to get him back onto furlough as quickly as possible. By email of 27 May 2021 the claimant advised he had returned to the UK on Monday, 24 May (page 185)

36. In an email of 30 May 2021 to Michelle the claimant queried the payments he had received in his April payslip of £93.94 and in May £50.76 (page 190). He stated he had no idea how these amounts had been calculated and asked for a detailed explanation. It was confirmed that the April pay was a bit higher than May in that they paid furlough from the 1 until 9 March furlough and then the claimant was recorded as on unpaid leave due to being abroad. His May pay was 'full unpaid leave from the April hours'. (page 189)

37. Michelle asked that the claimant confirm the date he would finish his isolation so they could put him back on furlough and could start to prepare any training he would need prior to his return to work (page 190).

38. On 8 June 2021 (page 186-7) it was confirmed to the claimant that he was removed from furlough payments due to him being out the country from 10 March 2021. The claimant had confirmed he would be returning to the UK from 24 May 2021 after which time he would need to take government specific mandatory leave for 10 days. During that time, he would remain on unpaid leave unless he wished to use any available annual leave. Once the 10 day quarantine period passed (4 June 2021) he would be placed back onto the furlough scheme unless he was sick or unable to work for any reason. He would be rostered in for work on flexible furlough from that point.

39. The claimant replied on 11 June 2021 that he and his wife had left quarantine in the UK at midnight on Saturday 8 June 2021 having made use of the "test and release" facility (page 186)

40. By letter of 2 June the claimant was invited to training via Microsoft Teams on 8 June 2021 (page 191)

41. On 7 June 2021 (p194) the claimant emailed to state that he was unable to participate in the training "since I have a clash in my diary tomorrow." He was asked to contact Nathan Wood and inform him of the reason why he was unable to attend. On 8 June the claimant emailed Nathan Wood to explain that the reason for his unavailability had been that his wife had a mammogram appointment with NHS breast screening. She was unable to drive in the UK, was apprehensive about the appointment and he needed to be with her.

Nathan Wood replied on 9 June confirming details of the new training session which had been organised for the claimant emphasising it was necessary to ensure that all necessary modules had been completed and he was ready to return to work. Once the training had been completed shifts would be planned for the claimant.

42. The new training date was scheduled for 11 June. As the claimant had been unavailable for the training on 8 June that would also be marked as unpaid.

43. The claimant produced in a supplementary bundle a copy of an email dated 9 June 2021 @ 11:55 to Michelle advising that he was unable to attend as 'I have a prior commitment at this time'. He asked her to call him to arrange a convenient slot for him to complete the training. The tribunal accepts the evidence of Michele Pekris that she had not received that email and that they have not been able to locate it on the respondent's system. The claimant was asked about this in cross examination and whether it had been obtained via a Subject Access Request he made. His answer was that the copy was 'of a document I had'. The tribunal is therefore satisfied that the copy did not come from the respondent.

44. As the respondent had not heard from the claimant that he was unable to attend the training on 11 June he was invited on 16 June to an investigation meeting to be held on the 18 June 2021. The claimant again had a prior commitment and asked that the meeting be rescheduled. Michelle replied asking for dates when he would be available and the meeting was rescheduled for the 28 June 2021 at 10.30am. Michelle confirmed that the meeting would be conducted by Nathan Wood and the claimant was reminded of his right to be accompanied. The reasons for the meeting had been set out in the earlier invite of the 16 June 2021.

45. The claimant thanked Michelle in his email of 18 June for 'being so flexible and understanding'. The claimant accepted in cross examination that at that point their relationship was 'cordial'.

46. By email of the 28 June 2021 at 10:35 the claimant advised Michelle that he would be unable to attend the rescheduled investigation meeting due to a 'prior commitment at this time'. He stated that her invite had only been sent on Saturday morning and he had therefore had 'extremely short notice' of the meeting. He confirmed however that following correspondence with the respondent's training manager his training had been conducted on the 24 June.

47. Whilst the respondent was trying to arrange this investigation meeting the claimant had raised a Grievance on the 22 June 2021 against the respondent's decision not to pay him for the 8 June 2021 when he did not attend the training day despite him having provided a full explanation as to why he could not attend.

48. The claimant was advised that his Grievance would be heard on the 28 June 2021 at 2pm and the claimant confirmed he would attend in person.

49. The claimant had raised further concerns in his email of the 28 June 2021 referring to the 'inconsiderate and threatening manner' he had been treated. He considered that since his return to the UK the respondent had 'indulged in an ill-concealed strategy to intimidate me' including the non payment of furlough, the investigation and 'clear threats of disciplinary action'. The claimant stated that there had been a campaign of victimisation as a result of the lodging of his first ET1 on the 23 June 2021 (Case number 3312040/2021). Michelle had responded asking if he would like to have those concerns heard as part of the grievance with Mr Edson. As she did not hear back from him she assumed that he did not wish to take up that option (page 213)

50. A Grievance Meeting was conducted by Eddy Edson, Station Manager on 28 June 2021. The claimant outlined his concern about not being paid for the 8 June when he was unable to attend training.

51. By letter of the 6 July 2021 the claimant was advised that his grievance had not been upheld.

52. Mr Edson did not find the claimant had given the respondent reasonable notice of his inability to attend when he emailed on the 7 June the day before the required training.

53. The claimant had also raised the allegation that he had not had further communication about training until 22 June. Mr Edson was however satisfied that he had been sent a rescheduled training invite on the 8 June for the 11 June. The respondent had not been able to contact the claimant despite various attempts to do so. Whilst the respondent had sympathy with the claimant's personal situation it was satisfied it had followed government and company guidelines.

54. On 9, 16 and 22 July 2021 (pages 223 – 224, 227 and 232) Nathan Wood emailed the claimant to follow up with various training and work shifts that he had been asked to attend but had failed to attend without any explanation as to why. The tribunal accepts Mr Wood's evidence that the claimant seemed to view the training shift as non – compulsory which was not the case and the claimant accepted in cross examination that it was mandatory.

55. In support of his constructive dismissal claim the claimant asserts that he was subjected to 'unfounded allegations' by Nathan Wood relating to his alleged failure to attend work on 13 and 20 July and 'unreasonable threats' with regard to the same. In cross examination he stated he was not saying that the letter of 22 July 2021 was threatening but he did not withdraw the allegation as it 'covers the campaign of harassment and victimisation' he was subjected to.

56. All that the letter of 22 July 2021 made clear was that as the claimant had failed to attend the previous two training shifts he had been removed from the allocated to him on 25 & 31 July 2021. A further training shift had been scheduled for the claimant on 27 July 2021 in the terminal building which would involve interacting with customers and:

> 'The schedule is due to increase significantly in August and almost all the staff in the department will be rostered back to work to help cover the operation. However, if you fail to turn up for this shift on Tuesday 27 July, you will not be able to attend your shifts as you will not have been assessed by the training team. As such, this will be considered as you not being available for work and may mean that the Company will need to remove you from furlough and the shifts will be classed as unpaid'.

57. Although the claimant's evidence was that he had no missed calls during this time the tribunal is satisfied that the respondent had tried to call him without success.

58. The claimant wrote to Michelle on 14 July 2021 (page 225) with regard to an invite to the adjourned investigation meeting on 15 July 2021. He considered this to be 'disproportionate and unwarranted'. He stated that the company's actions 'continue to take a toll' and he had consulted his GP over the stress he had been caused. He was unable to attend the investigation meeting again due to a 'prior appointment'. He asked that Michelle call him to arrange a mutually convenient time for the investigation meeting.

59. The tribunal saw an email from Michelle (page 229) stating she had tried to call without success and that there had been no option to leave a voicemail message. She attached a new letter with the new times and date of the investigation meeting and asked that he contact the duty manager as soon as possible with regard to his failure to attend a shift on 20 July 2021.

60. By email of the 26 July 2021 the claimant advised Michelle that he would be unable to attend the investigatory meeting scheduled for the 27 July as he had been 'fortunate enough to be offered a few days per diem work with a client of a business I operated until late 2018.'

61. The claimant having appeal against the Grievance outcome was invited to an appeal hearing on 26 July 2021 to be conducted by Phil Lloyd on Microsoft Teams.

62. Phil Lloyd provided his outcome in a letter of 28 July 2021. Having heard that the claimant had contacted the respondent on 7 June stating he would be unable to attend the training on 8 June and that he was not explicitly told he would not be paid if he did not attend and that he had met with Eddy Edson for a briefing session later on the 8 June after taking his wife to hospital he decided to reinstate his furlough pay for the 8 June 2021. He made it clear however that:

> 'I do not believe that the station has acted in bad faith. I believe that they have every right to expect employees to attend important training sessions when the employee has been given reasonable notice.'

63. He was giving the claimant 'substantial benefit of doubt' that the invite telling him to contact them if he was unable to attend might have given the impression it was optional. The station had 'left some gaps' in communicating the

absolute requirement to attend training 'which enable misinterpretation, unintentionally or otherwise'.

64. He also confirmed that no further disciplinary action would be taken in relation to other missed training but would make it clear what was expected going forward. He set this out in the remaining 1 ½ pages of his letter (p235-6)

65. The claimant commenced a period of sick leave but did not submit a fit note until August. He remained off sick until he submitted his resignation on the 17 August 2021 (page 244)

66. The claimant wrote on 9 August 2021 (page 240) advising he had been unable to return to work on 1 August as he was suffering from stress. He hoped to be able to return on 16 August 2021.

67. On the 3 and 10 August 2021 the claimant wrote to Michelle querying his pay for July and an alleged shortfall. He stated that his July pay was short by £398.10

68. She responded on the 10 August copying him her reply sent on the 6th in which she had explained that the claimant had returned to the UK on 24 May 2021 and had to self – isolate for 10 days. He was on unpaid leave until 3 June and then put back on furlough on the 4th. That would account for the 12 hours absence on his payslip.

69. On 12 August 2021 the claimant was sent his rota for August.

70. On 17 August 2021 the claimant submitted his resignation to Nathan Wood. He set out why he felt unable to return to work:

70.1 that the 'furlough allowance' had been withdrawn from him whilst 'stranded overseas' from 10 March 2021 until his return to the UK and completion of quarantine

70.2 that attempts to clarify his pay since June 2021 had been met with 'replies that reveal nothing and which in my view are intended only to obfuscate'.

70.3 since he had issued tribunal proceedings and queried his pay the respondent had 'mounted a very obvious campaign of aggression and intimidation against me'

70.4 emails had been ignored and left unanswered.

Despite these concerns he thanked Mr Wood for giving him the opportunity to work for them and had enjoyed his time with them.

71. By letter of the 18 August 2021 Nathan Wood invited the claimant to meet with him on 20 August to discuss his decision and how they could support him to remain in the business. The respondent received a fit note for the claimant's absence on 25 August 2021 but no response to the invite to this meeting and the claimant's employment terminated on 20 August 2021.

72. Despite his resignation further correspondence took place between the claimant and Michelle with regard to his pay and quarantine. The information given by the claimant and the respondent's responses cannot be relevant to the claimant's decision to resign which had already been taken. In a note which appears to have been 16 August 2021 (page 250) the claimant had stated his quarantine had ended on the 31 May 2021. They had arrived back in the UK on 24 May and used the test and release scheme to leave quarantine after 5 days. Having received a full set of negative tests their quarantine ended on 31 May.

73. By email of the 17 August 2021 (page 247) the claimant advised that his quarantine had ended on the 30 May and not the 31 May as he had indicated in this note to her the previous day.

74. Michelle asked on the 25 August whether the claimant had evidence of a negative test that released him on the 20 May (that date must have been an error).

75. In a further email of the 30 August 2021 Michelle confirmed that from the previous emails the claimant had stated he was released from quarantine on the 8 June, that he had arrived back on the 24 May and had to self isolate for 10 days. They had not at the time received any further evidence confirming earlier release from isolation. They therefore automatically put the claimant back on furlough 10 days from the day he arrived back in the UK once his isolation ended which was 4 June 2021. They were unable to retrospectively claim through the furlough scheme.

76. On 31 August 2021 (page 252) the claimant wrote again providing evidence of a negative tests taken on 22 & 29 May 2021 and confirmed that they had been able to leave quarantine at midnight on 29 May. He asked for the outstanding payment of £221.74 to be made. When this was queried in cross examination the claimant confirmed he was referring to the period 30 May to 4 June when he should have been put back on furlough. He stated that 4 days pay would be about £100 and claimed that a third of his pay was missing for the month of June. The claimant then did a calculation whilst giving evidence that 4 days pay was £126.

77. In cross examination the differences in the amount claimed and the date he left quarantine were put to the claimant. In the list of issues it was said to be £282.20. The claimant stated that was his mistake and was not the correct figure and it was 'more like £230'. It was put to the claimant that on the 11 June 2021 he had said he left quarantine on the 8 June and he admitted that was his mistake. When he then referred to the 4 June he had 'got the weeks wrong'.

78. By the end of cross examination it was not clear what the amount was the claimant was claiming and no real explanation for the different dates given. The tribunal must take note that the letter of the 11 June 2021 stating they left quarantine on the 8 June was written only 3 days after that date at which time it was much more likely to be accurate.

RELEVANT LAW

79. The starting point in a constructive dismissal is still the decision in ***Western Excavation (ECC) Ltd v Sharp*** **[1978] IRLR 27** in which it was held:

> 'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract'

80. The test is contractual and not one of reasonableness or fairness.

81. The breach of contract may be that of the implied term of mutual trust and confidence. Mahmud v Bank of Credit and Commerce International SA [1997] [IRLR 462 HL where it was stated that the employer must not;

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

82. The authorities were reviewed in London Borough of Waltham Forest v Omilaju [2004] EWCA (Civ) 1493 at paragraph 14 as follows:-

> "14. The following basic propositions of law can be derived from the authorities:
>
> 1.The test for a constructive dismissal is whether the employer(s) actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.
>
> 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or serious damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-

46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to **destroy or seriously damage the relationship** (emphasis added).

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at **objectively** it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

> "**[480]** Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the last straw which causes the employee to terminate a deteriorating relationship".

83. A more recent summary of the principles was referred to in the respondent's written skeleton argument and is that of Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA 978. The tribunal should ask itself the following questions:

1. 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.
2. Has he or she affirmed the contract since that act?
3. If not, was that act (or omission) by itself a repudiatory breach of contract?
4. 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 the implied term of trust and confidence
5. Did the employee resign in response (or partly in response) to that breach?

SUBMISSIONS

84. The respondent provided written submissions which will not be set out here but counsel also spoke to them

For the respondent

Constructive dismissal

85. Counsel added to the points made by him at paragraph 10 of his written submissions commenting on each of the matters said to go to a breach of the implied term of trust and confidence entitling the claimant to resign and claim constructive dismissal.

86. The first matter relied upon is said to be 'unfounded allegations' being made against the claimant. Counsel submitted that following cross examination the claimant ended up some considerable distance from that proposition. He had accepted that the emails from the respondent advising him of the training may well have been sent. He was in a bad place mentally with his focus being on his wife's health. By the 22 July the allegations were not at all 'unfounded' and in cross examination the claimant stepped away from the suggestion they were 'threats'. For the respondent it was therefore argued that as a pillar of the constructive dismissal claim this allegation fails.

87. The next matter relied upon by the claimant is that he was wrongly threatened with disciplinary action. It was submitted that there is no dispute that the claimant missed the training sessions on the 8 & 11 June. It is customary for such to be investigated and that is all the respondent was seeking to do. It was at the early stages of such investigation. The claimant had kept his reasons private to start with and although it can be seen why he might have chosen to do so it can also be seen why the respondent would go down the investigatory route. Much of the correspondence shows the respondent trying to schedule a meeting and the claimant cancelling due to prior commitments. That is uncontroversial. In due course the Grievance appeal outcome albeit with some misgivings gave the claimant the benefit of the doubt. The assertion that this was improper is a mischaracterisation and again as a pillar of the constructive dismissal claim must fail.

88. The claimant also relies upon an alleged failure to deal with his enquiries about a deduction. It was submitted that the claimant was provided with a conclusion which he did not agree with and did not accept. That is not a failure by the respondent to deal with it.

89. The claimant also asserts that there was a failure to deal with his repeated requests to the Michelle Pekris about what he stated was the respondent's aggressive approach. In cross examination the claimant confirmed he was referring to the paragraphs in his third witness statement headed 'Appeals for Reconciliation'. It was submitted that during cross examination when taken through the documents the claimant had been unable to point to anything that supported his allegation of a failure to deal with what he was saying. He was signposted to the Grievance Procedure but ignored the suggestion. He never expressed that he wanted a more informal sit down

meeting. It was difficult to see from the correspondent how the respondent's reaction amounted to an erosion of trust and confidence.

Unauthorised deductions

Furlough pay

90. The contract was varied by the furlough agreement. It was made clear to the claimant he may be needed at short notice. Whether or not the claimant saw the respondent's guidance on Teams he was told very clearly of the consequences when he informed them of his plan to go to Brazil. The claimant had not been given notice of redundancy although he might have thought it was inevitable. In deciding to go to Brazil the was taking a gamble as he could be called back to work at short notice. That gamble led to the consequences that had clearly been set out for the claimant. The claimant may have cleared quarantine by the end of May, but he cannot say he was available for work from the 10 March – 30 May 2021 and was therefore not entitled to be paid. That claim must fail and was unsustainable as a pillar of the constructive dismissal claim.

June pay

91. The burden of proof is on the claimant to establish the amount of the deduction he claims was unauthorised and has failed to do so. He has stated 3 different figures. It is not for the tribunal to work out the figure. There is no material before the tribunal from which it can draw a meaningful conclusion.

92. The information given by the claimant in his email of the 31 August 2021 was after his resignation and cannot therefore feed into the constructive dismissal claim.

The claimant

Claim 1 – furlough payment.

93. The claimant submitted that there is no doubt that he advised the respondent he would travel to Brazil and stay there. There was no secret to his presence there. Had he been asked he would have shared that information. It was common knowledge though that he was there. Although accepting he was told in November the consequences if he was required to return to work he submitted he was not told that the respondent would stop his furlough payments. He continued to receive those payments to which he believed he was entitled.

94. At a time of uncertainty, he decided to join his family. It was the right choice to make. It was preferable to staying in the UK without work and as the UK was entering lockdown. What happened in Brazil was entirely unforeseen. Flights did not resume until May/June 2021. Brazil had been regarded by

medics and the advice the claimant received was that it was safe. It was inconceivable it would go the way that it did.

95. The claimant submitted that at no time did he say he was unavailable for work. It was just going to be difficult to return to the UK. He made it clear that he wanted to return and made every effort to return as best as he could. In retrospect it was remarkable that they got back to the UK by 24 May.

96. It was argued that the respondent could have been more accommodating and not put the claimant back on the roster until he had returned. In his view that would have been easy to do. By the 28 May 2021 there were only 13 staff operating at Luton and no one would have minded covering his job. The respondent would have lost nothing.

Claim 2 – deduction from June 2021 wages.

97. The claimant stated that the amount is uncertain, but it was about £230. The deduction had not been explained. There is nothing in his contract to provide for that deduction.

98. Counsel for the respondent has argued that as the test and release day 5 test document is dated the 2 June (page 253) that he did not clear quarantine until some time at the beginning of June. That is not correct. The reason the claimant can say that is because the certificate dated 29 May 2021 and in test and release he was contacted by phone to say it was negative and he was released with the paperwork to follow.

99. Commenting on the respondent's position that there was insufficient detail as to the precise amount allegedly deducted the claimant stated that he had received 80% of his monthly wages during furlough and was receiving on average £630 a month. That dropped by about a third for the month of June.

Constructive dismissal.

100. Having read the respondent's submissions the claimant is not saying that a single incident led him to resign. It was a combination of a number. The pay, being fined for missing training, the repeated requests to attend investigatory meetings with the threat of disciplinary action. He was repeatedly asked to attend meetings at short notice.

101. Further the respondent repeatedly failed to answer his detailed enquiries about pay and what was happening. All the respondent's answers were evasive and of little use.

102. Against the background of his very precarious financial situation and his wife's illness he chose to resign. He had been depressed. The view the claimant took was that the confidence he ought to have in his employed would be supported and there would be fair handling at a time of difficulty

for everyone and enormous stress for him. He had no choice but to leave. He could not contemplate returning.

CONCLUSIONS

Claim 1 – furlough pay 10 March 2021 – 30 May 2021.

103. The claimant chose to travel to Brazil during a worldwide pandemic which he accepted in cross examination was a 'gamble'. He had not been made redundant, all the correspondence demonstrating that the respondent was consulting and that any figures for potential redundancy pay were only that, in case redundancies became necessary. This was made very clear to the claimant by Michelle Pekris in her letter of the 29 October 2020. On 26 November 2020 it was confirmed to the claimant that he was not at risk of redundancy.

104. When the claimant was informed of the Further Furlough Period on 31 October 2020 he was told explicitly that this could be terminated at any time and he be required to return to work.

105. There was no written contact from the claimant until his email of the 9 March 2021 when he advised that he was currently overseas and 'making plans to return to the UK'. He was clearly told the next day that whilst on furlough he needed to remain available for work in the UK. He would now be removed from furlough and put on unpaid leave until his return to the UK unless he wished to request to use annual leave.

106. The claimant set out in detail in subsequent emails the difficulties he was facing in returning to the UK and how he and his wife were reluctant to travel until they had both been vaccinated. The emails however show the claimant questioning whether as yet the respondent was anywhere near to full capacity working and in view of his circumstances asked that they 'exercise a degree of flexibility and defer the requirement for me to attend my refresher shifts…' It was not for the claimant to determine whether training was necessary. This was for the respondent, and it had made reasonable requests to the claimant to attend

107. The tribunal accepts the submissions of the respondent that the claimant cannot credibly maintain that he was not paid that which was properly payable for the period 10 March to 30 May 2021. The claimant was in effect absent without leave and was not entitled to payment irrespective of the furlough scheme.

Claim 2 – unauthorised deduction – June pay

108. In the list of issues this claim was said to be for £282.30. As set out above in its findings in emails and in cross examination figure has varied. The claimant has not been able to say for what period he in fact had an alleged unauthorised deduction and for what amount. It is not for the tribunal to

construct what the claim may be for and nor is it for the respondent when the burden of proof falls on the claimant.

109. It would appear that some of the discrepancies in the figures may be around the time that the claimant came out of quarantine and again there is confusion as to when that was. The various dates given are set out above. The tribunal must take note of the fact that the very first date (and therefore that nearest to the quarantine period) was the 8 June 2021.

110. Other dates and test results provided were after the date of the claimant's resignation and cannot therefore have any bearing on the reason for that resignation. They also do not assist with regard to establishing the correct dates.

111. The tribunal finds that there is no factual basis upon which to conclude that the claimant did not receive the sum properly payable for June 2021.

Constructive unfair dismissal

Unfounded allegations against the claimant

112. The offending email was the 22 July 2021. The claimant was told that he had been removed from two shifts for the 25 and 31 July as he had failed to attend the two training shifts on the 13 and 20 July. There is no dispute that he failed to attend. In cross examination the claimant accepted it was possible he had overlooked the invites to the assessment shifts due to his state of mind. He accepted that he was no longer pursuing an allegation that the respondent made any unreasonable threats about those shifts.

113. This cannot have been a breach of the implied term of trust and confidence. The respondent was entitled to request employees including the claimant to attend the training shifts having not been at work for some time. There was nothing inappropriate about this email scheduling another training shift but reminding the claimant that if he failed to attend he would be treated as not available for work, be removed from furlough and the shifts classed as unpaid.

Wrongly threatened with investigatory meetings and disciplinary action.

114. It is not in dispute that the claimant failed to attend training sessions on the 8 and 11 June 2021. He was perfectly legitimately invited to an investigatory meeting on the 18 June 2021. It was not threatening but pointed out it was to 'establish the facts and determine whether disciplinary action may need to be taken…'

115. The claimant wrote on the 17 June, the day before the meeting, that he was unavailable because of a prior commitment. He provided no further information. In response Michelle Pekris stated 'no problem' and asked that he confirm when he would be available. He replied thanking her for 'being so flexible and understanding' and gave his preferred dates.

116. The next invite was to an investigatory meeting on the 28 June 2021. The claimant replied on the 28th that he would be unable to attend as he again had a prior commitment. He raised a number of concerns about this investigatory process to which Michelle Pekris replied promptly asking if he would like those to be dealt with in conjunction with a grievance already raised. The claimant did not respond to that suggestion.

117. The next invite was for the 15 July and again the claimant stated he would not be attending due to a prior appointment. He asked that Michelle contact him to rearrange.

118. The investigation meeting never took place as the outcome of the claimant's grievance about the missed training resulted in no further action being taken.

119. There is no basis on which to conclude that the claimant was wrongly threatened. The respondent was perfectly entitled to call him to a meeting to discuss why he had not attended the training sessions. His correspondence was clearly not ignored.

Made unauthorised deductions

120. Neither of these claims have been made out. There were no breaches of the express or implied terms of the contract.

Failure to deal with the claimant's repeated enquiries about the £282

121. The facts found as above demonstrate that there was no failure to deal with the claimant's enquiries which were responded to. What the claimant did not like was that the respondent did not agree with his position. There was no breach of the express or implied terms of the contract in this respect.

122. It follows from those conclusions that there was no breach of the express or implied terms of the claimant's contract entitling him to resign yet claim constructive dismissal. The claim for constructive dismissal and the monetary claims fail and all claims are dismissed.

_____

Employment Judge Laidler

Date:13 April 2023

Judgment sent to the parties on

18/4/2923

NG

For the Tribunal office