EMPLOYMENT TRIBUNALS

Claimant: **Mrs B Chambers**

Respondent: **Smile Foster Care Limited**

Heard at: Nottingham

On: 1 March, 25 & 26 April 2023

Before: Employment Judge Smith sitting alone

Appearances

For the Claimant: In person

For the Respondent: Mr I Ahmed, Director

REASONS

Request for written reasons

1. By a judgment given orally on 26 April 2023 and sent to the parties on 17 May 2023 the Employment Tribunal upheld the Claimant's claims of (constructive) unfair dismissal and wrongful dismissal and dismissed the Claimant's unauthorised deductions from wages and holiday pay claims. By email on 30 May 2023 the Respondent requested written reasons under **rule 62(3)** of the **Employment Tribunal Rules 2013**. These written reasons have been provided pursuant to that request.

Introduction

2. By way of an ET1 claim form dated 20 April 2022 the Claimant presented the following claims to the Employment Tribunal:

   (1) A claim of unfair dismissal based on an alleged constructive dismissal and five alleged breaches of the implied term of mutual trust and confidence, set out as follows:

(a) The Respondent mentioning to the Claimant that she was a zero-hours contract worker when she was not;

(b) The Respondent forging the Claimant's contract of employment;

(c) The Respondent purporting to reduce the Claimant's hours of work;

(d) The Respondent only allocating late shifts to the Claimant; and,

(e) The Respondent's handling of the Claimant's grievance.

If I find that the Claimant was constructively dismissed that dismissal will inevitably be found to be unfair because the Respondent does not contend there was a potentially fair reason for dismissal.

(2) A claim of wrongful dismissal, in this case purely in respect of notice pay. The Claimant accepts that her entitlement was to the statutory minimum notice of termination, and she resigned without notice in circumstances where she contends she had been constructively dismissed. Both parties agree that if I find the Claimant was constructively dismissed in the unfair dismissal claim, she will also have been wrongfully dismissed and entitled to damages for breach of contract representing the amount of notice she ought to have been given.

(3) A claim of unauthorised deductions from wages. The Claimant contends that on each monthly occasion for payment following her return to work from furlough on 21 August 2021 she was not paid the amount that was properly payable to her. This claim is based upon her assertion that an express term of the contract of employment obliged the Respondent to provide her with, and thus pay her for, 37½ hours work per week. No specific amount has been put to me as being claimed but it is not at this stage necessary for me to set out the amounts as the matter turns on a point of principle.

(4) A claim for holiday pay. The basis of this claim has been clarified to some extent by the Claimant, but no particulars provided of the precise loss said to be the subject of it. What is known is that the claim concerns a compensation payment for accrued but untaken annual leave as at the termination of her employment. It is thus a **reg.14 Working Time Regulations 1998**-type compensation claim.

3. All four claims are defended by the Respondent, in full.

4. I was presented with two bundles of documents, to which additions were made by agreement during the course of the hearing. I have read and considered all of the documents to which I was taken by the parties during the course of the evidence and submissions. I heard live evidence from the Claimant herself, and for the Respondent from Mr Iftikhar Ahmed (Director) and from Miss Danielle Donaldson (Operations Manager). All the witnesses provided witness statements and the Tribunal read those statements prior to the witnesses giving oral evidence.

Findings of fact

5. All my findings of fact have been reached according to the applicable standard in the Employment Tribunal: the balance of probabilities. Whilst the parties, representing themselves, naturally wished for me to make findings in relation to a broad range of matters, I have restricted my findings to only those facts which it has been necessary to make in order to determine the claims.

6. The Respondent is a small business employing some 13 people. Mr Ahmed is its director and Miss Donaldson its operations manager. It is based in Nottingham and, in basic terms, it operates supported living accommodation for young people at three properties. Those young people are referred to the Respondent by local authorities and the numbers of young people for whom the Respondent provides services fluctuate over time depending on the amount of referrals from the local authorities.

7. The Claimant came to become an employee of the Respondent as a result of the following events. The witnesses broadly agree that the Claimant was introduced to the Respondent through her friend, Symoney Whittingham, who was at the time (and I understand still is) employed by the Respondent as a support worker. On 5 April 2019 the Claimant emailed Miss Donadlson expressing an interest in a full-time job and enclosed her CV. The Claimant also sent in an application form on 8 April 2019, and on the same day (as the Claimant agreed in evidence) she was interviewed for a support worker role with the Respondent. One of the parties' main disputes in this case concerns who was present and what was discussed at that interview, and my findings in relation to this are as follows.

8. The interview took place at 10.30am on 8 April 2019. In her witness statement (at paragraph 4) the Claimant stated that present at the interview were Miss Donaldson, Mr Ahmed, Ms Whittingham and herself, that the whole process was very informal, and that everyone sat in the kitchen diner save for when she was being shown around the property. Under cross-examination the Claimant agreed to a different version of events, namely that she and Miss Donaldson went upstairs to the office for probably about 10 to 15 minutes, where the interview questions were asked. Mr Ahmed and Ms Whittingham were not on the panel, although she stated that they were present in the kitchen later when she and Miss Donaldson returned downstairs. This version accorded with Miss Donaldson's evidence (at paragraph 3) and I therefore accepted that the interview was carried out by Miss Donaldson alone, upstairs, with the Claimant. I did not accept that the interview was carried out with Mr Ahmed or Ms Whittingham.

9. The Claimant gave a very good impression at the interview and Miss Donaldson decided to offer her the job, as she described, on the spot. The Claimant accepted the offer of employment in the same discussion. The Claimant, however, contended that in this discussion the parties entered into an oral contract with an express term that the Claimant would be guaranteed a minimum of 37½ hours' work per week and that she would never have to work on Sundays. Miss Donaldson, and thus the Respondent, contended that the Claimant was informed that employment would be on the basis of a zero-hours contract ("ZHC")

and that whilst the Claimant had indicated she would have liked to work 60 hours per week this could not be guaranteed, although if shifts were available the Claimant would be welcome to work them.

10. Whilst I accepted that the parties entered into a contract of employment at this stage, I did not accept the Claimant's contention that this included an express term that she would be guaranteed a minimum of 37½ hours per week. The Claimant was very clear in her evidence that the discussion itself was very informal. In my judgment, that kind of acknowledged informality is not supportive of the conclusion that concrete guarantees were being made within it. Furthermore, the Claimant agreed that as she had occupied a position of seniority in the past that she knew at that time that she would, in the near future, receive confirmation of the terms and conditions of employment in writing from the Respondent as her employer. In my judgment, she knew at the time that anything discussed in terms of the employment relationship would not amount to concrete guarantees unless and until they were set out in the written document she herself anticipated receiving in the near future. Finally, I accepted the Respondent's unchallenged evidence that all its support workers are employed on ZHCs and, given the fluctuating demand on the Respondent's services, no guarantees could realistically be given regarding hours or indeed Sunday working. For these same reasons, I accepted Miss Donaldson's evidence that she expressly stipulated to the Claimant at the time that employment would be on the basis of a non-guaranteed, zero-hours arrangement, even if it was her and Claimant's common anticipation that there were many hours to be worked at that time and that Claimant could work them.

11. What followed was that the Claimant gave notice to her current employer, and then that she under an induction and two days' shadowing. The shadowing days occurred on 22 and 23 April 2019. In her witness statement (paragraph 7) Miss Donaldson had stated that it was during the induction and shadowing process that the Claimant was presented with two copies of a written contract of employment. Under cross-examination she accepted that she was mistaken about the timing of her giving the Claimant those documents, because at the time she provided them to Claimant they already bore the signature of Mr Ahmed and the date of 1 May 2019.

12. The document in question is at A21-22 in the bundle. In her Particulars of Claim the Claimant said she was *"not given a written contract"* and furthermore, that she was not provided with a copy of this particular document until 18 January 2022. Under cross-examination it became abundantly clear to me that neither of those statements were true. I was shown an email authored by the Claimant herself dated 20 January 2022 which stated that *"I was surprised when after a few weeks into my employment I was handed two contracts of employment. I was asked to sign them and return one to Danielle. I read the contract and I was concerned that it didn't match up to our original contractual agreement; in particular with regards to the zero hours component of the written document, and raised this with Danielle there and then."* The Claimant accepted in cross-examination that she was *"90% sure"* A21-22 was the document she was doubly given at that time.

13. On the balance of probabilities I find that A21-22 was indeed the contract document given by Miss Donaldson to the Claimant. Whilst I accept this was not during the shadowing days, I do accept that this occurred a few weeks into the employment, as the Claimant herself had stated in her 20 January 2022 email. Indeed, as I have already found, the Claimant had expected to receive a written statement of the terms of the employment at the time it was in fact provided. Without going into the detail, that document provided for a zero-hours-type arrangement under which the Respondent did not commit itself to guaranteeing the Claimant any specific hours of work. Of particular relevance are clauses 7 and 8 of the contract, which (insofar as they are material) read as follows:

    7. Terms of employment. From time to time, Smile Care Services has a requirement for casual work and by this Agreement, you have confirmed to Smile Care Services that you may be available for Assignments. There is no obligation on Smile Care Services to offer you any Assignment and no obligation on your part, if an Assignment is offered, to accept it. This Agreement is not intended to give rise to any legally binding commitments unless and until you accept an Assignment that is offered to you.

    If you accept an Assignment your employment will begin on the date the Assignment starts and will come to an end automatically at the end of the Assignment. Your employment may be terminated at any time by Smile Care Services giving you, or you giving Smile Care Services one week's notice of termination, in writing. If your employment is terminated the Assignment is treated as being at an end.

    …

    Once an Assignment has been offered and accepted, you are obliged to undertake the Assignment and Smile Care Services is obliged to pay you for work you undertake during that Assignment.

    There is no continuous obligation on Smile Care Services to offer you any more work once an assignment has come to an end. Nor is there any obligation on you to accept any work that may be offered to you in the future. Your employment is not regarded as continuing for any purpose once an Assignment has ended.

    8. Hours of work. Your hours of work will be agreed in relation to each Assignment and Smile Care Services is under no obligation to offer any particular hours of work, and you are under no obligation to accept the hours offered for a particular Assignment, but, once you have accepted an Assignment, the hours agreed will become binding on both parties.

14. The contract made no special provision in respect of Sundays or Sunday working.

15. The Claimant says that she did not sign that document and, as a consequence, she cannot be taken to have agreed to its terms. The issue of the signature has been one of the major evidential issues in this case. There has been no expert

evidence from a handwriting expert but that does not prevent me from making a finding. My finding is that the Claimant did sign this and that the second signature upon page A22 is indeed hers. I find she accepted the arrangement on those terms in so doing. As I have found, such an arrangement as set out in this document was consistent with the basis for an employment relationship that had been discussed on 8 April 2019. There was no evidence of any protest by the Claimant about it at the time, despite there being evidence of Claimant being able to discuss other things relating to her employment (such as hours and incorrect payments) with Mr Ahmed via WhatsApp back in 2019 (in particular, page B99). The impression I got of the Claimant as a witness was that she was quite properly prepared to raise matters with the Respondent whenever they arose. If the Claimant was unhappy with the arrangement provided for by A21-22 there would likely have been corroborative evidence to show that happening. The fact there was not, in my judgment, spoke volumes. That signature was not forged.

16. Even if I am wrong in that finding I nevertheless would have found that the Claimant accepted the terms of the employment set out in A21-22 through her conduct, by her carrying on working for Respondent, despite having been provided with the document in question, for some two-and-a-half years after its provision.

17. It was clear to me from the rotas provided that the Claimant worked lots of shifts for the Respondent in 2019 and 2020. These were well in excess of the average of 25 per week contended for in the Respondent's witness statements. Without specifying the true average number of hours worked by the Claimant, Mr Ahmed and Miss Donaldson had to concede that the Claimant had worked substantially more hours than that prior to her being furloughed in December 2020.

18. The Claimant returned to work from a period of furlough on 21 August 2021. During the eight months or so that the Claimant had been on furlough the Respondent had taken on more support workers, but I accepted Miss Donaldson's unchallenged evidence that by the time the Claimant was about to return from furlough, the Respondent was only supporting six young people and thus there were fewer shifts available to the Respondent to divide between what had become in that time a wider pool of support workers.

19. Prior to her return the Claimant had a discussion with Miss Donaldson about her health during the time she was on furlough and what shifts might be available to her upon her return. The Claimant stated in her witness statement (at paragraph 15) that she told Miss Donaldson she wanted to reduce her hours to 30 per week. Miss Donaldson says the request was to reduce to 24 hours per week. The actual number is immaterial but what is important is that this represented a substantial decrease from the amount of hours the rotas showed the Claimant generally working per week back in 2020, before she was furloughed. The Claimant and Miss Donaldson agree, however, that at this time the Respondent could only offer the Claimant 16 hours per week going forward. Given the change to the situation regarding the number of young people being supported and the greater number of support workers taken on, I find that offering the Claimant 16 hours per week was reflective of that situation and not that it was done to bully or otherwise single the Claimant out for poor treatment. I find that Miss Donaldson was doing her

best to be as fair as she could to everyone in terms of the shifts offered, including the Claimant. Under the ZHC contractual arrangement the Respondent had with the Claimant, Miss Donaldson had the ability to offer what shifts were available and there were not guaranteed or set hours.

20. Upon her return the Claimant was given shifts at the Respondent's "Zulla" property. The Respondent typically operates three different shifts at Zulla, one of its three properties: early shifts (8am to 4pm), late shifts (4pm to 11pm) and waking nights (11pm to 8am). Typically, the Claimant was put on the rota for late shifts around three-quarters of the time. She was also put on the rota to work some Sundays. Miss Donaldson said that she offered the Claimant shifts at Zulla because her health situation at that time meant it was the optimal location rather than the other properties. I accepted this. However, I did not accept Miss Donaldson's evidence that the Claimant's health situation was the reason she was put on the rota for late shifts most of the time. A risk assessment was carried out with regard to the Claimant's health upon her anticipated return from furlough, and nowhere was a particular shift mentioned as a necessary adjustment for her. Equally, a six-month fit note provided by the Claimant's GP from October 2021 made no mention of the timing of shifts as something that needed to be adjusted in order to accommodate her.

21. That said, whilst I did not accept this as being the reason I did not accept the Claimant's contention that she was being bullied or singled out by the allocation of late shifts. There was no evidence to support the conclusion that there was a personal animus against her from Miss Donaldson or anything like that. For whatever reason though, these shifts were allocated to the Claimant and it was clear that in December 2020 preparations were being made for finalising the January and early February 2022 rota. That document appeared to show the Claimant being allocated three-quarters of her shifts as lates. She was also allocated some Sunday shifts. The Claimant protested about this via WhatsApp at that time and mentioned constructive dismissal in so doing.

22. On 24 December 2021 the Claimant presented a grievance, via email to Mr Ahmed. Whilst it is not necessary for me to get into the detail of that grievance, in summary it included a number of allegations of unfair treatment and bullying (at the hands of Miss Donaldson) concerning shift allocation. It also mentioned the point about reduced hours, working on Sundays, pay, holiday pay, and alleged that the Respondent was a corrupt organisation. There was no acknowledgement by the Respondent as to the grievance at the time.

23. The Respondent has a grievance policy, although I was not shown a copy. Everyone agrees that this policy provides that a meeting should be held with the employee concerned regarding their grievance. Everyone also agrees that it makes provision for an aggrieved employee to appeal the decision made in relation to the grievance, if they are unhappy with the outcome.

24. On or around 16 January 2022 Mr Ahmed decided that a meeting would not be held regarding the Claimant's grievance. He instead decided to determine the grievance on the papers, without interviewing the Claimant. Despite the seriousness of the allegations being made (in particular, about the conduct of

Miss Donaldson) he took no steps to interview Miss Donaldson about the specifics either. Mr Ahmed's evidence was that he didn't think a meeting to discuss the grievance was necessary as the Claimant was off sick at the time. However, the Claimant's period of sickness had ended on 14 January 2022 and this was before he had decided not to hold a meeting. It could not, therefore, have been the reason and I did not accept Mr Ahmed's evidence that it was in fact the reason.

25. Mr Ahmed did determine the grievance but did so without any adequate investigation and without speaking to the Claimant at all. He wrote to the Claimant on 18 January 2022 setting out his decision and his reasons. In relation to the Claimant's point regarding shifts, those reasons included an assertion that the Claimant was a ZHC employee and, in essence, could not be guaranteed shifts at any particular times or days. The grievance was not upheld. The Claimant wrote back on 20 January 2022 explaining her position and disagreeing with the outcome. She expressly requested to appeal the decision. Mr Ahmed did not write back to her about this email at all. In my judgment, he simply ignored this correspondence. No appeal was offered to the Claimant.

26. On 14 February 2022 the Claimant resigned her employment with immediate effect. Her resignation letter (an email at page A60) made reference to a number of things as constituting the reasons she resigned, including the allegations of her having been singled out and bullied by Miss Donaldson, and the alleged fabrication of the contract of employment *etc*. I have found that those allegations did not happen. However, in the same letter she also made critical references to her grievance of 24 December 2021, to the Respondent's decision on it, and to the request for an appeal. I accept that the Claimant resigned, at least in part, because of the way the Respondent had handled the grievance; that was clear from the resignation letter itself and it was not suggested by the Respondent that those particular matters did not form part of the reason for resignation.

The law

Constructive unfair dismissal

27. At common law, an employee who terminates the contract of employment may nevertheless claim to have been dismissed by the employer if the circumstances are such that he is entitled to terminate it by reason of the employer's conduct. This concept is known as a constructive dismissal. The entitlement to terminate must be a contractual entitlement. The leading case on whether there has been a constructive dismissal is **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27** (Court of Appeal), and there are four tests to be satisfied in this regard. Those are:

    (1) Did the employer breach the employee's contract of employment?

    (2) If so, was that breach fundamental?

    (3) If so, did the employee resign in response to that breach or for some other reason?

(4) If so, did the employee nevertheless affirm or waive the breach through his words or his conduct?

28. In this case the Claimant contends that she was constructively dismissed because she resigned in response to a breach of the implied term of mutual trust and confidence. The definition of that term was set out by the House of Lords in the case of **Malik & another v BCCI [1997] IRLR 462**, which I shared with the parties before the commencement of the evidence. It is an implied term of the contract of employment that "*the employer shall not, without reasonable and proper cause, conduct itself in a way which is calculated or likely to seriously damage or destroy the relationship of mutual trust and confidence with the employee"*. A breach of this term is always fundamental, automatically satisfying the first and second of the **Western Excavating** tests: **Morrow v Safeway Stores plc [2002] IRLR 9** (Employment Appeal Tribunal).

29. **Section 95(1)(c)** of the **Employment Rights Act 1996** deems a termination by the employee in the circumstances described above as amounting to a dismissal by the employer. In this case it is not in dispute that the Claimant has sufficient qualifying service so as to enjoy the right not to be unfairly dismissed (under **s.94**). If the Claimant establishes that she was constructively dismissed it is for the Respondent to prove (under **s.98(1)**) that the principal reason for the dismissal was a potentially fair one. In this case the Respondent has not advanced a case that it had a potentially fair reason for constructively dismissing the Claimant; its case rests on its denial as having constructively dismissed the Claimant in the first place. It therefore follows that if the Claimant establishes that she was constructively dismissed, her dismissal will necessarily be unfair under **s.94** as no potentially fair reason is advanced and questions of fairness under **s.98(4)** will not arise.

Wrongful dismissal

30. Wrongful dismissal is a common-law contractual claim, normally pursued in respect of notice pay. The Employment Tribunal has jurisdiction to consider complaints of wrongful dismissal by virtue of **arts.3** and **4 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** arising or outstanding on the termination of employment.

31. If the claim is for notice pay it must first be proven that the employee had an entitlement to notice of the termination of their employment. The second stage concerns the dismissal itself: if the employee is dismissed without notice, a breach of contract is in principle established. At the third stage it is for the employer to prove that it was entitled to dismiss the employee without notice. Such an entitlement is created if the employee had acted in fundamental breach of the contract of employment. This is typically (though not always) said to have occurred if the employee has engaged in conduct which would objectively be viewed as being so serious so as to repudiate the contract (**Hutton v Ras Steam Shipping Co Ltd [1907] 1 KB 834**, Court of Appeal).

32. In this case the Respondent does not contend that it was contractually entitled to dismiss the Claimant without notice because of any conduct on the Claimant's part. Its case is that it did not constructively dismiss the Claimant at all. It follows that if the Claimant establishes that she was constructively dismissed, she would be entitled to an award of damages representing the pay she has been prevented from earning by the wrongful dismissal (**Eastwood v Magnox Electric plc; McCabe v Cornwall County Council [2005] 1 AC 503**, House of Lords). Typically, the amount of damages is assessed as reflecting the period of notice to which the employee was entitled to receive. In this case, notice pay is all that is claimed.

Unauthorised deductions from wages

33. **Section 13** of the **Employment Rights Act 1996** confers upon workers the right not to suffer unauthorised deductions from wages. The starting point for determining whether there has been a deduction from wages (authorised or not) is therefore to identify what sum, in *"wages"*, was *"properly payable"*.

34. *"Wages"* is defined by **s.27**. The term includes *"any sums payable to the worker in connection with his employment"* including specific modes of remuneration set out at **s.27(1)**, but excluding those set out under **s.27(2)**. In this case there is no dispute that the sums claimed by the Claimant amount to *"wages"* in the classic sense and therefore meet the statutory definition.

35. *"Properly payable"* appears in **s.13(3)** and has been determined to mean sums to which the worker has some legal – but not necessarily contractual – entitlement (**New Century Cleaning Company Ltd v Church [2000] IRLR 27**, Court of Appeal; **Helliwell & another v Axa Services Ltd & another UKEAT/0084/11/CEA**, 25 July 2011, unreported). An Employment Tribunal is entitled to interpret the terms of the contract in order to determine what is *"properly payable"* (**Agarwal v Cardiff University [2019] IRLR 657**, Court of Appeal), and what is *"properly payable"* requires a finding of fact (**Davies v Droylsden Academy UKEAT/0044/16**, 11 October 2016, unreported).

36. The second stage – often taken for granted or otherwise uncontroversial – is the *"occasion"* of the payment and, by extension, the deduction. Both occasions must be the same (**Murray v Strathclyde Regional Council [1992] IRLR 396**, EAT) and it is necessary to identify that point in time with precision.

37. **Section 13(3)** provides the definition of the word *"deduction"* for the purposes of the unauthorised deductions jurisdiction under **Part II** of the **Act**:

> *Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

38. The third stage is therefore to identify the sum actually paid in *“wages”*, and compare the two. The difference between the sums is the *“deduction”* for **s.13(3)** purposes, and it can include a total non-payment (**Delaney v Staples [1992] IRLR 1919**, House of Lords).

39. The fourth and final stage is to identify whether the deduction was *“authorised”*. **Section 13(1)** provides for two situations in which a deduction is authorised: either where *“the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract”* (**s.13(1)(a)**) or where *“the worker has previously signified in writing his agreement or consent to the making of the deduction”* (**s.13(1)(b)**). The term *“relevant provision”* is defined in **s.13(2)**.

40. To succeed in an unauthorised deductions claim a Claimant must therefore satisfy the Tribunal that an identifiable sum of wages was properly payable to him on a particular occasion, that this was not paid on that occasion (either in part or not at all), and that the *“deduction”* that results was not authorised in either of the two senses cited above.

Holiday pay

41. The key provisions in relation to holiday pay claims are set out in the **Working Time Regulations 1998**, and I reproduce those which are relevant to this case as follows:

13 Entitlement to annual leave

(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

(3) A worker's leave year, for the purposes of this regulation, begins—

(a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply—

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

13A Entitlement to additional annual leave

(1) Subject to **regulation 26A** *and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).*

(2) The period of additional leave to which a worker is entitled under paragraph (1) is—

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and **regulation 13(1)** *is subject to a maximum of 28 days.*

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of **regulation 13**.

14 Compensation related to entitlement to leave

(1) Paragraphs (1) to (4) of this regulation apply where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under **regulation 13** *and* **regulation 13A** *differs from the proportion of the leave year which has expired.*

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under **regulation 16** *in respect of a period of leave determined according to the formula—*

(A x B) – C

where—

A is the period of leave to which the worker is entitled under **regulation 13** *and* **regulation 13A**;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

42. Holiday pay claims of this nature may be presented to an Employment Tribunal by virtue of **reg.30(1)(b)**.

Analysis and conclusions

43. It is not necessary for me to rehearse each party's submissions in full but, where necessary, I have referred to them in the analysis that follows. My analysis follows the order in which the Claimant's claims were set out in the introductory paragraphs of these Reasons.

Constructive dismissal

44. Returning to the five alleged fundamental breaches of contract as set out in paragraph 2(1), above, my judgment in relation to each is set out as follows.

(a) The Respondent mentioning to the Claimant that she was a zero-hours contract worker when she was not

45. In my judgment, there was no fundamental breach of contract in Mr Ahmed informing the Claimant on 18 January 2022 that she was a zero-hours employee (see paragraph 25, above). That was the basis of the true agreement between the parties, as was evident from my findings at paragraphs 12 to 16, above. What Mr Ahmed told the Claimant was, in fact and law, true in this regard.

(b) The Respondent forging the Claimant's contract of employment

46. In my judgment, there was no fundamental breach of contract as the Respondent did not forge the Claimant's contract of employment. As I have found (at paragraphs 12 and 15 in particular), the Claimant was herself *"90% sure"* the contract document that appeared in the bundle was the one that was handed to her by Miss Donaldson not long after the employment commenced and I have found that she signed it herself.

(c) The Respondent purporting to reduce the Claimant's hours of work

47. The parties agreed in evidence that a discussion took place between the Claimant and Miss Donaldson in advance of the Claimant's return from furlough in late August 2021 in which a reduction in hours was at least part of the conversation (see paragraph 19, above). Furthermore, given both Mr Ahmed's and Miss Donaldson's concessions in evidence, it was ultimately an agreed fact that the Claimant ended up being allocated fewer hours upon her return to work from furlough in August 2021 than she had worked prior to being furloughed, and I have found that the reduction was substantial (paragraph 19 also).

48. In my judgment, however, there was no fundamental breach of contract in the Respondent allocating the hours it did to the Claimant following her return from furlough, for two reasons. Firstly, the contractual arrangements had always been

that there was no obligation on the Respondent to offer any work to the Claimant at all, which is typical of ZHC-type employments. I rejected the Claimant's contention that she was guaranteed 37½ hours' work per week under her contract of employment (see paragraph 10), and even in the pre-December 2020 period – when the Claimant worked significantly more hours – such hours as were offered to the Claimant were never contractually guaranteed. The amount of hours available to be offered was dictated by service need, and it was not suggested by the Claimant that an obligation to provide 37½ hours' work per week arose simply by virtue of the fact she had been given more shifts than this by the Respondent over the course of time.

49. Secondly, and even if I am wrong in my first reason, in my judgment the Respondent had reasonable and proper cause for offering the Claimant the hours it offered her upon her return from furlough in August 2021. By that time the situation *vis-à-vis* the Respondent's workforce demands had changed. As I have found (at paragraph 10), by that stage the Respondent had taken on additional support workers since the Claimant was furloughed in December 2020 but the demands for its services had reduced owing to the fact that fewer young people had been referred to the Respondent by the local authorities. The Claimant did not challenge the Respondent's evidence on that point. Furthermore, the Claimant knew as a result of the discussion between her and Miss Donaldson prior to her return that the hours situation would be different come 21 August 2021. It follows that by August 2021, the Respondent's ability to offer hours was reduced but whatever hours that could be allocated had to be spread across a wider complement of support workers.

(d) The Respondent only allocating late shifts to the Claimant

50. Generally for the same reasons as set out in relation to point (c), above, in my judgment there was no fundamental breach of contract in allocating the Claimant mostly late shifts upon her return from furlough in August 2021. Whilst I accepted that this represented a departure from her pre-furlough working pattern, under the ZHC contract of employment the Respondent had the power to offer as many shifts, and at whatever times, it deemed appropriate. The Claimant had no obligation to accept any of the shifts offered. Allocating particular shifts to an employee as a way of singling her out or bullying that person could well be a breach of the implied term of mutual trust and confidence, but I rejected that contention (see paragraph 21). The Claimant had not proven that in allocating her particular shifts, the Respondent did so without reasonable and proper cause and in a way that was calculated or likely to seriously damage or destroy the relationship of mutual trust and confidence between the parties.

(e) The Respondent's handling of the Claimant's grievance

51. It is important that in every employment relationship that an employer should afford an employee the reasonable means of seeking the redress of any concerns they may have. The significance of this principle is recognised by the fact that there is a statutory **Code of Practice** issued by Acas in respect of grievances, and in this case, by the Respondent itself as it has a grievance policy for use in these circumstances (even though, most regrettably, it did not show a

copy to me). An employee being able to raise grievances and have them dealt with is, in my judgment, something inherent to the mutual trust and confidence that must exist for there to be an employment relationship in the very first place.

52. In this case, despite its own grievance policy expressly providing that the employer should in the first instance hold a meeting with the concerned employee in order to discuss the grievance, the Respondent failed to do so. As I have found (at paragraph 24), the reason originally put forward by Mr Ahmed as to why he decided not to hold a meeting could not be sustained on the evidence before me, as the Claimant was no longer absent from work through sickness when the decision was made.

53. Furthermore, Mr Ahmed took no adequate steps to investigate the matters raised by the Claimant in her grievance: he did not even canvas with Miss Donaldson the serious allegations the Claimant had levied against her. Miss Donaldson herself fairly stated in evidence that she was *"horrified"* to discover the allegations the Claimant made about her. In my judgment, it was plain on the face of the grievance that this was not something that could adequately be dealt with on a paper-based exercise of the kind Mr Ahmed said he carried out.

54. Finally, and again despite its own grievance policy expressly providing for the right of an employee to appeal against the initial decision of the employer not to uphold a grievance, the Claimant was not only not offered the opportunity to appeal but when she raised the matter herself was simply ignored by Mr Ahmed.

55. In my judgment, from the above paragraphs it is, and always has been, abundantly clear that in its handling of the grievance, the Respondent – in the person of Mr Ahmed – conducted itself in a way that was likely to seriously damage or destroy the relationship of mutual trust and confidence between it and the Claimant. There was no reasonable and proper cause contended for by the Respondent for its handling of the grievance in this way. It follows that in my judgment, the Respondent fundamentally breached the Claimant's contract of employment.

56. It further follows, given my finding at paragraph 26, that the Claimant resigned (at least in part) in response to the Respondent's fundamental breach of contract. The Respondent did not contend that she had, by her words or conduct, waived the breach or otherwise affirmed the contract. It therefore further follows that the Claimant was constructively dismissed by the Respondent.

57. In circumstances where no potentially fair reason for dismissal is advanced by the Respondent, I must conclude that the Claimant's constructive dismissal was an unfair dismissal contrary to **s.94 Employment Rights Act 1996**. Accordingly, her claim of unfair dismissal is well-founded and succeeds.

Wrongful dismissal

58. The Claimant had a contractual entitlement to be given notice of the termination of her employment. That was provided for by clause 7 of the contract of employment (see paragraph 13, above), which provided for a week. However,

this contractual provision provided for less notice that what statute requires. **Section 86(1)(b)** of the **Employment Rights Act 1996** intervenes to provide that in the case of an employee whose length of continuous service is more than two years but less than twelve years, the entitlement to notice is one week for every completed year of continuous employment. Given the Claimant's length of service, her statutory entitlement to notice was in fact two weeks given that her employment commenced on 8 April 2019 (see paragraph 9) and ended on 14 February 2022 (paragraph 26) with immediate effect upon her resignation.

59. At paragraphs 51 to 56, above, I have found that the Claimant was constructively dismissed by the Respondent. She was constructively dismissed without notice in circumstances where she had an entitlement to two weeks' notice. In circumstances where the Respondent does not advance a case that it was entitled to dismiss her without notice, it follows that in my judgment the Claimant was wrongfully dismissed. That claim also succeeds.

60. Damages for wrongful dismissal are assessed at the two weeks' pay the Claimant lost on account of being dismissed without notice. The precise amount of damages shall be determined at a remedies hearing.

Unauthorised deductions from wages

61. The Claimant contends that on each monthly occasion for payment following her return to work from furlough on 21 August 2021 she was not paid the amount that was properly payable to her. This claim is based upon her assertion that an express term of the contract of employment obliged the Respondent to provide her with, and thus pay her for, 37½ hours work per week. It is that amount which is said to have been *"properly payable"* to her on each monthly payday.

62. Based upon my finding as to the terms of the contract between the parties (see in particular, paragraph 10), the Claimant's contention that a sum representing 37½ hours' pay per wek was *"properly payable"* to her each month following her return was wholly unsustainable and I had no hesitation in rejecting it. There was no legal entitlement to such a sum. It follows that this claim must necessarily fail at this first hurdle, and it is dismissed.

Holiday pay

63. In relation to the holiday pay claim, the Tribunal was at a distinct – and in my judgment, insurmountable – difficulty. Although the contract of employment (clause 9) made reference to a leave year, neither party confirmed or indeed challenged that provision as being their common understanding. Furthermore, I was presented with no evidence as to the amount of leave the Claimant had taken during the relevant leave year (if any), no evidence showing leave that had been accrued but untaken during the course of the leave year, and no method of calculating the entitlement to leave given the highly significant factor that the Claimant was a ZHC employee. The burden of proof lay on the Claimant to prove all of the essential matters in this claim and regrettably she fell well short of doing so. It is not the role of the Employment Tribunal to make a case for either party

and in the almost complete absence of evidence, I am duty-bound to dismiss this claim.

Remedy hearing

64. A remedy hearing will take place on **8 August 2023** in order to determine any remedy issues in relation to the unfair and wrongful dismissal claims. In the meantime the parties are encouraged to resolve those issues without further recourse to the Tribunal.

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Employment Judge Smith

Date: 5 June 2023

JUDGMENT SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

……………………….....……………..

FOR SECRETARY OF THE TRIBUNALS