EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105347/2020

Held at Aberdeen on 17 & 22 February & 20, 26 & 27 May and 11 July 2022

Employment Judge J M Hendry

Miss Y Pestano Tome	**Claimant** **In Person** **Assisted by** **Mr J McGregor,** **Ms A Uribe** **& Ms R Topping** **Interpreters**
MXCNHQ Ltd	**Respondent** **Represented by** **Ms N Gray,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is:

1. **That the respondent company unfairly dismissed the claimant;**
2. **That the respondent company will pay the claimant a monetary award in the sum of Three Thousand Six Hundred and Forty Four Pounds Eighty four pence (£3644.84) and**

3. That all other claims including the claims for race discrimination, detriment arising from whistleblowing and harassment are not well founded and are dismissed.

REASONS

1. The claimant in her ET1 made various claims against her former employers principally for ‘‘constructive’’ unfair dismissal and wages she believed were due to her including holiday pay. It was also clear from the body of the ET1 the claimant believed she had been discriminated against on the grounds of her nationality (Spanish). The respondent denied the factual basis of the claims and also argued that any incidents of race discrimination were time-barred and that there was no basis for the claimant to resign.

Issues

2. The claimant set out a series of claims (unlawful deductions, discrimination and constructive unfair dismissal) which required to be considered the principal claim was for constructive unfair dismissal. The Tribunal had to consider whether the employers had committed a material breach of contract entitling the claimant to resign, whether there was a last straw, whether the claimant resigned in response or affirmed her contract. If the claimant was dismissed then whether the dismissal was that fair in all the circumstances.

3. The claimant had earlier withdrawn a claim for holiday pay but asked that the narrative remain. The respondent had pleas in relation to time bar in respect to the discrimination and unlawful deductions claim.

4. We adopt the issues set out in the respondent’s written submissions in relation to the issues pertaining to the dismissal claim. We had to determine the following:

1. What was the last straw complained of by the claimant, and did the alleged breaches taken as a whole, form a series of acts or omissions which constituted a repudiatory breach of the claimant's contract of employment.
2. If so, did the claimant resign in response to said breach, or did she accept or affirm the said breaches.
3. Alternatively, if the claimant is considered to have been constructively dismissed, was said dismissal unfair in the circumstances.

5. And the discrimination claim:

1. Whether the claimant suffered unfavourable treatment, and if so, was such unfavourable treatment on the basis of her race, when considered against an actual or hypothetical comparator,
2. Whether the respondent operated a provision, criterion or practice which placed Spanish speaking staff at a particular disadvantage and did the claimant suffer said disadvantage.
3. Was the claimant harassed on the basis of her race.

6. In relation to the claim for unauthorised deduction the claimant had to demonstrate what sums were due and when her entitlement to these arose. In relation to discrimination claims the claimant had to show she was either directly discriminated against on the grounds of her nationality or indirectly in that she was treated less favourably than a hypothetical non-Spanish comparator would have been.

Evidence

7. The order in which parties and their witnesses gave evidence was varied by agreement and Mr Brandie the owner and Managing Director of the respondent company gave evidence immediately after the claimant as her witness, Mr Zalba

who had attended the hearing had to leave for work before he could give evidence. (Mr Zalba was a former employee of the respondent company). The respondent called Ms Gina Buffilino, a current employee and contemporary of the claimant as a witness.

8. The claimant as she was a party litigant and to assist her give her evidence was allowed to prepare a witness statement.

9. Parties agreed a Joint Statement of Facts which was incorporated into the findings.

Facts

10. The claimant is a Spanish national. She is 27 years of age. She was engaged as a student in a higher education course in Aberdeen and began working part time for the respondent on 31 July 2017 as a member of their counter staff.

11. The claimant received a contract of employment dated 15 March 2019. The contract stated her pay rate as £8.72 per hour. The respondent also had an employee handbook which was appended to the contract.

12. The contract contains a clause titled ‘‘Working Time’’ which narrated the employee’s entitlement to an uninterrupted break of 20 minutes if working more than six hours.

13. The respondent company operates a take-away business in Aberdeen specialising in Mexican food. They trade under the name of the ‘‘Muchacho’’.

14. The claimant was hard-working, intelligent and initially well thought of by Mr Brandie. She would often act as an intermediary between him and the rest of the staff who were Spanish speakers although not all were Spanish nationals. Mr Brandie had a limited knowledge of the Spanish language. The claimant would

explain work related matters to the staff on his behalf and articulate their concerns to him. The group of staff worked well and cohesively with each other generally Spanish was spoken in the workplace. They would distribute tasks between themselves. Mr Brandie was happy that the staff spoke Spanish as this added to the atmosphere he wanted to create.

15. The staff worked using a rota. They were given shifts in advance. The system was flexible. It was arranged through a "App'' called ''Deputy". The settings were controlled by the respondent. Staff would input their hours worked and the respondent's payroll providers would arrange payment. Comments could be "posted" on the App.

16. When the claimant started work the manager was a Jenny Suniaga. She left in about November 2019. She was a Spanish speaker. Mr Brandie introduced Ms Marsha Clarke in late November 2019 to the employees. He did not explain that she was a consultant. Ms Clarke became the manager.

17. The claimant who knew how the business operated and who was experienced expected to be considered for the vacant role of manager. She had been involved in training and the allocation of duties to staff. The claimant was disappointed when the manager's job was given to Ms Clark an acquaintance of Mr Brandie. Ms Clark did not know how the business worked day to day and had no experience running a take-away shop. She did not speak Spanish like the previous manager. She had an abrasive management style which did not go down well with the staff including the claimant. It became clear that she was fulfilling the role of manager.

18. Mr Brandie hoped that Ms Clark could review the respondent's paperwork, processes and procedures and prepare a "Bible" to allow the operations of the business to be fully recorded. This would assist the running of the business in the future if the manager or experienced staff left and if other outlets were opened.

19. In November 2019 Ms Clark implemented a revised time-keeping system though ‘‘Deputy’’. The changes to the system were not discussed with staff members or the claimant. The staff became concerned when they received their payslips they had noticed that the breaks allowed had changed. They noticed that 30 minutes had been deducted automatically through the Deputy app from any hours claimed. The claimant and other staff understood that under their contract they would expect to receive 20 minute paid break when working 6 hours.

20. The claimant raised this matter on her own behalf and on behalf of other staff. It turned out that the system had been reset by Ms Clark to deduct breaks whether they were taken or not. The staff complained that the business was often busy and on occasions it was difficult to take breaks. In addition, there was often insufficient staff to allow breaks to be taken. Staff felt “short changed” by the changes in the system. These changes also included the rule that staff were no longer allowed to eat food for free but had to contribute 50% of the cost.

21. The claimant raised the issue of these changes with Ms Clark who indicated that she didn’t need to let the claimant or other staff know about the changes in advance and that if she did not like the working conditions she could resign and go to the Job Centre and ask for benefits.

22. As a consequence of this incident in about January 2020 the claimant expressed her concerns about Ms Clark’s behaviour direct to Mr Brandie. He was aware that she was disappointed at not being made the manager and about Ms Clark’s manner. He told her to be patient.

23. The claimant also raised the matter by writing an e-mail to Mr Brandie but did not receive a written response in relation to the issue of the breaks.

Background Issues

24. Many of the staff, including the claimant did not have a high opinion of Ms Clark's abilities. They believed that she often acted with an air of superiority towards them. The claimant believed that this was because she and the other staff were Spanish speakers.

25. The claimant was also concerned at the treatment of a staff member, Daniel Yanez, who had been disciplined by Mr Brandie in November 2019.The claimant believed that the disciplinary process was unfair.

26. The claimant also became aware of an incident that had occurred involving Mr Yanez when he was working with Mr Brandie at an event at the Soul Bar in Aberdeen. Mr Brandie failed to intervene when a third party began making fun of Mr Yanez's command of English and that of another Spanish working there for the respondent.

27. The claimant later became concerned about an employee Borja Zalba, a Spanish national. She was aware that he had previously had cancer and thought that he should have been furloughed when that scheme was introduced. She was unaware that the condition had been cured by surgery and it no longer affected his general health or compromised his immunity.

28. The claimant believed that when Mr Zalba returned to work following his operation Mr Brandie's attitude towards him had changed and he had become unfairly critical of his work.

Corona Virus Pandemic

29. In or around early to mid March 2020 staff became concerned at news of the Coronavirus Pandemic. They saw how the pandemic was developing worldwide.

They were concerned at the spread of the disease and the impact on travel. They were concerned that as the illness was passed from person to person they would be vulnerable working in a take away shop. The claimant was particularly concerned for her own health as she was asthmatic. The full effects of the illness were unknown at this time. There was no vaccine and treatments for those suffering from Covid were undeveloped.

30. The claimant attended work on 23 March 2020. This was the date of the first lockdown. She was concerned about the Pandemic and how the business could operate with customers coming and going who might have Covid. The premises were small and she was concerned about the close proximity staff had to work with each other. She had sourced hand sanitiser on her own initiative and masks for herself and other staff. Mr Brandie entered the shop. He was immediately dismissive of the claimant's concerns. He picked up a mask and held it up laughing and asking her if ''this'' would protect her from any virus. He gave the claimant the impression that he was not concerned about the matter. Aberdeen was at this point in lockdown and restaurants shut but take away premises were still open.

31. The staff collectively expressed concerns to the claimant about interacting with members of the public and preferred not to work and be furloughed under the scheme announced at this time by the UK Government. It was explained by the claimant to Mr Brandie that some of the staff were more vulnerable to the virus because of their health or the health of friends and relatives.

32. The claimant e-mailed Mr Brandie (JBp.155):

"*Hello, due to the increasing number of patients with Coronavirus and the recent case of the employee Jose Yanes with symptoms of the same, then the Muchacho staff have decided not to work anymore until the situation improves in the country and it is safe for our health to work, since this affects us directly by being exposed to contact with customers throughout the day.*

We feel the situation is not favourable to the business but we believe this will be the best solution for our well-being.

We hope that Muchacho will continue to have the strength to open up to the public after the situation improves."

33. Mr Brandie responded on the same date (JBp.156):-

"*Thanks for getting in touch and explaining that the staff no longer wish to work in Muchacho.*

What I need from every member of staff is an e-mail with their letter of resignation, individually, in English. This will ensure that everyone is clear about these intentions. I would expect everyone to continue to work until the end of the week to honour the current employment contract and allow the business to hire new staff.

I'm really sorry it has come to this, as you are all really good staff.

Can I also ask that this is done and completed by the end of the day."

34. The claimant responded:-

"*I'm sorry for the misunderstanding, but we all want to continue working in Muchacho when the situation improves, since right now one of the workers is doing self-isolation from today for having symptoms of the virus. We will not issue any letters of resignation. It is not our intention to leave Muchacho. We just don't feel safe working here as we're in direct contact with clients without preventative measures.*

The last message that has been sent is due to the question you asked us today. The Government gives us the option of staying in our house for security receiving 80% of our salary or the option of coming to work voluntarily, for this reason we have chosen to protect us from the situation at home. I think that due to the fact that one of the employees has the obvious symptoms, it would be reason(able) enough not to be able to open more to the public for a minimum of 14 days because all the employees were exposed to the disease.

I'm sorry that this situation has worsened, but we are very concerned about our health.

We will continue working until the end of the day as you have asked us, but will not do it from tomorrow."

35. Mr Brandie did not want the staff concerns to be articulated through the claimant. He responded (JBp.159):

"*Thank you for your more recent e-mail Yari, firstly, to confirm to everyone going forward I need a communication with your all individually, Yari I'm afraid, given the situation, you can only speak for yourself, in order for maintenance of HR records. I need communication with you all individually. From now on, I will not be replying all to your e-mail – this is confidentially for each of my employees. I would like to take this moment to thank you all for your hard work to date.*

I would like to make it clear and state, that as the director of Muchacho, I have been keeping abreast of the COVID-19 situation for some time, the COVID-19 epidemic and its effect is not changing daily. I have also been adhering to all government advice and guidelines from the outset.

As your employer, your health, wellbeing and future employment are of utmost priority to me. I have worked tirelessly to ensure that your are all working in a safe and environment together with trying to ensure that you will all remain in employment throughout this COVID-19 epidemic, I have been committed to that, even so much so, to date, I have not reduced anyone's hours.

To be clear, there are many protective and preventative measure in place for all employees – this week based on further government guidelines, I plan to put more protective measure in place.

On Friday, the government issued a statement that all restaurants and bars were to close, however the government, (you can read about it on the government website https//www.gov.scot/coronavirus-covid-19/) clearly stated that takeaways can remain open."

36. The claimant remained concerned about the Pandemic and the fact that Mr Brandie did not seem to take safety measures seriously. There was no effort to maintain social distancing or to enforce the wearing of masks or gloves. There was no additional cleaning of surfaces. The measures introduced were that he had asked that a chair should be put across the entrance of the premises and customers asked to order food from there and pay by debit card. On occasions the claimant witnessed customers being allowed into the shop and being allowed to pay in cash rather than by debit card. Mr Brandie advised the staff that it was important not to lose sales. He regarded the lockdown and the closure of restaurants as being a possible business opportunity.

37. In March there was also a visit from a Police Officer following a complaint. He checked whether people were eating in the restaurant.

38. In mid-late April 2020 someone from the Environmental Health department telephoned the premises and spoke to the claimant. She told the claimant that there had been an anonymous complaint that there were no security measures against COVID-19 being carried out. The terms of the call were reported to Mr Brandie who advised the claimant that only he should speak to the Environmental Health department and he would take all the calls in the future.

39. The claimant felt that she had no choice but to carry on working. She e-mailed Mr Brandie on 23 April confirming that she would continue working (JBp.165/166):-

"*Hello Lee,*

As you told me in the meeting, I am writing this email to put everything we talked about on the table.

Since November that Jenny left, I have been performing a lot of duties that I consider, to be fair, are not part of my duties. Such as trainings, being responsible of the shop, organization of the shop, events, also organizing staff (assigning duties to everybody that I feel they are needed), putting in place stock orders, or even putting rotas together sometimes.

Moreover, this month we have been insanely busy, like it never was before, and I have had to push myself on every sense to be able to deliver what the business requires to succeed. Knowing and taking into consideration the levels of work, and I appreciate that you have worried and have given me an incentive, which I also appreciate.

This era of uncertainty is being tuff for everybody. As you know, I have been taking the responsibility to try and communicate everything needed or everything that happens on the shop, so I have passed to you the concern of the rest of the staff, as per some of our conversations these weeks, their worries about the COVID19. This is something that completes to every single one of us that are part of this business.

In my humble opinion, I think due to all this extensive efforts that I have put into the company, and the tough times that are going through, I am being deserving of a raise. A job title promotion, pay raise and also some kind of incentive would be fair.

As I have mentioned before to you, there are hundreds of improvements that could be also put on the table for the business to be better, not only for us, but for yourself and also customers. And there are also a few "musts", that you, as an owner, should be aware of as they are law-obligated.

I have always worried about the staff, as we are meant to be a team. People that worry and care about each other no matter what the situation is. For this reason, they have trusted me and they always communicate to me everything they feel. In this case, I feel they are also working hard.

Another point that I would like to talk about is what I have mentioned about compensatory breaks.

As you should, I have assumed that you were aware about "compensatory weekly break payments", and to make sure that these monies are going to be effective for the next month's payment, which is for April (giving you some time for you to put everything in place).

As if a worker/employee works more than 14 days in a row with no whole-day breaks, they should get two (2) days off. If the person doesn't take these two (2) days, they should be payed along with the monthly payment.

In my case, I should get four (4) days worth of money, as I have been working non stop since the 12th of March until the 11th April. That makes 31 days working non stop without whole-day breaks.

Also taking into consideration that most of us are not taking any proper 30 minutes breaks at all most of the time, as the shop is too busy. I have to include and for you to emphasize this is Marsha and/or other members of the staff, that these breaks "must be uninterrupted", specially now that we are short-staffed and very busy, otherwise people won't be able to mentally cope if they are being called for duties they should know how to get them done, or other nonsensical reasons that have nothing to do with work.

Rests as per the gov.uk page:

"Weekly rest:

Workers have the right to either:

- *Uninterrupted 24h without any work each week.*
- *Uninterrupted 48h without any work each fortnight.*

Compensatory rest:

- *Workers might be entitled to 'compensatory rest' if they don't have the right to specific rest breaks. Compensatory rest breaks are the same length of time as the breaks (or part of it) that they have missed.*

A worker might be entitled to compensatory rest if:
- they're a shift worker and can't take daily or weekly rest breaks between ending one shift and starting another".

In my case, I couldn't take either "weekly rest breaks" and I should be getting paid for 4 days.

For the calculations,, it should be based on the hours worked that corresponding month: from the 22th of March till the 21st of April (payment period), I have done a total of 231,67 hours worked. Divided by 30 days (from the 22/03 till the 21/05) make a round average of 7,7 hours per day.
7,7h x 4 days = 30,80 hours I should get paid for at a rate of 8,72£.

Also a little note on that the payslips should be given to us as soon as they are produced by the accounting department. We all are still waiting on February's. Some people need these for benefits and/or council requirements.

Kind regards,
For you to consider,
Yaritza"

40. The claimant e-mailed later on 23 April indicating that she wasn't going to attend work as she wasn't feeling well. She wrote:

"*I have swollen throat, a lot of phlegm and headaches since very late last night.*

Just to remind you that we need to do enough sauces for the taco-boxes packing. We also need to finish putting the stamps on them, and to finish building the remaining cardboard boxes.

Don't forget to place the food order with King's Food.

Be patient with José and Mariana as they barely speak any English."

41. The claimant e-mailed Mr Brandie on 24 April (JBp.169):

"*I phoned NHS to see if I could get some advice over my symptoms and they've advised to take 7 days of self-isolation after assessing me through a video conference. My symptoms have worsened since yesterday.*

I am waiting on Monday to phone my G.P. to get a further assessment and try to confirm this. Meanwhile, they have advised me to let you know that I "might" have COVID-19. This was said by the nurse. Unfortunately due to this I won't be able to come back to work within 7 days."

42. Ms Clark acknowledged the email.

43. The claimant e-mailed again on 28 April (JBp.170):

"*Hello Lee,*

I called my GP yesterday as the NHS recommend me to tell you about my situation. The current situation is this:

- 23rd of April: I was sick with chest pain, headache, swollen throat and phlegms.
- 24th of April: I communicate my symptoms to the NHS trying to see what they recommend. They assessed me through a video call. The summary was that I could have COVID-19, so they tole me to stay at home for at least 7 days (I have an NHS isolation note) and communicate my asthma condition to the GP as I might be included in a high-risk group.
- 27th of April: I called my GP to assess the situation that I have. The GP told me that I am not in the highest risk group, but I must not work if the shop cannot maintain strict social distancing. I asked the Doctor to give me a note with my situation as a proof for you, but the note cost 30£ and the alternative was a medical record note with an insition written by the Doctor. I will attach a photo of these documents.

I am sorry to give you this communicated, but I could not work until Muchacho maintains strict social distances between employees inside the shop. I will be delighted to work whenever you need me, but respecting safety distances since my illness requires it for my safety at this moment.
I know that the situation is not easy for anyone, but I try to avoid anyone being harmed.
At this moment, my partner has a throat infection and a lot of coughing. They advised him to take 14 days of isolation as we are living together.

I have phoned Council and HMRC to see how can I get furloughed, and they also told me to communicate the situation I am on and ask you how I will be paid for my absence from work since I am concerned due to asthma.

Sorry for the inconvenience caused.

Regards
Yaritza"

44. In an attachment to the e-mail there was a note of a telephone conversation with a Dr. Alistair McEwan:

"*Boss looking for proof of condition – asthma. She is not in a shielding category but needs to maintain strict social distancing. Directed to NHS Inform and will give summary as proof of condition.*"

45. The claimant provided an isolation note from 23 April to 29 April.

46. On 21 April 2020, an employee Juan Yanez was placed in isolation for living with someone who manifested symptoms of COVID-19. The claimant acted as an intermediary between the workers and Mr. Brandie advising that he had to stay in self-isolation. The claimant also told the rest of the team I communicated this to the manager Marsha Clark and Mr. Brandie, in addition I also communicated it to the rest of the team. This annoyed Mr Brandie who told her that she shouldn't do that.

47. Mr Brandie did not immediately respond to the matters raised in the e-mails until he wrote to her on 30 April (JB173):

"*Firstly thanks for sending these e-mails and my apologies for not getting back to sooner……totally understand your position Yari and don't worry about your job. Will be here when you are ready. In terms of the social distancing I had a meeting (with) environmental health to speak about the shop processes. We've taken guidance from the Government and I've applied them as far as practicably possible, which they are ok with. In terms of the you still having money coming in to you. I'll go and speak to the accountants, but I believe that in the circumstances, it will be statutory sick pay (SSP) let me see what they say first.*"

48. The claimant did not hear anything further for a period. She understood from contact with the other Spanish speaking staff that new non-Spanish speaking staff had been hired by Mr Brandie. She was told by existing staff that there were difficulties with the new staff and that social distancing and basic hygiene measures were not being used.

49. The claimant messaged Mr Brandie on 8 May (JB 175):

"*Lee I would like to go to Muchacho just one busy day because I received bad feedbacks regarding the new people like no gloves wore, no cleaning, no hand washed,….those important things. I just want to train a bit this kind of things, so there is not stress the people who were in Muchacho a bit longer and knows this. I know in busy day is difficult to train, but it is the best day to see how the new people manage in the shop and what they do the things wrong.*
What do you think?"

50. The claimant was concerned that she was unable to work and yet had not been furloughed. She had not been told what precise measures had been put in place to protect staff from Covid that might allow her to consider returning to work and had been told by staff that routine measures such as social distancing, handwashing and wearing gloves were not being used. She contacted HMRC for advice about the furlough scheme. She was advised that employers should pay sick pay whilst isolating but that she could then be furloughed. She wrote:

"*I have tried to speak to my employer but he is not responding since about a month (JBp.178).*"

51. The claimant e-mailed Mr Brandie on 28 May (JBp.180):

"*Hello Lee,*

I think I have received a wrong payment. I received an amount of £304.66, but I am not sure where the calculation came from. I have checked with the HMRC about what should I received as I am not working now. They were so clear with my payroll and said that I should receive a sick pay between the 23rd of April until 29th of April (those were my self-isolation days from NHS) and them furlough from 30th of April as I am not able to work since my asthma condition because Muchacho is a small workplace and could not respect the distance measures. I have added a part of the conversation I had with the HMRC today.

- *Yaritza: 3:05PM Just to be clear, I should be furloughed after my isolation? What is JRS?*
- *Krystal: 3:06PM Job Retention Scheme… is the 80% pay from the Government employees receive*
- *Krystal: 3:07PM yes, you should be furloughed if no longer isolating but still unable to work.*
- *Yaritza: 3:09PM Should this be put together by my employer?*
- *Krystal: 3:09PM Yes*

I am worried about my payment because that is not the amount that I should get. In my last email (month ago), I was asking about how Muchacho is going to pay me regarding that you is going to check my situation with your accountant and you were sure that I should get SSP not furlough (month ago). I have not received any email from you confirmed any of those.

I would like you to check my May payment as I am sure it is wrong. I am not going to take that money just in case I have to refund it. Also, I would like to have Mays payslips with the wrong and the corrected payment and my payslips from February and April.
As this situation is an important issue, I would like you to check this as soon is possible, please."

52. Mr Brandie e-mailed on 2 June (JBp.181):

"*Thanks very much for your note.*

I'm afraid you are not on Furlough, and you've only stated that you were self-isolating for 2 weeks. The shop is currently open for business and we are continuing to trade.

I will send this month's payslip as soon as I can.

If you have any further queries, please do not hesitate to contact me."

53. The claimant responded on 2 June (JBp.182):

"*Hello,*

Thanks for you reply.

As I told in my last email, I should be on Furlough. I was asking HMRC and I have all the conversation which said that I should have Furlough since the 30th of April. Also, a Doctor which I had a consultation recently asking me why I have not received Furlough because my situation now. Other evidence is in your email on the 23rd of March in which you added a bbc link with the explication of Furlough.

I think is confusing the fact I am at home now, but I am not doing self-isolation. I am at home because the Doctor told me to stay in it as the local was not to follow the PPEs and I have asthma. It was not my decision, so I am not self-isolated.

I was having the same type of doubt as you: if the local is open can I have Furlough?, if the doctor told me to stay at home I am doing self-isolation?, If I was sick for 1 week but them I have to return to work but the Doctor tome me to do not

because is a risk for me…. I contacted HMRC to resolve them and now I sure that my payment is wrong. I have to receive a SSP for one week because that were my isolation days by NHS and you can see them in the NHS note that I sent you in previus emails (23rd until 29th of April), and them Furlough since 30th as I am not self-isolated any more, but I am not able to work (even if the local stil open).

I do not understand well if there is an issue for you to apply Furlough for my self, but the thing is the payment is wrong (again I have not taken that money just in case). Even if I have to receive a sick pay because you said I am self-isolated to the Government, it should be since the 23rd of April to the 21st of May and those are four weeks not two.

I have very clear what I should receive after the conversation with HMRC and if I can, I will recommend you to inform your self with HMRC and how we can solve this important issue as the amount I received is not the correct.

Have you already applied for Furlough?"

54. Mr Brandie made no effort to explain to the claimant any steps he had taken to protect staff at work and what advice he had received. He did not explain why he thought that it might be now appropriate for the claimant to return to work. He was annoyed that she had suggested that she and other staff should be furloughed. He did not want her at the premises to witness what precautions he had put in place in case she made trouble about them and the lack of training of the new staff. He had decided not to rota her for work. He did not tell her this or why he could not maintain social distancing or had not put in place other safety measures. He responded on 3 June (JBp183):

"*For the avoidance of doubt, you have NOT been furloughed, and it's not the intention of the business to furlough you in the future.*

I can sympathise with your individual situation, and hope you get through these stressful times."

55. The claimant was left with no income. Her financial position was desperate. She applied for and received her accrued holiday pay from the respondent.

56. The claimant was still unsure what steps the respondent had actually put in place to protect workers from Corona Virus. She was sceptical that Mr Brandie he would

put in place adequate measures or train staff in them or enforce them. She was disappointed that he would not furlough her and did not understand why. She could not understand why if he was not prepared to furlough her he would not allow her to come back and make sure the staff were properly trained and the anti- Covid measures working properly. She felt she was in an impossible position. She decided to wait and see if he would come back to her and ask her to train staff or to work. She decided to wait to see if he either put her on the rota for July or asked her to return. The next rota became available in early July.

57. The claimant was not put on the rota and heard mothing further from her employer. She considered her position. The changes to the breaks without notice and the deductions made had impacted on her confidence in her employer. She had been upset that he had not responded to her written complaints. The claimant believed that she was deliberately not being put on the rota nor was she being told how her employer could protect her from the virus whilst at work. She could not understand the reason why she was not furloughed given these circumstances. In these circumstances she concluded that she had lost trust in Mr Brandie and decided to resign by giving notice which she did by email dated 13 July (JB p203) with effect from the 27 July. At this point she still hoped to be rota's to work but had obtained alternative part time employment in case she was not rota'd to work by the respondent. The claimant was sent her P45 on the 19 August.

58. The claimant managed to obtain part time work at a restaurant called La Lombarda on the 13 July. Her first wage was £216 paid on 5 August. She later received £362.66 and £475.24 on 7 and 28 September respectively. In the autumn the claimant returned to full time study and did not apply to other businesses to work.

Witnesses

59. The claimant is an intelligent and articulate young person who has a strong sense of what she believes is right and wrong. We found her to be a truthful witness and

generally both credible and mostly reliable. We were conscious that she was not a lawyer and although she had made considerable efforts to research her employment rights it would be fair to say that she did not have a very developed understanding of the law in relation to her claims and what she required to prove.

60. Mr Zalba was a clear and truthful witness and both credible and reliable in relation to the matters to which he spoke.

61. We found Ms Bufalino a straightforward witness who was generally credible and reliable. She had no difficulty with Ms Clark who she thought to be professional in her approach. She explained that the Spanish speakers who stayed on after new English speaking staff were recruited knew the tasks to be done and cooperated with each other to do them whereas the new staff were unsure of the tasks and did not cooperate in the same way. This had led to the resentment that the claimant had become aware of.

62. We did not find Mr Brandie a persuasive witness. His evidence was often self-serving and inconsistent. At one point indicating how much he valued his staff but unable to explain how this sat with him asking them all to resign and mischaracterising their position as being that they no longer wanted to be employees of the business. It was clear that he wanted to prevent the claimant speaking for the other staff or to be aware of what measures he had actually put in place to allow the business to operate safely. He said in his evidence that the claimant was not liaising with staff for him and had never been asked to do this but later his evidence he indicated that she did in fact have this role. He attempted to minimise her role in the business as being just an ordinary worker. That was patently untrue.

63. We concluded that the claimant was seen by him as unwelcome for raising concerns about Ms Clark, changes to the treatment of breaks and finally about her

concerns around Covid precautions, her wish to be furloughed and problems with new staff. It was clear that he deliberately disengaged from the claimant in about early May. He did not furlough her as she requested, neither did he rota her for work or tell her about the safety precautions he claims he had put in place following Government and local authority advice. He was aware that the claimant was being left with no income.

Submissions

64. The Tribunal allowed an exchange of written submissions. We will summarise these but do not intend to rehearse them in detail.

Claimant's Submissions

65. Ms Tome concentrated on the background evidence to her employment. As she put it *the '' …series of aggravating and labour-related unacceptable circumstances that I witnessed and experienced when I worked at Muchacho''* She attributed the failure to promote her or increase her salary to ''discriminatory treatment''. She made reference to Ms Clarke's behaviour towards her and other staff and the failure of Mr Brandie to act. She mentions indirect discrimination caused by a failure to put in place social distancing measures and hygiene necessary for her asthmatic condition after lockdown.

66. The claimant relied on what she regarded as a breach of contract and unauthorised deductions relating to the change in the way breaks were dealt with introduced by Ms Clark. She commented on what she saw as the more favourable treatment towards English speaking staff and her employers putting the safety of workers and the public at risk by allowing poor hygiene during food handling during lockdown.

67. The claimant argued that there had been unlawful deductions made without prior notice despite the clear terms of her contract. This had happened without any notice or consultation. Mr Brandie she said claimed to have transmitted these changes through emails and meetings in December 2019, but there is no evidence of such emails had been produced. She submitted that an employee has the right not to suffer unauthorised deductions. There was also she complained a rounding down of hours worked in the period 23 July 2019 to 21 January 2020 through the Deputy app. This would, she argued, have been done manually by the employer. Mr Brandie repeatedly stated that the working hours and breaks were calculated automatically. The rotas showed that on two occasions thirty minutes had been deducted when less than six hours had been worked and where there would have been no break taken.

68. The claimant argued that she had been harassed following her bringing to Ms Clarke's attention the changes she had made to the breaks.

69. The claimant then turned to the period of the Covid Pandemic. She had a morning 'chat' to discuss Mr Brandie's plans for furloughing the staff. He thought that the staff would want to continue working and only a few would want to be in Furlough. But all the workers (including herself) were afraid of the situation that was happening and opted for Furlough. Mr Brandie was informed about the unanimous position of staff his response was to insist they resign. The claimant referred to her evidence about the visit from the Police and the call from the Environmental Health Department.

70. At the end of March 2020, a policeman came into the premises regarding someone who claimed that no security measures were being implemented at Muchacho. She suggested that this could be due to the fact

that Mr Brandie allowed the occasional entry of costumers and allowed cash payments. The policeman spoke to the claimant since she was the person in charge at that time in the store. This was reported to Mr. Brandie. The claimant also referred to her evidence that the respondent had been contacted in April by the environmental health department.

71. The claimant submitted that telling Mr Brandie that Mr Yanez had to self-isolate was as Protected Disclosure under Public Interest Disclosure Act.

72. The claimant then turned to look at the events around furlough and the way this was dealt with by Mr Brandie. He had said in evidence that he needed the claimant at work. She had given him the self- isolation note and the evidence that she could not return until proper measures were put in place. There were she suggested no security measures implemented and that is why despite him saying she was needed at work she was not added to the rotas as would normally have occurred after an absence period.

73. The claimant said that the respondent had put the claimant at a disadvantage by not allowing her to return to work by not implementing distancing measures. There was no cleaning regime put in place. The claimant offered to come in and do training but this was refused. Mr Brandie argued that he was not aware that these measures were not being respected. In the email of 30 April 2020 where Mr. Brandie said that he would contact her again, after speaking with his accountants, to inform me if SSP or Furlough would be appropriate. A response was never received.

74. The claimant explained that she was waiting to see if Mr Brandie added her to the rotas when the situation with the COVID-19 began to improve,

but this did not happen. She finally resigned because had to find work and knew that she would not be rota's by the respondent.

Respondent's Submissions

75. Ms Gray first of all reminded the Tribunal about the statutory basis for the claim of unfair dismissal and referred the Tribunal to **Western Excavating (ECC) v Sharp** (1978) ICR and to the Judgment of Lord Denning at page 226. Ms Gray then examined the witness statement of the claimant and her assertion that she had resigned because of a ''bunch of things'' She had agreed that by February she felt unwanted. The solicitor then examined three categories of behaviour the treatment of the claimant by Ms Clark, the failure to promote her, and the refusal to furlough her. To succeed the claimant had to show a significant breach of contract. Ms Gray referred to the case **Abbycars (West Horndon) Ltd –v- Mr M Ford** UKEAT/0472/07/DA and the statement at para 35 by the then President Ellias.H.H.J. "*It follows that once a repudiatory breach is established, if the employee leaves then even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon*."

76. The Tribunal she submitted also had to consider the 'last straw' This concept was considered in the case of **Kaur-v-Leeds Teaching Hospitals NHS Trust** [2019] I.C.R. The Tribunal had to consider whether the claimant affirmed her contract after the refusal on 3 June to furlough her. The claimant was aware at the time of repeating her request for furlough on 2 June 2020 that the decision to place an employee on furlough must be achieved through an agreement between the employer and the employee, as she was advised through an HMRC WebChat on 28 May 2020 and part of which was recounted to the Tribunal on 17 February. In repeating her request, the claimant indicated by emails dated 28 May 2020 and 2 June 2020, both of which excerpts were recounted to the Tribunal on 22 February, that she had a *right*

to be placed on furlough. This was contrary to the advice provided by the HMRC adviser. The claimant conceded on 22 February that she had no right to be furloughed but rather that she *could* have been furloughed. Mr Brandie confirmed to the Tribunal that on 20 May the business operated the furlough scheme on a case by case basis depending on a dynamic risk assessment of staff on a high, medium or low basis. In response to a panel question on 26 May, Mr Brandie explained that staff had been assessed considering 1) risk to life, 2) risk to health and 3) where staff may be exposed. The claimant's circumstances were considered by Mr Brandie but she was not considered to be high risk. She was not therefore placed on furlough. Mr Brandie explained on 20 May, he needed the claimant's experience back at work, and the GP note had confirmed that the claimant was not shielding so he did not place the claimant on furlough.

77. The claimant asserts she could not return to work as insufficient safety measures were implemented by the respondent in respect of the covid pandemic. Proper measures were taken as the evidence of Mr Zalba showed. The respondent provided masks although not surgical ones and hand sanitizer was made available as well. Masks were worn to according to personal choice and Mr Brandie explained that in addition to masks, limited time use aprons were deployed and the preparation area spread into the closed shop floor. Although not formally listed to the claimant, Mr Brandie advised the claimant by email on 30 April 2020 that the business had implemented covid safety measures as far as was reasonably practicable. Mr Brandie explained he had been in regular contact with the Environmental Health Officers, although they were not conducting site visits, to implement the changing guidance. It is the Respondent's position therefore that the explicit refusal to place the Claimant on furlough was not a repudiatory breach of contract but exercising the employer's discretion as available at the time.

76. In the event, she submitted, that the Tribunal concluded otherwise, the claimant confirmed to the Tribunal on 22 February that, on 25 June 2020, and in the knowledge of the respondent's final, explicit, refusal to place her on furlough and her not having been unilaterally returned by the respondent to the rotas she requested payment of her holiday pay and for those accrued holiday hours to be paid in the June pay-run. This request was made a full three weeks following the respondent's final furlough refusal (3 June 2020) and seven weeks following the Claimant's indication that she would be willing to return to work for "one busy day" to check the training of the new staff (8 May 2020. It is the respondent's position that said request for the payment of contractual holiday pay during employment constituted an act of affirmation.

77. Ms Gray referred the Tribunal to the case of **W.E.Cox Toner (International) Ltd –v-Crook [1981] I.C.R. 823** at page 828 where Browne-Wilkinson J. explains at the end of page 828:

> *"Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract.*"

78. The claimant made an explicit request to be paid her holiday pay during a month where she acknowledged she would not otherwise be entitled to any income from the respondent. This is an act of affirmation and brings the Tribunal's consideration of the principles summarised in ***Kaur*** to an end at question 2. The Tribunal is not therefore required to look beyond the alleged "last straw" event of the explicit furlough refusal on 3 June 2020 to consider whether any earlier conduct may have constituted, as a whole, a repudiatory breach of contract.

79. For further support of the proposition that expecting payment in terms of the contract is an act of affirmation, the Tribunal may consider the statement of Mr Justice Silber in the case of ***Mrs A Fereday- v-South Staffordshire NHS Primary Care Trust*** UKEAT/0513/10/ZT, where he states at para 44:

> "*…although affirmation is needed, it can be implied by prolonged delay and/or if the innocent party calls on the guilty party for further performance of the contract. That is precisely what happened here. The Employment Tribunal was quite entitled to take the prolonged delay of nearly six weeks between the grievance decision on 13 February 2009 and the Claimant's resignation sent on 24 March 2009 in the light of the earlier history as an implied affirmation, bearing in mind that the Claimant was expecting or requiring the Respondents (who were employers) to perform their part of the contract of employment by paying her sick pay."*

80. In summary, the claimant affirmed the contract of employment by no later than 25 June 2020 when she requested the respondent's continued performance.

Discussion and Decision

Claims for Discrimination

81. The Equality Act 2010 protects employees from discrimination relating to a 'protected characteristic' or perceived characteristic. Race is a protected characteristic in terms of Section 4 of the Act. Section 13(1) provides that an employer will directly discriminate against a person if they treat them less favourably that they would treat others and the difference in treatment is because of the protected characteristic.

82. It has been said that discrimination is rarely obvious or blatant and where facts are in dispute and the law has developed what is known as the burden of proof to determine who has the burden of proving their position. The statutory basis for this is contained in Section 136 of the Act. The first stage is for the claimant to the prove a '*prima facie*' case. The case of ***Igen Ltd v Wong (2005)*** ICR 931 CA

contains guidance on how the Section is applied. The claimant in her submissions summarised her claims:

"(a) Discriminatory treatment by race by Mr Brandie: I asked for a raise in salary and position for the tasks I was already carrying out and these were given to Miss Clark instead. In addition, Mr. Brandie was in a vicarious liability situation between Marsha and myself in December 2019 which he took no action to protect myself.

(b) Indirect discrimination: I could not work because distancing measures and hygiene necessary for my asthmatic condition were not put in place during first lockdown COVID-19.

(c) As well as I, other workers suffered intimidation and distress from Miss Clark and the necessary procedures were not taken after having formally communicated it to Mr Brandie: Fail to comply with ACAS Code of Procedure.

(d) Breach of contract and unauthorised deductions: change in the breaks section of the contract without prior notice, rounding off the hours and therefore receiving less than the National Minimum Wage, carrying out intentional wrongdoing, and not complying with the disciplinary procedures.

(e) Mister Brandie had a favourable treatment towards English-speaking workers as has been verified with the testimonies presented.

(f) Putting the safety of workers and the public at risk: allowing poor hygiene during food handling during the COVID-19 lockdown could lead to the easy spread of the virus.

(g) Absence of payment: for 3 months I did not receive remuneration/ income and consequently I could not meet my basic needs such as buying food, paying electricity."

83. The points made by the claimant at (f) and (g) we will deal with later as they cannot be characterised as discrimination but form part of the background to the claimant's resignation.

84. We first of all considered the claims being made for direct race discrimination. The conclusion we reached was that although there were some aspects of the evidence

that gave rise to some concern, such as Mr being mocked in the present of Mr Brandie who did not intervene, the was nothing to suggest that the claimant had been discriminated against on the grounds of her race or nationality. She had not been party to the events involving Mr Yanez.

85. The claimant pointed to Ms Clark's attitude of superiority but could not give examples of this that had any discriminatory context. Telling the claimant to put up with the changes in the treatment of her breaks or get another job was blunt and unreasonable but not, without more, enough to show some racial motive. Ms Buffalino's evidence that she did not encounter any race discrimination and that Ms Clarke in her experience was as she described it professional. The claimant also complained that the new staff brought in by Mr Brandie were allowed to leave the more menial tasks to the Spanish speakers. This was perhaps explained by the fact that the Spanish speaking staff were more experienced, cooperated with each other and knew what takes had to be done as opposed to the new workers. In any event there was simply not enough evidence of discriminatory behaviour.

86. The claimant was unable to point to anything which might indicate a discriminatory motive on the part of her employers and in addition the failure as she saw it to promote her was even if motivated by her nationality was time barred. We also bore in mind that the previously appointed manager was also a Spanish speaker although she seems to have come from a South American country. The claimant was unable to demonstrate facts from which we could infer discrimination.

87. The claim for indirect discrimination appears to be based on the claimant having a disability. That was not one of the claims before us. The claimant had in any event not demonstrated that she was disabled in terms of the Equality Act although we fully accepted that she had asthma which she took regular treatment for and which was a serious enough underlying condition for her GP to have concerns about if she was exposed to the virus.

Unlawful deductions/Breach of contract

88. We had some sympathy with the claimant over what had occurred in relation to the treatment of breaks. The claimant was right to protest that the changes should have been highlighted and discussed with staff (we accepted that they had not) rather than discovered when wage slips were issued. The respondent produced no emails or documents corroborating his position that the matter was fully discussed with staff. The claimant is correct that her contract provides for breaks. Unfortunately, she was not able to demonstrate when/what money was actually unlawfully deducted except perhaps on two occasions. These claims were considerably out of time. We understood that the real underlying issue for her was that she was unable to take breaks on certain occasions and that the routine deduction to reflect unpaid time on breaks was therefore unlawful when made. Unfortunately, as noted the actual days on which this occurred were not identified leaving the claimant unbale to prove what sums she was seeking by way of unlawful deductions or breach of contract. Another complication was that the inability to take breaks because of the shop was busy appeared to be an irregular occurrence and arguably not part of a series of deductions meaning that claims older than three months would be time barred.

Unfair Dismissal

89. An employee can, in certain circumstances terminate, the employment contract and claim what is referred to as 'constructive' dismissal.

The statutory basis for this is set out in Section 95 of the Employment Rights Act 1996 (ERA) as follows:

"***95 Circumstances in which an employee is dismissed.***

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)…, only if)—

(a)…

(b) …

(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."

In cases concerning constructive dismissal it is clear that the focus should be on the employer's actions and the reasons for those actions rather than the employee's response to what has happened.

90. In the case of **Garner v Grange Furnishing Ltd.** [1977] IRLR 206, the EAT observed:

"… the conduct of both parties has to be looked at when assessing whether or not the employer's conduct was such that the employee is entitled to … say that he was forced to go... In our judgment, in which, once the [employment] tribunal reasonably and properly concludes that the relative conduct of both, and particularly of course the conduct of the employer, is such that there was a constructive dismissal, the choice of time, or the choice of incident, may be either completely or largely irrelevant when it comes to the degree of compensation. Put another way, once the very difficult assessment is arrived at in favour of the employee arising out of some trivial incident, or the last straw, it seems to us logical that one is forced back then, so far as the contribution is concerned, to look at the conduct of the employee, not with reference to the triviality of the final incident, but over the whole period. Just as the employer may be found liable in a constructive dismissal situation as a result of conduct over a period of time, so it seems to us that the more normal and perhaps more sensible way of assessing contribution should be to pay very little attention to the finality of the situation, but to look at it much more broadly, over the whole period of time."

91. A constructive dismissal case is determined by applying the law of contract. That was determined in the well-known case of **Western Excavating (ECC) Ltd v Sharp** [1978] IRLR 27. It has recently been re-asserted in the case **Bournemouth University Higher Education Corporation v Buckland** [2010] IRLR 445. What causes there to be a constructive dismissal is not conduct of the employee but conduct of the employer which amounts to the employer abandoning the contract (the modern test or expression of 'fundamental breach'). That is conduct which is,

centrally, that of the employer. Where the conduct said to be a fundamental breach in that sense is a breach of the implied term of trust and confidence, then not only will it be repudiatory, but by definition there will be no reasonable or proper cause for the employer's behaviour. That is because the accepted formulation of the test for that which amounts to the implied term is that an employer must not conduct itself in such a way as is calculated or likely to destroy or damage the relationship of trust and confidence between employer and employee without reasonable or proper cause (applying the test in **Mahmud v BCCI** 1998 AC 20).

92. The present case was pled as a final straw case. Mrs Gray referred the Tribunal to the case of **Kaur v Leeds Teaching Hospitals NHS Trust** (2018) EWCA Civ 978 CA. That case is authority for the proposition that a final straw can revive repudiatory acts that would otherwise have been said to have been waived by the employee. The 'final straw' itself may be relatively insignificant and may not always be unreasonable or 'blameworthy'. However, the last incident cannot be utterly trivial or innocuous, and it must contribute something to the breach. Where an employee 'soldiers on' when the employer's behaviour is capable of amounting to a repudiatory breach then employee will have affirmed the contract. But the Court of Appeal confirmed that in a case where cumulative breaches are relied upon, further contributory acts allow an employee to rely on the whole series of acts, notwithstanding any earlier affirmation.

93. The claimant eventually resigned and her evidence was that there had been a number of events ''bunch of things'' that caused her to resign. The first in a series of events that caused the claimant concern took place in December and related to the way in which Ms Clark spoke to the claimant when she raised the issue of breaks and Mr Brandie's failure as she saw it to promote her either to some team leader role or as manager. His evidence varied between praising the claimant for her initiative and acting as an intermediary with Spanish speaking staff and how she was very nearly but not quite ready or a more senior role to his evidence downplaying her involvement, denting she acted as intermediary and characterising her role as no more than other counter staff. There was no

obligation on Mr Brandie to promote the claimant. No doubt because she is a capable person she regularly used her initiative to assist the business and to carry out additional duties. However, we concluded that she was unable to rely on his failure to promote her as being an event undermining the implied term.

94. Where we accepted that the claimant was on stronger ground was the respondent's failure to intervene in relation to the changes to treatment of breaks. This should have been discussed with staff before being implemented and staff's concerns, including those of the claimant, about being unable to actually take breaks addressed. This was an important matter especially for staff working part time on relatively low wages. The comments attributed to Ms Clarke that the company was entitled to do what it wanted is not the stance of a reasonable employer in the face of employees contractually agreed right to breaks. There is also the failure by Mr Brandie to address the claimant's written grievance. However, the respondents take the position that even if these events did erode the underlying implied term of trust and confidence that the claimant subsequently affirmed her contract by not resigning in December. If these had been the only matters the claimant could rely on then we would have accepted that submission. However, matters did not lie there.

95. The events that finally led to the claimant resigning related to the period after the beginning of the Corona Virus Pandemic. The essential background was not in dispute and is within judicial knowledge. We had to bear in mind that this was a particularly difficult period and the understanding of the virus at a very early stage. It was clear, however, that the matter was one of considerable seriousness which had led to an unprecedented national lockdown being imposed. The Government indicated in mid-March that non-essential travel and contact should cease. On the 23 March people were ordered to stay at home. Just before that order support was announced for business including the 'furlough' scheme. Lockdown was extended in mid- April.

96. We do not accept that Mr Brandie decided who went on furlough on the basis of the scheme he says he implemented. We do not believe there was, as he said, a dynamic risk assessment. We reject his evidence on these matters for a number of reasons. Firstly, there was no consultation or dialogue with staff setting out the alleged categories he intended using or information gathering about their own circumstances. There appears to be no contemporaneous documentation corroborating his position. We formed the view that he saw the lockdown as a business opportunity and he did not want to lose experienced staff nor be involved in furloughing staff (some of the cost of which he would have to bear) if he could avoid it. If he had such a scheme in mind it then he would have communicated his reasoning to the claimant who was left with a blunt refusal to furlough her and no explanation why given the concerns expressed by her GP.

97. The issue of affirmation was raised. There is no fixed time within which an employee can choose to resign following a repudiatory breach and the matter is fact sensitive. In many cases the employee remains at work drawing a salary while taking a reasonable period to decide how to resign. The claimant did not latterly receive any wages but asked for holiday pay in June. This was sought by her because of her desperate financial position. Even if we had regarded this as unequivocal affirmation of the contract it occurred before the failure to rota the claimant in July which we regarded as the final straw.

98. There was in this case an opportunity for the employer to remedy the breach by advising the claimant specifically what measures he had put in place including appropriate training which concerned her and whether in the light of these she could safely return to work perhaps after discussing the matter with her GP. The claimant was waiting to hear from the respondent during this period in effect to remedy the breach. The final straw as she saw it was the issue in late June or early July of the rota which neither contained her name nor by that point had she been told what measures had been put in place to allow her to return. That last straw

was in our view a repudiatory. As such it revived the earlier acts that we have set out above that undermined the implied term.

99. We do not hold that this act, asking to be paid accrued holiday pay, in these particular circumstances amounts to affirmation. The claimant resigned in essence because she could wait no longer to obtain work in a situation where the employer was aware of her difficulties but wholly unwilling to reassure her she could return to work safely. Once the July rota was published with contact from the respondent she was aware that she was facing months of being an employee but being unable to work and earn and income. Our conclusions, as we have set out above, was that the claimant had irritated Mr Brandie both advocating her rights and the rights of her colleagues and had made herself a nuisance to him when he did not want any scrutiny of the steps he had actually taken or their implementation.

Remedy

100. The claimant lodged a Schedule of Loss (JBp73/74). The basic award was not contentious in its calculation. The claimant completed two full years of work and her final average gross pay was £299.91. This means that she would be entitled to an award of £599.82. She would be entitled to £500 for loss of statutory rights. The claimant received £350 from the Scottish Welfare Fund. We understand that this for both her and her partner. The benefit is not recoupable. Assuming that the claimant would have returned to the same hours, there was evidence that the take-away was busier than it had been before, she would lose £299.91 per week. The claimant applied for and received a grant for her study and appears to have made the decision not to apply for other better paid work. We accept that this would have been difficult given the economic situation and with lockdown. There is a strong argument that she failed to mitigate her loss by not applying for other work but in the circumstances we think that a broad approach is merited. It would have taken some time to obtain other better paid work given the Tribunal's knowledge of the

employment situation here and the fact that there were some local lockdowns in Aberdeen that affected the local economy adversely. Aberdeen returned to lockdown on the 5 August 2020. We also bear in mind that the claimant had to take care in obtaining employment that had suitable Covid precautions in place. We also bear in mind that she ultimately decided not to seek work during the last year of her course. In these circumstances we hold it would be just and equitable to set the compensatory period as three months from her resignation. This makes her loss £2545.02 (£299.91 X 12 less £216, £362.66, £475.24) earned at La Lombarda.

101. The total monetary award amounts to £3644.84 (£599.82 +£500+£2545.02).

Employment Judge: J M Hendry
Date of Judgement: 25 August 2022
Date sent to Parties: 29 August 2022