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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101053/2023

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Held in person on 4 and 5 September 2023

Employment Judge S Neilson

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Ms E McIntyre

Claimant

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Airdrie Services Club

**Respondent
Represented by
Mr R Milvenan,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that:-

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- (a) The claimant was not constructively dismissed and her claim for unfair dismissal is accordingly dismissed;
- (b) The claimant claim for accrued holiday pay is dismissed;
- (c) The claimant's claim for unlawful deductions in respect of arrears of pay is dismissed;
- (d) The claimants claim for breach of contract/unlawful deductions in respect of notice pay is dismissed; and
- (e) The claimants claim for redundancy pay is dismissed

REASONS

1. The case was heard over two days. The Claimant represented herself and the Respondent was represented by Mr Milvenan, Solicitor. There was an agreed bundle of productions to which the witnesses referred.
2. The claimant gave evidence on her own behalf. Mr Fitzgerald, Mechanical Manager, and Ms Law, the claimant's daughter, also gave evidence on her behalf. Mr McLelland, President of the respondent, gave evidence on behalf of the respondent.

Issues

3. The issues to be determined in the case were as follows.
4. Did the respondent commit a fundamental breach of the claimant's contract which entitled her to resign and treat herself as dismissed?
5. Did the claimant resign in response to any fundamental breach of contract?
6. Did the claimant delay before resigning and affirm the contract and lose the right to claim constructive dismissal?
7. If the claimant was constructively unfairly dismissed what compensation should be awarded to the claimant?
8. Is the claimant entitled to a payment in respect of accrued holiday pay arising on the termination of her employment?
9. Is the claimant entitled to payment in respect of any unpaid wages?
10. Is the claimant entitled to any payment in respect of pay for the notice period?
11. Is the claimant entitled to a redundancy payment?

Findings in Fact

12. The respondent operates a members club for military personnel and others. They operate from premises at Aitken Street, Airdrie.
13. The respondent's premises have a bar and rooms that may be used for social functions.
14. The claimant commenced employment with the respondent in 2001 as Bar Manager.
15. The claimant reported into an elected committee who had responsibility for the respondent's operations.
16. In the period from 2020 through to 2021 the President of the respondent was Mr Kevin Goodier and the Housing Convenor was Mr George Buchanan. Both sat on the committee of the respondent.
17. By letter of 27 May 2020 from Mr George Buchanan the claimant was invited to an investigatory interview regarding her pay. The letter stated "It has recently come to light that you gave yourself an unauthorised pay rise on 05/04/19." The letter also stated "I would like you to come in and discuss this matter in a formal investigation, this matter could lead to a disciplinary meeting."
18. No further action was taken against the claimant following the investigatory meeting and the allegation was dropped.
19. The claimant wrote to the respondent on 8 September 2020 complaining about the conduct of Mr Godier and Mr Buchanan in respect of the investigation in May 2020.
20. Mr Godier and Mr Buchanan left their positions with the respondent in or about September 2021. Mr McLelland was appointed as president of the respondents by the members at an annual general meeting in November 2021.

21. Mr McLelland took a more active role in the running of the respondent's operations following his appointment than the previous president.
22. The claimant signed a new contract of employment with the respondent on 18 March 2023 for the role of Bar Steward. There was a Job Description attached to that contract of employment that the claimant also signed on 18 March 2022. Mr McLelland signed both the contract of employment and the Job Description on behalf of the respondent on 18 March 2022.
23. In carrying out her role as Bar Steward during 2022 the claimant carried out the duties set out in the Job Description dated 18 March 2022. In particular the claimant oversaw the staff; scheduled staff rotas; worked in the bar when required; was responsible for marketing and promotional advertising of the social functions (and taking bookings); ordering stock from time to time; recorded holidays for the bar staff; contacted the accountants with hours staff worked; did the weekly banking total and informed the President when wages must be paid.
24. Whilst the claimant had responsibility for decoration of the hall for social functions the President would from time to time assist in that activity.
25. In or about December 2021/January 2022 the respondents were dealing with an employment tribunal claim from a former employee, Louise Johnston. This was a claim for unpaid holiday pay. Mr McLelland asked the claimant to provide details of the holidays taken by Louise Johnston to allow him to assess the claim.
26. The claimant was absent from work on health grounds in August 2022 and during this period Mr McLelland took on many of her duties.
27. On 30 August 2022 Ms Gillian Veldhoven was holding her regular exercise class at the respondent's premises. The respondent had a sound limiter installed to damp down the noise level of any music. Ms Veldhoven had unplugged her music system from the socket attached to the sound limiter and plugged it into another socket with the consequence that the music was

louder than normal. The claimant asked Mr McLelland to speak to Ms Veldhoven. Mr McLelland spoke to Ms Veldhoven in abrupt terms and instructed her to use the correct socket so that the sound would be reduced. The claimant was not present when this exchange took place. Ms Veldhoven subsequently complained to the claimant about this incident. Following an approach from the claimant Ms Veldhoven sent an e mail to the claimant on 16 October 2022 complaining about her treatment from Mr McLelland in respect of this incident.

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28. On 18 September 2022 the claimant removed from the respondents premises the keys for the cash box and took them home. The claimant did this to keep the keys safe as she was worried about money going missing from the cash box. Mr McLelland was in the respondent's premises on the evening of 18 September 2022 and required access to the cash box to refund a customer. When Mr McLelland could not find the keys he contacted the claimant by telephone and asked where the keys were. The claimant explained that she had the keys. The respondent was annoyed by this, said "aw fuck" and put the phone down.

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29. On 25 September 2022 the claimant gave to Mr McLelland a written letter of resignation from her employment with the respondent. The letter stated "*Dear James McLelland, This letter represents my official notice of resignation from my position of bar manager with Airdrie Service Club be made final on the 18th December 2022. It has been with great pleasure to work alongside the individuals at Airdrie Service Club and I will always appreciate the experience and knowledge I have gained during my time of employment. I hope the notice period is sufficient for you to find my replacement. Furthermore, please inform me of any help you require to train or assist the person who will take over my position. Sincerely Evelyn McIntyre.*"

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30. On 28 September 2022 the claimant asked Mr McLelland if she could retract her resignation. Mr McLelland told the claimant she would need to put that in writing.

31. On 6 October 2022 the claimant sent an e-mail to Mr McClelland in the following terms *“Dear James McClelland, I am writing to retract my previous resignation letter issued 25/09/22. I wish to continue working in my current position as Bar Steward. I would like the retraction of my resignation to commence on 06/10/22. Sincerely Evelyn McIntyre.”*
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32. The claimant sent a further e-mail to Mr McClelland on 11th October 2022 seeking an update on the status of her resignation or retraction.
33. Mr McClelland responded to the claimant by e-mail on 15th October 2022 stating *“Dear Evelyn, Ref your resignation letter on the 25/09/22 it was processed and you were sent a letter by recorded post. I had asked you verbally to send in a letter if you wished to retract your resignation but this was not received but your but we did receive an e-mail dated 06/10/22 at 23:04. Your resignation will still go proceed and you last day of employment will still be the Saturday the 17 December 2022. Sincerely James McClelland John Fitzgerald”*
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34. Mr McLelland raised the issue of the claimant’s resignation at the annual general meeting of the respondent on 28 November 2022. The meeting did not agree to accept the retraction of the claimant’s resignation.
35. The claimant worked out her notice period from 25 September 2022 through to 7 November 2022. By letter of 4 November 2022 Mr McLelland agreed to the claimant’s request to take 4 weeks accrued holiday from 7 November through to 5 December 2022. The letter also instructed the claimant not to return to work after 5 December 2022 unless advised she could do so by Mr McLelland. The claimant did not return to work after 7 November 2022 and her employment terminated on 17 December 2022.
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36. The claimant’s wages were paid one or at most two days late on or about 18 December 2021; 8th January 2022; 21 January 2022 and 29 January 2022. On each occasion the claimant notified Mr McLelland who instructed payment.

37. The claimant was paid in full in respect of the notice period from 25 September 2022 through to 17 December 2022.

38. There were no accrued holidays outstanding as at the termination of the claimant's employment on 17 December 2022.

5 39. The claimant received a payment of £1,482.42 from the respondent at the end of December 2022.

40. The claimants net weekly pay with the respondent was £358.90 (gross of £436) with an employer weekly pension contribution of £9.18.

10 41. The claimant was unemployed from 18 December 2022 through to 22 March 2023. The claimant secured alternative employment as a retail assistant earning £10.42 per hour on 23 March 2023. The claimant worked 13 hours a week for 3 weeks, then moved to 18 hours a week for 7 weeks and on 5th June 2023 moved to full time on 40 hours per week.

42. The claimant was in receipt of universal credit whilst unemployed.

15 **The Law**

43. Section 94 of the Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed. Under Section 111 of the ERA an employee has a right to present a claim for unfair dismissal to an employment tribunal.

20 44. Section 95(1)(c) of the ERA provides "*For the purposes of this Part an employee is dismissed by his employer if ... (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*"

25 45. As established in *Western Excavating -v- Sharp 1978 IRLR 27* there are three essential elements to a claim for constructive unfair dismissal:- (1) there must be an actual or anticipatory breach of contract by the employer which is a fundamental or repudiatory breach, ie one that goes to the root of the contract

so as to be sufficiently serious to justify the employee's resignation; (2) the employee must resign in response to that breach, rather than for some other reason; and (3) the employee must not delay too long in terminating the contract in response to the employer's breach, otherwise the employee may be regarded as having elected to affirm the contract and the right to accept the employer's breach would be lost.

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46. In all contracts of employment there is an implied term of trust and confidence. In the context of constructive unfair dismissal the employee must show that the employer has, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them.

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47. In the context of a constructive unfair dismissal claim the Tribunal may have to have regard to the last straw doctrine. This might arise in three different ways. Firstly, where earlier acts or omissions do not by themselves amount to a fundamental breach but the last act or omission ("the last straw") adds sufficient weight that the cumulative total does repudiate the contract (*Waltham Forrest -v- Omilaju 2005 IRLR 35*). Secondly where earlier acts or omissions do amount to a fundamental breach but the employee carries on working thus affirming the contract and there is then a last straw event – the employee can rely upon the entire series of events as repudiating the contract (*Kaur -v- Leeds Teaching Hospitals NHS Trust 2018 IRLR 833*). Thirdly where the earlier acts/omissions do amount to a fundamental breach and the employee has not affirmed the contract then an innocuous final straw will allow the employee to go back and rely upon the earlier breaches provided they materially contributed to the decision to resign (*Williams -v- Alderman Davies Church in Wales Primary School 2020 IRLR 589*).

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48. The burden of proof to establish that there has been a fundamental breach of contract lies with the employee.

49. A claim in respect of unpaid holiday pay may be brought under the Working Time Regulations 1998 Regulation 30 on the basis of a breach of the

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obligation under Regulation 14 to pay accrued holiday pay on termination of employment.

50. A claim in respect of unpaid wages whether relating to the notice period or any earlier period may be brought either as an unlawful deduction from wages claim under section 23 of the ERA or as a breach of contract claim under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

Discussion & Decision

51. The claimants primary claim is a claim for constructive unfair dismissal. It was not disputed that the claimant decided to resign from her employment with the respondent on or shortly before 25 September 2022. That was the date when she delivered to the respondent her resignation letter intimating that she was resigning with effect from 18 December 2022. In her ET1 and in giving evidence the claimant made reference to a number of alleged incidents of behaviour by Mr McLelland that arose after 25 September 2022. In particular she made reference to a late payment of wages in the sum of £300 at the end of October; his conduct towards her on 31 October 2022 in switching lights off in a room whilst she and Mr Fitzgerald were still there; being locked out of the premises by Mr McLelland on 4 November 2022 and his refusal to retract her resignation. It was clear to the Tribunal that there was a material breakdown in the relationship between the claimant and Mr McLelland following her resignation on 25 September 2022. Mr Milvenan submitted that the Tribunal should not take into consideration any events that occurred after 25 September 2022 in determining whether there had, as at 25 September 2022, been grounds to claim constructive dismissal. The Tribunal agrees with that submission. Accordingly, whether or not there had been a fundamental breach of contract by the respondent entitling the claimant to resign has to be determined as at 25 September 2022. Insofar as the claimant has referenced specific events that occurred after 25 September 2022 these cannot form the basis of a claim for a fundamental breach of contract that precipitated a resignation on 25 September 2022.

52. The events that preceded 25 September 2022 and that are relied upon by the claimant are as follows:- (a) in May 2020 being called to an investigatory meeting over an alleged unauthorised pay rise; (b) removal of almost all her duties as Bar Manager in the period from November 2021 onwards; (c) the
5 adoption of less legitimate means of business by the respondent including undeclared money to HMRC and additional income not being declared properly to the accountants to avoid tax; (d) the conduct of Mr McLelland including a “dictator like approach”, unprofessional conduct, lack of respect and intimidating tendencies, including seeking the claimants unquestioned
10 support on a Tribunal claim from a former employee Louise Johnston, an incident on 30 August 2022 where the claimant had to apologise to a customer in respect of the conduct of Mr McLelland, and an incident on 18 September 2022 when Mr McLelland contacted the claimant by phone then hung up on her in a rage; (e) late payment of wages on 18 December 2021,
15 8 January, 21 January, 29 January, 7 July, 16 July, 17 August all 2022.
53. In considering the evidence put forward by the claimant the Tribunal has considered both whether any of these specific alleged events by themselves amount to a fundamental breach of contract, whether some of all of them taken together might amount to a fundamental breach of the duty of trust and
20 confidence and lastly whether taken together some or all of these alleged events might give rise to a resignation based upon the last straw doctrine.
54. Dealing with the evidence in relation to each alleged event set out above at paragraph 52.
55. It was not disputed that the claimant was called to an investigatory meeting
25 in May 2020 with regard to an alleged unauthorised pay rise. That related to a time when Mr McLelland was not involved. Under cross examination the claimant accepted that the respondents had a right to investigate but not in circumstances where the allegation was unfounded. No further action was taken by the respondent against the claimant. The Tribunal considers that
30 employers are entitled to investigate issues with employees without that investigation by itself being a breach of any express or implied term of the

employment contract. It may be different if there is evidence that such an investigation was carried out on a malicious basis – but there was no evidence of that here. The claimant may have been unhappy about the allegation being made but that by itself is not a basis for saying that the investigation amounted to a breach of contract.

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56. In relation to the removal of duties the claimant alleged that she had effectively been demoted to be a member of bar staff following Mr McLelland being installed as President in November 2021. The claimant considered herself to be the Bar Manager. That is certainly how she referred to herself in correspondence prior to November 2021. Mr McLelland considered that the formal minutes of the Club recorded the position as Bar Steward rather than Bar Manager. Whatever the correct title ought to have been the Tribunal accepts the evidence of the claimant that she considered herself, prior to November 2021, to be the Bar Manager and that prior to Mr McLennan taking on the position of President in November 2021 she had a greater degree of control and in particular autonomy over the running of the bar and the social club than she had post November 2021. However, the Tribunal also accepts that Mr McLennan as the incoming President wanted to take on more responsibility for the affairs of the respondent. The claimant signed a new contract of employment with the respondent on 18 March 2022. Mr McLennan signed on behalf of the respondent. That contract was for the role of Bar Steward. There was an attached job description which both parties also signed. The Tribunal was satisfied based upon the evidence that the claimant agreed to the both the contract and the job description as at March 2022 and in fact have responsibility for carrying out the duties listed in the job description. It was also clear that Mr McLelland took a closer interest in these duties being carried out and would assist with them from time to time. For example, Mr McLelland would assist with decorating the hall for social events. When the claimant was absent on grounds of ill health in August 2022 Mr McLelland did take over a number of her duties. Whilst the Tribunal accepts that Mr McLelland took a more active role in the running of the respondent post November 2021 the duties that the claimant carried out from that point

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in time were in accordance with her agreed job description and there was no evidence that she was effectively demoted (in the claimants words) to being akin to bar staff. There was accordingly no breach of contract by the respondent in respect of the job duties.

5 57. The claimant alleged that Mr McLelland was responsible for adopting what she described as “less legitimate” means of business. She specifically stated in her ET1 *“I became very uncomfortable in my position as the running of the business gradually adopted less legitimate means of business, which I wanted no part in, including undeclared money to HMRC and additional*
10 *income not being declared properly to the accountants to avoid tax”*. However, the claimant was not able to offer any evidence to support these allegations. Mr McLelland insisted that all the money that came in for the hire of the hall was recorded and banked. In the absence of any evidence on this point the Tribunal does not find that this allegation is made out.

15 58. With regard to the conduct of Mr McLelland the claimant referenced three instances. The first related to involving her in an Employment Tribunal claim by a former colleague, Louise Johnston. The claim was one for holiday pay. The claimant thought the claim was entirely justified and objected to Mr McLelland seeking her (in the claimant’s words) unquestioned support. The
20 Tribunal accepts the evidence of Mr McLelland that he was simply seeking information from the claimant about the holiday entitlement Louise Johnston had. The Tribunal considers that as an employee the claimant is obliged to support a reasonable request to provide management information relating to holiday entitlements even if the claimant considers the claim to be wholly
25 valid. In giving her evidence the claimant also made reference to an alleged comment from Mr McLelland in relation to Louise Johnston to the effect that if he had a gun he would know what he would do with it – and made a gesture akin to cocking back a gun. Mr Milvenan objected to this evidence on the grounds of lack of notice. It is not referenced in an otherwise detailed ET1.
30 The Tribunal agreed that this allegation had not been made in the ET1 and

that there was accordingly no fair notice, and accordingly has disregarded it – although Mr McLelland did in his evidence deny he said it.

59. The second related to the incident on 30 August 2022 when it is alleged Mr McLelland was rude to a customer, Ms Veldhoven and the claimant had to apologise to the customer. The Tribunal accepts that Mr McLelland may have had good cause to speak to the customer but also accepts the claimants and Mr Fitzgeralds evidence that in doing so he was somewhat direct and confrontational. However, this was not conduct aimed at the claimant. It may have caused the claimant some embarrassment but by itself is difficult to categorise as dictatorial as regards the claimant. The Tribunal also note that the e mail of complaint was sent by Ms Veldhoven to the claimant on 16 October 2022. This was after the resignation and after the claimant had been notified that her resignation would still proceed. Although the claimant denied that she encouraged Ms Veldhoven to complain the Tribunal does think it more likely than not that Ms Veldhoven was encouraged by the claimant to put in her written complaint. The Tribunal does not accept that his incident amounted to a fundamental breach of the relationship of trust and confidence.

60. The final incident is the telephone call on 18 September 2022. This related to the removal by the claimant of the keys to the cash box at the respondent’s premises. This caused Mr McLelland some frustration. The evidence on this was not really in dispute. Mr McLelland accepts that he called the claimant to enquire about the whereabouts of the keys. She told him that she had them whereupon Mr McLelland swore and put down the phone. Mr McLelland claims he was not in a rage but just wanted to get the situation resolved. The Tribunal accepts that this conduct by Mr McLelland was inappropriate but does not consider that by itself it is sufficiently material to amount to a repudiatory breach of contract.

61. The claimant also referred to there being a “toxic environment” at the Club with her life being made “hell” by Mr McLelland for a period of time. Whilst the Tribunal can accept that relations between the claimant and Mr McLelland were not ideal prior to 25 September 2025 (perhaps as a consequence of his

greater involvement and more direct style) it does note, as Mr Milvenan submitted, that the claimant sought to retract her resignation shortly after 25 September 2022 and return to work, an action which the Tribunal considers that it is unlikely she would have done had the conduct of Mr McLelland been as bad as she indicated.

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62. In relation to the late payment of wages there was evidence that wages were paid late to the claimant on or about 18 December 2021 and on 8, 21 and 29 January 2022. Although the claimant alleged late payment on other dates there was no evidence to support this. The claimant agreed that on all occasions the payment was one or at most two days late. The claimant was paid weekly at that time. Mr McLelland did not dispute that but explained that the delay often arose if he was not able to get to the respondent's premises to action the payment. The Tribunal was not directed to any express contractual provision regarding the date of payment for weekly wages but accepts it is likely there was an agreed date for payment of weekly wages and on these occasions, payment was late and that that did amount to a breach of contract. However, it was not a material breach and in giving her evidence under cross examination the claimant stated "the wages being late was part of a problem, not the main problem when I decided to resign – it was mental anguish more than anything." There was also a delay of 9 months from the last "late" payment to the resignation date. Mr Milvenan submitted that if there was a breach then the claimant had affirmed any breach by failing to take action for 9 months. The Tribunal does agree that to the extent there was any breach then the claimant affirmed that breach by continuing to work.

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63. In considering all the evidence with regard to the alleged fundamental breach the Tribunal is not satisfied that there are grounds upon which it has been established that there was a fundamental breach of contract. Specifically, the Tribunal is not satisfied that there was any breach of contract as regards (a) the investigatory meeting in June 2020; (b) the removal of the claimant's duties as Bar Manager; and (c) the allegations surrounding illegitimate means of business. With regard to the conduct of Mr McLelland these might be said

to relate to a breach of the duty of trust and confidence. The Tribunal found that only one of the instances referred to was relevant in this context – being the incident on 18 September 2022. Whilst his conduct on 18 September 2022 was inappropriate we did not consider that by itself that amounted to a repudiatory breach. There was a further non-material breach of contract as regards the late payment of wages – although that minor breach was affirmed, in the Tribunal’s view, by the claimant continuing to work. The Tribunal has considered whether the last straw doctrine might be relevant here but has concluded that it is not. Accordingly, it is the decision of the Tribunal that the claimant has failed to discharge the onus of establishing that there was a fundamental breach of contract entitling her to resign. Having reached that decision it is not necessary to consider the remaining tests set out in *Western Excavating -v- Sharp*.

64. The Tribunal has also considered whether the respondent ought to have allowed the claimant to retract her resignation. However, there was no evidence that the resignation was given in the heat of the moment or that there were any other special circumstances that would suggest that the respondent was under any obligation to give the claimant any period of time to reconsider her decision. In the circumstances there was no basis upon which the respondent was obliged to accept the retraction.

65. In relation to the claimant’s claim for accrued but unpaid holiday pay the claimant was also not able to set out whether or not she was due any accrued holiday pay. She thought she might be due some accrued holiday pay due to carrying over holidays from the Covid 19 pandemic lockdown. However, she was not able to specify this any further. The position of the respondent was that the claimant was not due any accrued holiday pay. There was no evidence that any holidays were outstanding as at the termination date. In these circumstances the Tribunal dismisses the claim for accrued holiday pay.

66. In relation to the unlawful deductions claim for unpaid wages the claimant accepted in her evidence that she was not in a position to say that she had

been underpaid and offered no evidence to support a claim for unlawful deductions. This claim is accordingly dismissed.

5 67. In relation to the claimants claim for breach of contract/unlawful deductions in respect of notice pay the claimant accepted that she had been paid for her notice period and offered no evidence to support a claim that there was any failure by the respondent to pay her what she had been due in respect of the notice period. This claim is accordingly dismissed.

10 68. Finally, there was a reference in the ET1 to a claim for redundancy pay. This was noted at the Preliminary Hearing on 5 June 2023. At the outset of the final hearing the claimant confirmed that the claim in respect of redundancy pay was not being insisted upon and was withdrawn. The Tribunal accordingly dismisses that claim.

15 **Employment Judge: S Neilson**
Date of Judgment: 14 October 2023
Entered in register: 16 October 2023
and copied to parties