EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Alessandro Colli	**v**	True Beauty Salon Limited

Heard at: London South

On: 20th to 21st September 2022 & 19th to 20th January 2023

Before: District Tribunal Judge Shields
(Sitting alone as an Employment Judge)

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

JUDGMENT

1. The claimant was not unfairly dismissed, and the unfair dismissal claim is dismissed.
2. The respondent has made an unauthorised deduction from the Claimant's wages and failed to pay the claimant's holiday entitlement at the effective date of termination.
3. The respondent is ordered to pay the claimant the gross sum of £639.60.

REASONS

Introduction

1. The claimant, Miss Colli, was employed by the respondent, True Beauty Salon Limited, as a beauty therapist at King Street Parade, Twickenham, from 3rd of December 2018 until 9th of April 2021.
2. ACAS was notified of a claim on 6th of April 2021 and the certificate was issued on 18th of May 2021. The claimant submitted her ET1 on 4th June 2021. The respondent's ET3 and grounds of resistance were submitted on 13th of July 2021.
3. The claimant further applied for a second ACAS conciliation certificate on 5th of July 2021 and ACAS issued the certificate on 12th July 2021. The claimant issued her second ET1 on 7th October 2021 and the respondent provided its ET3 and grounds of resistance on 2nd December 2021.
4. The tribunal held a preliminary hearing on the 16th of February 2022 and set out case management orders to deal with the preliminary issue on jurisdiction, whether the claim relating to unfair dismissal was out of time, and if so, whether the time should be extended. A second preliminary hearing was held by the tribunal on 29th of April 2022. Employment Judge Corrigan found that the second claim was issued out of time but considered the second claim as an application to amend the first claim to include constructive unfair dismissal and that application was granted. The constructive unfair dismissal claim proceeded.
5. The claimant claims that her dismissal was a constructive unfair dismissal. She also claims holiday pay and an unlawful deduction of wages.
6. The respondent contests the claims. It says that the claimant resigned from her employment on 12th of March 2021 providing 4 weeks notice. They contend that the claimant has been paid correctly for all hours worked and for the duration of time spent on furlough. The respondent accepts it deducted one hour too many on the final pay slip and the holiday pay claim was conceded to that extent.
7. The claimant represented herself and gave sworn evidence. The respondent was represented by Mr. Leonhardt, Counsel, he called sworn evidence from Ms Sherwood, sole director of True Beauty Salon Limited and Ms Robins, the Salon's manager.
8. I considered the documents from an agreed bundle of documents consisting of 353 pages which the parties introduced in evidence.

Claims and Issues

9. The issues to be determined by the tribunal were agreed at the outset of the hearing as identified in the case summary, following the case management order dated 3rd May 2022 and as set out on pages 81 to 84 of the tribunal bundle. I adopt the issues set out, including the additional issues added by the Parties after the Case Management Order, as follows:

1. Unfair dismissal

1.1 Was the claimant dismissed?

1.1.1 Did the respondent do the following things:

1.1.1.1 Fail to properly resolve the first grievance;

1.1.1.2 Francesca Sherwood wrote to the claimant in an inappropriate ("rude, controlling and superior") tone on 26 February 2021;

1.1.1.3 Francesca Sherwood scheduled a meeting on 4 March 2021 without the claimant's agreement;

1.1.1.4 Francesca Sherwood made false claims in the letter dated 5 March 2021;

1.1.1.5 Francesca Sherwood harassed the claimant with emails and letters;

1.1.1.6 Francesca Sherwood sought to control the claimant whilst she was on furlough;

1.1.1.7 Imposed one week's holiday on the claimant during furlough;

1.1.1.8 Francesca Sherwood bossed the claimant around, being demanding and storming up and down while on a shift with the claimant;

1.1.1.9 Paid holiday that the claimant had not requested;

1.1.1.10 Made unlawful deductions from the claimant's wages;

1.1.1.11 Sent the claimant a formal letter threatening disciplinary action (the alleged last straw).

1.1.1.12 Francesca Sherwood demanded I leave work due to not having enough clients and to be furloughed with no notice.

1.1.1.13 Francesca Sherwood sent me a WhatsApp message on the team group on the 11th July 2021 with intention to bully and intimidate me.

1.1.1.14 Francesca Sherwood and interrogated and insulted me for three and half hours on the 6th January 2020.

1.1.1.15 Francesca Sherwood pressured for personal content for upload on the work platform on social media whilst on furlough during the first lockdown (between March to June 2020)

1.1.1.16 Francesca Sherwood and Julie Robins would frequently between my first formal complaint on the 11th July until my resignation in April 2021 behave in a calculated and vicious way towards me with extreme intention to push me out of my employment.

1.1.1.17 Francesca Sherwood extremely let me down as an employer and I felt it was intolerable to continue working at the workplace of True Beauty. They both (Julie Robins) destroyed the confidence and trust between myself, the employee, and employer.

1.1.1.18 Francesca Sherwood and Julie Robins made allegations towards me of poor performance which was untrue.

1.1.2 Did that conduct breach the implied term of trust and confidence? The Tribunal will need to decide:

1.1.2.1 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

1.1.2.2 whether it had reasonable and proper cause for doing so.

1.1.3 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.

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

1.2 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?

1.3 Was it a potentially fair reason?

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

2. Remedy for unfair dismissal

2.1 Does the claimant wish to be reinstated to their previous employment?

2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

2.5 What should the terms of the re-engagement order be?

2.6 If there is a compensatory award, how much should it be? The Tribunal will decide: 2.6.1 What financial losses has the dismissal caused the claimant?

2.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.6.3 If not, for what period of loss should the claimant be compensated?

2.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.6.5 If so, should the claimant's compensation be reduced? By how much?

2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? 2.6.7 Did the respondent or the claimant unreasonably fail to comply with it?

2.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

2.6.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

2.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

2.6.11 Does the statutory cap apply?

2.7 What basic award is payable to the claimant, if any?

2.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. Holiday Pay (Working Time Regulations 1998)

3.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when her employment ended?

4. Unauthorised deductions

4.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

4.2 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.3 Did the respondent or the claimant unreasonably fail to comply with it?

4.4 Is it just and equitable to increase or decrease any award payable to the claimant?

4.5 By what proportion, up to 25%?

10. Further, the respondent's counsel set out a final agreed list of issues between the parties which is set out on pages 89 to 91 of the bundle (and incorporated into the issues identified above).

Documents and Evidence

11. I heard evidence from each of the parties in person. For the benefit of the tribunal, the Parties had produced witness statements, and these were taken as read.
12. The parties had prepared a single bundle of documents as directed and when necessary I will refer to the relevant page numbers.

Relevant findings of fact

13. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.
14. The claimant was employed as a beauty therapist for two years and five months, from 3rd December 2018 until 9th April 2021. Her employer was True Beauty Salon limited. A statement of her terms of employment, dated 15th January 2019, is at pages 94 to 97 of the bundle.
15. The respondent is True Beauty Salon Limited whose trading address is 57 King Street, Twickenham, TW1 3SG. Ms Francesca Sherwood is the sole director of the respondent. Ms Julie Robins is the Salon's manager and has been employed by the respondent since 2002. Ms Robins's role involves the day-to-day running of the salon. She is also responsible for arranging one to one meetings with the team to review performance, identify improvements or additional training for employees.

16. The relationship between the claimant and the respondent was good throughout the first year of the claimant's employment.
17. On 6th of January 2020, the claimant met with Ms Robins on a one-to-one basis and the notes are set out on page 104 of the bundle. A number of issues were discussed ranging from training to staff cover over Christmas. These were normal interactions between an employer and employee and the follow up action was for the claimant to meet with Ms Sherwood. I find that this meeting did not amount to an interrogation and insulting of the claimant for 3 and a 1/2 hours.
18. On 13th January 2020, the claimant met with Ms Sherwood and Ms Robins. The interaction related to training and cancelled clients and a discussion on the placing of a Christmas tree in a consultation room, the notes are set out on page 105.
19. On 10th February 2020, a further meeting took place between the claimant and Ms Robins, the notes are on page 104. These notes specify that Ms Robins had not written up the notes of 13th January 2020 and therefore I find that the notes on page 105 were not contemporaneous notes. However, the notes of 10th of February 2020 are contemporaneous notes and I find that the issues raised with the claimant and the respondent were dealt with and completed between 6th January 2020 and 10th February 2020 with informal issues being raised by both sides and to the parties agreeing to move on. I find that these were not allegations of poor performance of the claimant but were discussions raised informally as part of a two way process regarding clients, retail sales and training.
20. On Friday 14th February 2020, a dispute arose between the claimant and Ms Robins. Ms Robins detailed the dispute on pages 108 and 110.
21. A meeting took place on 17th of February 2020 to deal with the dispute of Friday 14th February 2020. The contemporaneous notes of the meeting are set out on pages 106 to 107. The claimant raised the issue that she was not being paid correctly for the sale of retail products. Ms Sherwood stated that she would sort out any issues with any products not being correctly identified as sold by the claimant. At the end of the meeting, the notes state that the issues between the claimant and Ms Robins and the respondent had been resolved.
22. On 18th of March 2020, Ms Sherwood had verbal discussions with staff members in relation to whether they would be willing to take holiday if she had to close the salon due to the start of the pandemic. Ms Sherwood telephoned the claimant and asked her whether

she would be prepared to take paid holiday if the salon was closed. The claimant said she needed time to think about it.

23. On 19th March 2020, the claimant attended at work. There was a dispute at that time between the claimant and Ms Sherwood. The claimant did not put any complaint in writing after the dispute with Ms Sherwood on 19th March 2020. The salon closed on 21st March 2020 as the United Kingdom went into lockdown due to the COVID pandemic on 23rd March 2020. The claimant was placed on furlough between 21st March 2020 and 3rd July 2020.
24. During the pandemic lockdown, Ms Sherwood asked for content from the beauty therapists in relation to social media. I do not find that the claimant was pressured for personal content. She was asked for personal content but when she stated that she did not want to supply it, she was not pressured to do so.
25. Before 2nd July 2020, Ms Sherwood attempted to move staff from furlough to flexi furlough and she sought to obtain a signed agreement from all the staff that they agreed to return to work on a flexible basis. By 2nd July 2020, all the staff had agreed to the flexi furlough agreement, except for the claimant. Ms Sherwood sent an e-mail to the claimant asking if she wanted to sign the flexi furlough agreement or not. She further chased again on 3rd July 2020 and the claimant expressed her surprise at the continuous chasing. I do not find that the chasing of the claimant in that regard was undue or excessive pressure.
26. The salon was permitted to reopen on 13th July 2020. Ms Sherwood informed the salon staff that they were to reopen the salon and via the salon WhatsApp group another team member raised concerns about being in the salon without a senior member of the team available. On 10th July 2020, Ms Sherwood organized for a zoom meeting to take place on 13th July 2020, to discuss the measures that were being implemented to ensure the safety of staff and clients, including PPE. Ms Sherwood informed them that they could attend the salon to familiarize themselves with the safety aspects and review their treatment rooms. The claimant decided to attend the salon and was informed she could do so on 10th July 2020.
27. Via WhatsApp, the claimant agreed with the other team member regarding being in the salon without a senior member of the team available and asked for clarification of what was happening with the PPE training. The claimant further stated that she wanted clarification so that there could be no changing of arrangements or arguments on her return to work.

28. By email and by WhatsApp, Ms Sherwood responded by stating that she had tried to arrange a time for the claimant to attend the Salon but the claimant had attended on Friday without notice and both Ms Sherwood and Ms Robins were dealing with clients at the time. Ms Sherwood stated that she wanted to have a meeting with the claimant in order to move forward from previous negative comments. This meeting was arranged for 21st of July 2020. Ms Sherwood inadvertently sent the message to the entire WhatsApp group and understandably the Claimant was not happy about this.
29. The claimant wrote to Ms Sherwood on 11th July 2020 this detailed the issues that she had with Ms Sherwood. The meeting arranged on 21st July 2020 then incorporated the issues raised by the Claimant in her letter. Ms Sherwood met with the claimant and Ms Robins on 21 July 2020 and a note taker was arranged to take the notes.
30. The issues discussed were as stated on pages 124 to 141. There were 16 issues raised and 16 resolutions specified. The resolutions were added on 16th September 2020 and the note ends with Ms Sherwood and Ms Robins asking whether the resolutions were accepted to the points raised by the claimant.
31. Between 21st July 2020 and 16th September 2020, Ms Sherwood did ask to meet with the claimant on 11th September 2020. This was to discuss potentially changing the claimant's hours or days of work. This was intended to be an informal meeting to discuss the direction of the business and potential changes that needed to happen post-COVID. The claimant agreed to move her working day to a Saturday in order to avoid a redundancy. This is noted on page 143. The conversations were not concluded until 5th October 2020 in this regard, noting the emails that are on pages 262 to 265 of the bundle. The change in working days resulted in the threat of redundancy being lifted.
32. Between 4th and 9th August 2020, the parties were seeking to agree the contents of the meeting notes and responses. By 28th September 2020, there was still no agreement to the minutes or resolutions between the parties. On 24th September 2020, Ms Sherwood gave the claimant only one hours' notice to not attend her shift and on 25th September 2020, the claimant was allowed to turn up to her shift for one client and then sent home on furlough.
33. The claimant did not agree to any resolutions put forward by Ms Sherwood or Ms Robins but continued to work at the respondent's beauty salon. The respondent did not finalize the grievance process in September 2020.

34. On 8th October 2020, one to one meetings were held with the claimant and Ms Robins. The notes are on page 142 to 143; this clarified that the claimant was going to work on Saturdays from 31st October 2020 onwards and she was thanked for this.
35. The claimant raised the fact that she needed more notice to be placed on furlough and this was accepted by the respondent and an apology provided.
36. The claimant expressed the fact that she felt pushed into working on a Saturday or to be made redundant and Ms Robins asked the claimant to meet directly with Ms Sherwood. On 12th October 202,0 Ms Sherwood wrote to the claimant asking for a further resolution of the grievances. She said, “I'm trying to conclude the contents of the notes”. She referred to her apology regarding a number of issues and misunderstandings regarding what each of them had said and she would like to have a constructive meeting with Ms Robins and the claimant to progress the grievance.
37. On 25th October 2020, the claimant wrote to Ms Sherwood to state that she wished to pause the grievance situation and come back to it in four weeks time. This is at pages 349 to 351 of the bundle. The claimant further referred to the last four weeks of work being good.
38. On 29th October 2020, Ms Robins discussed a client with the claimant and at the end of the conversation sought to agree the resolutions for the grievance. The claimant declined to conclude the grievance.
39. During November and December 2020, the claimant, Ms Robins and Ms Sherwood worked well together. The country then went into a further lockdown from December 2020 and the announcement for the reopening of beauty salons was made on 22nd February 2021.
40. Ms Sherwood sent a text message to the WhatsApp group to arrange a meeting in the Salon on Saturday 10th April 2021 to prepare for the reopening on the following Monday. The claimant did respond but informed the respondent that she would let her know nearer the time. Ms Sherwood contacted her with an alternative day, Sunday 11th April 2021, to which the claimant replied but did not respond positively to the request to attend the meeting.
41. As Ms Sherwood had not received a positive response to her invitation she wrote to the claimant requiring the Claimant to attend the strategy meeting. This is on pages 156 to 157 of the bundle. She went on to say that if the Claimant could not attend due to her health, Ms Sherwood would progress to arrange a wellbeing meeting on 4th March 2021. The claimant did not attend the meeting on 4th March 2021 and in fact it was not clear if

she was required to do so because she did not respond to whether or not she would attend the meeting on 10th or 11th April 2020.

42. Ms Sherwood then wrote to the claimant by e-mail on 5th March 2021 explaining that she was expected to remain contactable whilst on furlough and available for work and that any failure to respond may lead to disciplinary action. She invited her to a reconvened meeting with herself and Ms Robins for 10th March 2021. There is no evidence to support the assertion by Ms Sherwood of a letter sent by recorded delivery.
43. The claimant was never actually removed from the furlough scheme.
44. The claimant responded to the invitation to the reconvened meeting on 10th March 2021, on 6th March 2021, but again did not confirm whether she would attend the arranged meeting.
45. On 12th March 2021, the claimant resigned from her employment and the letter is at page 161 to 162 of the bundle. This letter formally states that the claimant considers the respondent in breach of her contract. The basis of the resignation was that the respondent falsely claimed that the claimant was not available for work which was an untrue statement. The claimant resigns as she states she has no alternative due to the pattern of behaviour towards her over the past 14 months and that the employment relationship has irrevocably broken down as a result of the fundamental breach of her contract of employment by the respondent.
46. The respondent wrote to the claimant and a copy of this letter is at page 163 of the bundle. She asks the claimant to reconsider her position and that the company has not requested her resignation. The respondent invited the claimant to a grievance meeting on 17th March 2021 and the meeting was held on 26th March 2021.
47. The respondent wrote to the claimant on 27th May 2021 with the outcome of the grievance which was that the grievance was predominantly not upheld and the claimant was given a right of appeal against the decision to be made within five days. This letter is at pages 172 to 185 of the bundle.
48. The claimant exercised her right to appeal on 3rd June 2021 but failed to provide the grounds of the appeal. The respondent extended the deadline to appeal the decision until 8th June 2021, but the claimant failed to respond by the extended deadline or at all.
49. The claimant's last date of employment with the respondent was 9th April 2021. It is noted on page 74 that the claimant commenced employment with a new employer on 12th April 2021.

50. The claimant was entitled to 22.4 days holiday per holiday year and in hours this equated to 154 hours. The holiday year commences on 1st of January and ends on 31st of December each year.
51. The claimant was entitled to the full 154 hours annual leave for the period 1st January 2020 to 31st December 2020. The claimant was further entitled to accrued annual leave entitlement from 1st January 2021 when the annual leave year commenced, up to her effective date of termination, being 9th April 2021, this was 41.8 hours.
52. Regarding holiday pay, I find that the claimant took holiday whilst on furlough in August and September 2020. On 4th of November 2020, the respondent instructed the claimant to take one week's holiday, that is 27.5 hours, on Monday 23rd November 2020. This e-mail exchange is on page 188- 191 of bundle.
53. The payslips of the respondent show that the claimant was paid for holiday pay in the annual leave year 2020, as follows:
    a. 32.5 hours holiday within her 7th February 2020 payslip,
    b. 14 hours holiday within her 26th June 20 payslip,
    c. 68.5 hours holiday within her 21st of August 20 payslip,
    d. 27.5 hours holiday within her December 20 payslip.
54. The respondent contends that a further 22.5 hours holiday is contained within the claimant's January 2021 payslip. The pay slip does not show that is the case.
55. There are no text messages, emails, or other evidence to support the respondent's contention that the claimant asked for or was asked to take holiday during December 2020. In relation to paid holiday that had not been requested, the claimant had received a sum of money into her account in January 2021 but had not received her payslips as she had blocked the respondent from sending her messages on WhatsApp. The claimant did not question the alleged overpayment.
56. There is no supporting evidence that the Claimant asked the respondent to add furlough or holiday pay into the pay in her pay slip for mortgage purposes. Given the plethora of documentary evidence with regard to other matters, I find that the lack of evidence supports the claimant's contention that she did not in fact ask for her holiday pay to be identified in that manner on her payslips for mortgage purposes.
57. The contract of employment does not refer to annual leave being carried over between annual leave years nor does it prevent it from doing so. On page 186, Ms Sherwood states that any remaining holidays this year (2020) can be carried forward to 2021- 2022 if they are not able to be taken.

58. I find that the claimant is entitled to accrued holiday pay of 11.5 hours. I further find that the claimant is entitled to 41.8 hours accrued holiday entitlement for the annual leave year 2021.
59. This is a total of 53.3 hours. The claimant's hourly rate of pay was £12.00.

Relevant Legal framework

60. Section 94 of the Employment Rights Act 1996 (ERA 1996) confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the tribunal under section 111 ERA 1996. The employee must show that she was dismissed by the respondent under section 95 ERA 1996. The starting point is ss95(1)(c) and 136(1)(c) ERA 1996 which states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. The burden of proof is on the employee to establish the constructive unfair dismissal.
61. The test is whether, on the facts, in all the circumstances the employer so conducts itself as to destroy or seriously undermine the relationship of trust and confidence between it and the employee without reasonable or probable cause. The employer's conduct must either amount to a significant breach going to the heart of the contract or show that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee is then entitled to treat the contract as discharged at common law (Western Excavating Ltd v Sharp). This is an objective test, not a subjective one. Whether the employer intended to breach the contract or not is irrelevant.
62. A significant breach of an implied term by the employer will entitle the employee to treat themself as constructively dismissed. There Is implied into contracts of employment, a term that employers will not conduct themselves in a manner, without reasonable or proper cause, likely to destroy or seriously damaged the relationship of trust and confidence between the parties. If an employer act in an unreasonable way there may be a breach of this duty, but the test remains that as above in the Western Excavating case.
63. An employee may rely on constructive dismissal citing a pattern of actions, the most recent of which is the last straw. The last straw need not itself be a breach of contract so long as it is more than trivial and is capable of contributing to a breach of the implied term of mutual trust and confidence and has been preceded by blameworthy or unreasonable conduct in the past (Omilaju v Waltham Forest LBC [2005] IRLR 35 CA). I took into

account the principles set out in the case of Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.

64. The employee must leave in response to the breach. The employee must act promptly and resigning following the breach or they may be deemed to have waived the breach and agreed to vary the contract.
65. Once the constructive dismissal element has been established by the employee, the test for unfair dismissal is set out in section 98 of the ERA 1996.
66. The basic right given to workers by part II of the ERA 1996 is stated in section 13, whereby an employer must not make any deductions from wages unless:
    a. it is authorised by statute; or
    b. it is authorised by the workers contract; or
    c. the worker has previously signified in writing his consent to the making of it. This means that the worker must have agreed to the deduction before the event occurs.
67. A deduction is defined in section 13(3) ERA 1996 as follows where the total amount of wages paid on any occasion by an employer to a worker employed by them is less than the total amount of wages properly payable by him to the worker on that occasion, the amount of the deficiency shall be treated, as a deduction. Non-payment of a sum due may amount to a deduction, provided that the sum relates to a period of employment.
68. Section 27 of the ERA 1996 defines wages as any sums payable to the worker by his employer in connexion with his employment, including any fee, bonus, Commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise. The burden of proof is on the employer to show that one of the exemptions or exceptions applies.
69. The Working Time Regulations 1998 (WTR 1998), Regulation 13, provides UK workers with an entitlement to a minimum or 5.6 weeks annual leave in each leave year (for those who work five days a week). Regulation 13(9) provides that leave may only be taken in the leave year in respect of which it is due however where leave can be carried over is where the employer obstructs the worker taking holiday but also where the employer has not helped the worker to take their holiday, particularly by not providing adequate information.
70. The Working Time (Coronavirus) (Amendment) Regulations 2020 provide that, with effect from 26th March 2020, leave can be carried over for two leave years where it was not reasonably practicable for a worker to take some or all of their statutory leave due to the effects of coronavirus on the worker comment the employer or wider society.

71. Regulation 14(2) of the WTR 1998 states that if a worker has taken less holiday than their entitlement under the Regulations, then the employer must pay the employee holiday pay as an amount, as specified in the contract of employment, on termination of employment.

Conclusions

72. The first matter I have had to decide is whether the claimant's resignation should be construed as a dismissal. The claimant resigned on 12th March 2021 she stated she was only doing so because she had no alternative, page 161.
73. The definition of a dismissal for these purposes is found in section 95(1)(c) of the Employment Rights Act 1996 which is where an employee terminates the contract in circumstances where she is entitled to terminate it because of a fundamental breach of contract by the employer.
74. The claimant raises the issue that her employer breached the implied term of trust and confidence, I therefore needed to decide 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 whether it had reasonable and proper cause for doing so.
75. The claimant alleges that there was a final straw situation and that in light of the letter dated 5th March 2021, she was dismissed.
76. Based on my findings of fact, I conclude that the respondent did not interrogate and insult the claimant for 3.5 hours on 7th January 2020.
77. I further not did not find that the respondent made allegations of poor performance of the claimant. There were discussions on performance and retail sales but I do not find that they were anything other than normal discussions between employer and employee regarding client numbers in a post-covid world and retail sales. I reached the same conclusion on the allegation that Ms Sherwood bossed the claimant around, being demanding and storming up and down while on a shift with the claim. Not only is this an allegation that formed part of the grievances (which is dealt with below) but I also did not find that Ms Sherwood acted in this manner. There were certainly times when Ms Sherwood and the claimant clashed but the findings above are that matters were dealt with, principally by Ms Robins, and that the actions did not meet the objective test of a pattern of actions that cumulatively led to a constructive dismissal as required.

78. The respondent did not harass the claimant with emails and letters, either during lockdown for social media purposes or, at the end of 2020 and in the beginning of 2021, with respect to getting the claimant back into work.
79. I found that the respondent was seeking to exercise the relationship of employer and employee with respect to the claimant's obligations during furlough. I did not find that Ms Sherwood wrote to the claimant in an inappropriate or rude manner. The respondent was entitled to schedule a meeting with the claimant, who was its employee, in working hours. False claims were not made by the respondent. The letter represented the position of the respondent, and the claimant did not agree with the contents but that does not make the contents false and therefore a breach of the duty of trust and confidence between the parties.
80. The claimant accepted that she would take two weeks holiday whilst on furlough and this was agreed. The respondent imposed a further week's holiday on the claimant but did so appropriately. She provided the proper notice in order to use the holiday during the furlough period. The employee remains an employee whilst on furlough, The employer is entitled to exercise reasonable control over the employee during normal working hours. The actions above, taken by the employer, were with reasonable or proper cause. This is a reasonable action by the respondent and does not undermine the trust and confidence between employer and employee.
81. I concluded that the claimant was not paid holiday pay that she had not requested. I deal with the issue of holiday pay below.
82. The respondent was seeking to agree a resolution with the claimant regarding the grievances raised rather than imposing an outcome however the grievance was not formally concluded before the resignation. The claimant asked to pause the grievance in October 2020 and thereafter the respondent took no further action in relation to the grievance. If there was a failure to redress grievances, the respondent attempted to redress the grievance and the claimant waived any failure to complete the grievance process by asking for the pause in the process and failing to respond to the resolutions offered.
83. I concluded that the actions of the respondent in detailing resolutions was in effect an outcome delivered to the claimant. The claimant did not agree with the outcome. However, the claimant would not specify her grounds for not agreeing to it. The respondent reviewed them with her multiple times and no agreement was reached. In short, I concluded that the respondent did redress the grievances, but it was not to the

satisfaction of the claimant. The claimant accepted that position by continuing to offer her employment services to the respondent from October 2020 onwards. The formal grievance appeal was offered after the resignation to conclude the grievance issues but in effect the claimant had reviewed the outcomes and not agreed them in October 2020, then waived her right to rely on them and did not seek to end her employment until March 2021.

84. From 26th February 2021 until 12th of March 2021, I find that the respondent was attempting to schedule a meeting with the claimant of which she was entitled to do in order to restart the business after a lockdown. Whilst I could find no evidence to support a recorded delivery letter, I do not find that the phraseology used in the letter on page 158 is anything other than a reasonable instruction by an employer. The formal letter stated the correct position if an employee does not follow a lawful and reasonable instruction. The respondent was asking the claimant to comply with a lawful and reasonable instruction to meet with them.
85. I concluded there were occasions where the respondent did not respond appropriately to the claimant, for example, when the claimant was made to leave work due to not having enough clients and was then furloughed with no notice. The respondent did partially admit to that in the final grievance outcome however those issues were from 2020 and not in 2021 when the claimant left her employment. I did not find that this was sufficiently serious to breach the contract of employment and it was, significantly, a long time before the actual resignation and was dealt with under the grievance that I concluded was redressed but not to the claimant's satisfaction in October 2020.
86. The non-payment of holiday pay and the unlawful deductions, as alleged, occurred after the termination date and therefore did not form the basis of the constructive dismissal claim as at the date of the resignation letter or the termination date.
87. On the basis of my findings of fact, I do not find that the respondent behaved in a calculated manner likely to destroy or seriously damage the trust and confidence between the claimant and respondent. Whilst there were clearly issues between the claimant and Ms Sherwood I do not find that the respondent's actions amounted to a significant breach going to the heart of the contract or shows that the respondent no longer intends to be bound by one or more of the essential terms of the contract, whether cumulatively or as a one-off act.
88. The respondent had reasonable and proper cause to ensure that the claimant was ready to return to work on the lifting of the Christmas 2020 lockdown. I do not find that the alleged

last straw of the respondent sending its letter dated 5th March 2021 was sufficient to be a last straw and to cumulatively amount to a breach of the implied term of trust and confidence. The letter contained a lawful and reasonable instruction and therefore could not substantiate a final straw situation, nor did it amount to a repudiatory breach of contract, entitling the employee to treat the contract as at an end. It was not part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach term of trust and confidence. The previous acts had been affirmed from October 2020 and in any event did not constitute a course of conduct which cumulatively, amounted to a repudiatory breach term of trust and confidence.

89. Further, the actions of the respondent were not calculated, vicious or carried out with the intention of pushing the claimant out of her employment.
90. I have therefore concluded that the claimant's resignation was not a dismissal under section 95(1)(c) of the Employment Rights Act 1996 because there was not a fundamental breach of contract on the part of the respondent. The claimant was therefore not dismissed but resigned.
91. Turning to the holiday pay and unlawful deductions claim, I'm satisfied that the respondent failed to pay the claimant for annual leave that had accrued from 2020 to 2021 when her employment ended. The purpose behind the Working Time Regulations 1998 is for the claimant to take annual leave on health and safety grounds. There was no evidence to support the respondent's contention that there was an agreement to pay holiday pay in January 2021 as a lump sum. On weighing up whether I could accept the evidence of the respondent in this regard, I've noticed that in all other respects there was written evidence to support the evidence but with respect to the holiday pay any contemporaneous evidence was completely absent.
92. The respondent failed to pay the claimant for annual leave the claimant had accrued but not taken when her employment ended.
93. I find that the claimant is entitled to accrued holiday pay of 11.5 hours for 2020. I further find that the claimant is entitled to 41.8 hours accrued holiday entitlement for the annual leave year 2021.
94. This is a total of 53.3 hours. The claimant's hourly rate of pay was £12.00 and therefore she is owed holiday pay of £639.60. This was unlawfully deducted from her final salary.
95. The ACAS uplift was not applied. It is not just and equitable to increase the award payable to the claimant.

District Tribunal Judge Shields
Date: 28 February 2023