EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss T Foreman	**v**	(1) Mr Harneil Bains; and (2) My Plaice Gorleston Limited

Heard at: Norwich **On:** 2 and 3 November 2023

Before: Employment Judge M Warren (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Ms S Ismail, Counsel

RESERVED JUDGMENT

1. The Claimant was not employed by and her claims against, the First Respondent, fail and are dismissed.

2. The Claimant's claim against the Second Respondent of unfair dismissal and in breach of contract fail and are dismissed.

3. The Claimant's claim against the Second Respondent for holiday pay pursuant to the Working Time Regulations1998 succeeds. The Second Respondent shall pay the Claimant without deduction, taxable in the hands of the Claimant, **£4,777.50**.

REASONS

Background

1. Miss Foreman was employed by the Respondent, (which owns and runs a fish and chip shop) as a Counter Assistant between 13 January 2014 and 21 November 2022. After Early Conciliation between 11 November and 19 December 2022, she issued these proceedings claiming constructive unfair dismissal and holiday pay on 19 December 2022.

2. There was a Case Management Hearing before Employment Judge Graham on 28 June 2023. Originally, Miss Foreman named as her

employer, Mr Bains. At the Preliminary Hearing, Employment Judge Graham added My Plaice Gorleston Limited as a Second Respondent. Employment Judge Graham listed this case for hearing and made Case Management Orders.

The Issues

3. At the Preliminary Hearing on 28 June 2023, after discussion with Miss Foreman, Employment Judge Graham identified the issues in this case as set out, (by way of cutting and pasting) below.

Employer

1. Who was the Claimant's employer? The Claimant says that it was Neil Bains up to some point in 2017 and then it became My Plaice Gorleston Limited as per her payslips. The Respondent says that the Claimant worked illegally and was paid cash in hand without statutory deductions for many years and that My Plaice Gorleston Limited became her employer on an unspecified date in December 2018.

Illegality

2. Was there an illegal contract? The Respondent says that the Claimant was employed illegally up to 2018. The alleged illegality is said to be the failure to pay the Claimant subject to statutory deductions (also known as PAYE).

Unfair dismissal

3. Was the Claimant dismissed?

    3.1.1 Did the Respondents do the following things:

        3.1.1.1 Make personal comments about the Claimant's weight and personal life throughout the last 4 to 5 years of her employment?

        3.1.1.2 Go onto the Claimant's Facebook page during November 2021 to obtain evidence and following which then accuse her of going to her sister's birthday party on a non working day (a Sunday) after she had called in sick for work?

        3.1.1.3 Issue the Claimant with a final written warning without giving her two verbal warnings first for her attendance?

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

        3.1.2.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the

trust and confidence between the Claimant and the Respondent; and

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

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

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

3.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal?

3.3 Was it a potentially fair reason?

3.4 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

Remedy for unfair dismissal

4. The Claimant does not wish to be reinstated or reengaged by the Respondents. If there is a compensatory award, how much should it be? The Tribunal will decide:

4.1.1 What financial losses has the dismissal caused the Claimant?
4.1.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
4.1.3 If not, for what period of loss should the Claimant be compensated?
4.1.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
4.1.5 If so, should the Claimant's compensation be reduced? By how much?
4.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
4.1.7 Did the Respondent or the Claimant unreasonably fail to comply with it?
4.1.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
4.1.9 If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
4.1.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
4.1.11 Does the statutory cap of fifty-two weeks' pay apply?
4.1.12 Is the Claimant entitled to compensation for loss of statutory rights? If so, how much?

4.2 What basic award is payable to the Claimant, if any?

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

5. **Wrongful dismissal / Notice pay**

5.1 What was the Claimant's notice period?

5.2 Was the Claimant paid for that notice period?

5.3 If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

6. **Holiday Pay (Working Time Regulations 1998)**

6.1 Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended? The Claimant says that she was owed 9 years of holiday pay but the Respondent only paid the equivalent of one's year holiday in December 2022 after she resigned and had filed in her ET1. The Claimant now says that she is seeking 8 years of holiday pay.

7. **Unauthorised deductions from wages**

7.1 Did the Respondent make unauthorised deductions from the Claimant's wages by not paying her holiday pay? If so how much was deducted?

7.2 Do s.23(4A) and s. 23(4B) Employment Rights Act 1996 prevent the Claimant from seeking more than two years' worth of deductions from her pay?

7.3 How much is the Claimant owed?

Evidence

4. I had before me a witness statement for Miss Foreman and a further statement from her partner, Mr Waters. For the Respondents, I had witness statements from Mr Bains and from two former colleagues of Miss Foreman, (neither still employed by the Respondents) Mr Cockerell and Mr Duffy. I read those statements before hearing evidence from each of the witnesses.

5. I also had before me a properly paginated and indexed paper bundle originally running to page 121.

6. At the start of the hearing, the Respondents produced screen shots of a series of WhatsApp messages passing between Miss Foreman and Mr Cockerell between 5 and 21 November 2022, which were added to the Bundle at pages 122 - 129. These were served on Miss Foreman the day

before the hearing started. The explanation for their late production was that in conversation between Mr Bains and Mr Cockerell a couple of days ago, Mr Cockerell revealed that he had WhatsApp messages with the Claimant at around about the time of her resignation, which discussed the reasons for her resignation. The existence of these messages had not been known by the Respondents until then. On reviewing the messages, I could see that they were relevant and that potentially, their content could assist either party. Having regard to the overriding objective and the balance of prejudice to the parties, (I saw no prejudice to either side) I decided to allow that additional evidence.

7. Before hearing evidence, I read those documents in the Bundle to which I was referred in the witness statements.

The Law

Holiday Pay

8. The relevant law is contained in the Working Time Regulations 1998.

9. The Working Time Regulations 1998, (WTR) include provision for workers statutory entitlement to minimum periods of paid holiday: under regulation 13, pursuant to EU Directive 2003/88 article 7, four weeks, (20 days for a full time worker) and under regulation 13A, an additional 1.6 weeks, (8 days for a full time worker, equivalent to the 8 public holidays of England and Wales) which is not derived from European law.

10. Regulation 13(9)(a) provides that the 20 days leave must be taken in the leave year in which it accrues due. That does not apply to the additional 8 days under regulation 13A(6); an agreement may provide for the additional 8 days leave to be carried over, (regulation 13A(7)). The rationale of requiring leave to be taken in the year that it is due, is to encourage leave to be taken because of its health and safety benefits.

11. Pursuant to regulation 14, a payment in lieu of untaken leave entitlement must be paid on termination of employment if the paid holiday taken is less than the accrued entitlement as at the date employment terminated.

12. European case law has evolved to recognise that when a worker is unable to take leave during the leave year in question, it may be carried forward, for a limited period, so as to preserve the health and safety benefits, see Stringer & Others v Revenue and Customs Commissioners [2009] ICR 932 and Pereda v Madrid Movilidad SA [2009] ICR959. As a consequence, a purposive approach has been adopted in the UK to interpreting regulation 13(9)(a) in cases where a worker has been unable to take holiday due to long term sickness absence, see NHS Leeds v Larner [2012] ICR 1389 CA.

13. In King v The Sash Windows Workshop Limited & Another [2018] ICR 693 ECJ, the employer wrongly thought that Mr King was self-employed and so

not entitled to paid holiday. Mr King therefore took limited unpaid holiday. He was subsequently found as a matter of law, to have been employed and he therefore claimed his accrued due but untaken holiday pay. The European Court found that because he had been unable to take his leave, (he was prevented from taking it because he thought he would not be paid for it) he was permitted to carry it over, for an unlimited period.

14. In Pimlico Plumbers Ltd v Smith (No2) [2022] IRLR 347 Mr Smith had been treated by the employer as self-employed and so not entitled to holiday pay. In an earlier case, the Supreme Court had determined that Mr Smith was in fact a, "worker". This second case concerned the outcome of his claims for holiday pay following the Supreme Court ruling. He sought his accrued holiday pay for his untaken leave and for his taken but unpaid leave during the course of his employment as a worker. Following King, the Court of Appeal held that a worker can only lose the right to paid leave at the end of the leave year, (where the right is disputed and the employer refused to pay) when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take paid leave, encouraged the worker to take paid leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot do that, the right carries over and accumulates until the end of the contract, at which point the worker is entitled to a payment in lieu.

15. This case law derived from European Law does not apply to the additional 1.6 weeks leave. Such leave, untaken, is not carried over unless provision for such is made in the workers contract.

16. The amount of holiday pay, as provided for by regulation 16, is to be calculated by reference to a week's pay as defined in sections 221 to 224 of the Employment Rights Act 1996. Where hours of work vary, one takes an average of the worker's pay over the previous 12 week's pay, (section 224), where hours of work do not vary but rate of pay does, one takes the previous 12 weeks average, where the hours of work and rate of pay does not vary, one takes the normal rate of pay.

17. Regulation 30 requires that a claim for unpaid holiday pay must be brought within 3 months of the date on which payment should have been made. However, pursuant to Pimlico Plumbers v Smith in respect of accrued leave in a case where paid leave has been denied, the 3 month time limit runs from the termination of employment, whether that be in respect of untaken leave, or leave taken but not paid for.

Illegality

18. The classic statement relating to illegality in contract law is that of Lord Mansfield in Holman v Johnson Tinsley v Milligan Court of King's Bench 1775 1 Cowp 341, *'no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act'.* This doctrine was adopted in Hall v Woolston Hall Leisure Ltd [2001] ICR 99. That is the

approach adopted in all the reported cases on illegality that employment lawyers have become familiar with over the years.

19. Traditionally, what is known as a "rule based" approach has, on the authorities, been taken to cases where illegality arises: a party cannot rely upon his or her illegal act. But the strictness of that approach has changed with the decision of the Supreme Court in Patel v Mirza [2016] UKSC 42. The majority decision was provided by Lord Toulson. Two policy objectives in respect of illegality were identified: (1) a person should not be allowed to profit from his or her own wrongdoing, and (2) the law should be coherent and not self-defeating nor condone illegality, (paragraph 99 of the Supreme Court's Judgment). The majority in the Supreme Court held that courts should consider the underlying purpose of the prohibition that had been transgressed and whether that purpose would be enhanced by denying the claim, any other relevant public policy that might be rendered ineffective or less effective by denying the claim and the need to apply the law with a due sense of proportionality. As Lord Toulson put it at paragraph 107, we should, *"keep[ing] in mind the possibility of overkill unless the law is applied with a due sense of proportionality"*

20. A range of factors approach was to be adopted, in a disciplined, principled and transparent manner. Those factors were not prescribed, but it was suggested they might include the seriousness of the illegal conduct, its centrality to the contract, whether it was intentional, and whether there was marked disparity in the parties' respective culpability. Lord Toulson said [at 109] that the court*:*

> *"…must abide by the terms of any statute"*
>
> but the court in construing the statute could:
>
> *"… have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in the denial of the relief claimed."*

Constructive Unfair Dismissal

21. The right not to be unfairly dismissed is provided for at section 94 of the Employment Rights Act 1996, (ERA).

22. Section 95 defines the circumstances in which a person is dismissed as including where:

> *"(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."*

23. That is what we call constructive dismissal. The seminal explanation of when those circumstances arise was given by Lord Denning in Western Excavating(ECC) Ltd v Sharpe 1978 ICR 221:

> *" If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employers conduct. He is constructively dismissed."*

24. The Tribunals function in looking for a breach of contract is to look at the employer's conduct as a whole and determine whether it is such that the employee cannot be expected to put up with it, (see Browne – Wilkinson J in Woods v W M Car Services (Peterborough) ltd [1981] IRLR 347).

25. A fundamental breach of any contractual term might give rise to a claim of constructive dismissal, but a contractual term frequently relied upon in cases such as this is that which is usually described as the implied term of mutual trust and confidence.

26. The leading authority on this implied term is the House of Lords decision in Mahmud & Malik v BCCI [1997] IRLR 462 where Lord Steyn adopted the definition which originated in Woods v W M Car Services (Peterborough) Ltd namely, that an employer shall not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

27. The test is objective, from Lord Steyn in the same case:

> *"The motives of the employer cannot be determinative or even relevant…..If conduct objectively considered is likely to destroy or seriously damage the relationship between employer and employee, a breach of the implied obligation may arise."*

28. Individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust & confidence, thereby entitling the employee to resign and claim Constructive Dismissal. That is usually referred to as, "the last straw", (Lewis v Motorworld Garages Ltd [1985] IRLR 465).

29. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA 978 the Court of Appeal, (Underhill LJ and Singh LJ) reviewed the law on the doctrine of the last straw and formulated the following approach in such cases

> *In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?*

30. The last straw itself need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of mutual trust and confidence, see London Borough of Waltham Forrest v Omilaju [2005] IRLR 35. However, an entirely innocuous act cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of mutual trust and confidence.

31. The employee must prove that an effective cause of his resignation was the employers' fundamental breach. However, the breach does not have to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach, which must have played a part (see Nottingham County Council v Miekel [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13)

32. An employee is perfectly entitled to wait for a period of time to seek alternative employment before resigning, see for example Walton & Morse v Dorrington [1997] IRLR 488.

The Facts

33. Miss Foreman began working in the fish and chip shop at 45 Baker Street, Gorleston as a Counter Assistant on 13 January 2014. Although she said on her ET1 that her employment commenced on 14 January 2013, she acknowledged that was a mistake and the 2014 date is correct. She was originally employed by Mr Bains and his Mother, who were jointly running the business as a partnership.

34. For the first few years, Miss Foreman was paid cash in hand without deduction of Tax and National Insurance.

35. The Second Respondent Company was incorporated on 10 June 2016. Mr Bains and his Mother were Directors.

36. Mr Bains' evidence about when Miss Foreman's employment transferred to the Company and at what point she was properly paid, with tax and national insurance deductions made, was contradictory. In his witness statement, he suggested the Company continued to pay cash in hand, it looks as if that is from 10 June 2016. He says that from 1 September 2016, whilst most staff continued to be paid in cash, tax and national insurance was deducted and properly paid. He said at his paragraph 7 that Miss Foreman had been legally employed since 1 September 2016.

37. In his oral evidence, Mr Bains said that the Company continued paying cash weekly, without deductions, until 2018. He acknowledged that was different from what he had said in his witness statement, which he said he had only read through very quickly before approving it and had just skimmed through it before today's hearing. Clearly, he was somewhat cavalier as to the accuracy of his witness statement and the gravity of giving evidence under oath.

38. Mr Bains gave contradictory evidence as to when employment transferred to the Company. His first answer was that it transferred on the day the Company incorporated. His second answer, after looking at paragraph 6 and 7 of his witness statement, was that it transferred on 1 September 2016.

39. I refer to the documents in the Bundle. The first P60 in the Bundle for Miss Foreman is that for the year ending 5 April 2017. This refers to pay in previous employment of £3,048 and in this employment, £6,723. That suggests the employment did not transfer quite as quickly as June 2016, just two months into the tax year. I note that the P60 shows payment of zero tax and NI contributions of £249. The first payslip, issued by the Second Respondent, at page 86 of the Bundle, is for 5 October 2016. Gross pay to date is shown as £3,658 , gross pay for the period £609, which having regard to figures on the P60, is consistent with employment with the Second Respondent having commenced on 1 September 2016 and I find that to be the case.

40. Miss Foreman was issued with her first Contract of Employment on 8 September 2018, pages 40 – 42. In the heading it stated that her employer was My Plaice Fish & Chips Limited. There is no such limited company. Item 2 of the Contract states that the name of the employer is Harneil Bains. Continuous employment is stated to have commenced on 9 August 2018. Mr Bains acknowledged in evidence that is incorrect, her continuous employment began in January 2014. Her Contract states, "holidays are unpaid due to independent business". Mr Bains acknowledged

that is contrary to the Law. Her hours of work were stated to be 37.5 per week.

41. On 31 October 2018, Miss Foreman was issued with a verbal warning for not closing a freezer door overnight, causing loss of stock. The warning was stated as remaining on record for six months.

42. Miss Foreman was issued with a further oral warning on 11 February 2020, pages 47 – 49. Again, it bears a heading that the employer is My Plaice Fish & Chips Limited. This warning is stated to be for, "six continues [sic] sickness in the last six months…". The note of the Disciplinary Hearing, (and the language used is that this is a disciplinary matter) refers to Miss Foreman having periods of absence due to a bad back, which the Respondent accepted was genuine. She was also warned about the fact that she had not complied with company procedure by telephoning to report her absence, rather than sending in text messages. At page 49, it is recorded that Miss Foreman was offered a reduction in hours and she declined that offer. She did not dispute that was accurate. Minutes of the meeting record Miss Foreman as saying that the problem comes and goes and that she was about to have a scan. In evidence, Miss Foreman confirmed the scan revealed nothing.

43. On 26 August 2020, Miss Foreman was issued with a second Contract of Employment, copied at page 43 – 45. The incorrect reference to My Plaice Fish & Chips Limited continues. The Contract also continues to state details of the employer as being Harneil Bains. The period of continuous employment is stated to have commenced on 26 August 2020. The Contract continues to state that holidays are unpaid because it is an independent business. There is an absence of reference to pensions. Neither Contract contained any reference to what notice the employer was required to give the employee to terminate employment. Both contracts referred to Company Disciplinary Procedures and both Contracts contain a reference to the employee acknowledging receipt of, "those documents as referred to above". It was accepted that there were no such further documents. There were no Company Policies or Procedures. Her hours of work were said to be 41 per week.

44. In October 2022, Miss Foreman took eight days holiday between and including 22 – 29 October 2022, for which she was not paid at the time as confirmed by her October payslip at page 109.

45. Before I come to the events of November 2023, (which I note is more than three years since the last verbal warning) I should make a finding of fact in relation to Miss Foreman's complaint that Mr Bains, about ten times during her employment, made adverse references to her weight, by suggesting that she should go to the gym. She says that she asked Mr Bains not to make such remarks, but he ignored her. Mr Bains denies that he made such remarks and that he was asked not to do so. The documents recording meetings during employment that are in the Bundle do not record Miss Foreman as ever having raised that such remarks were made,

or that she objected to them. As the documents were prepared by Mr Bains, that is perhaps not surprising. More surprising, particularly as she offers this as a reason for her resignation, Miss Foreman makes no reference to it in her resignation or correspondence post resignation. I am not persuaded by the fact that two former employees say that they never heard Mr Bains make such remarks. I have no particular reason to doubt the credibility of Miss Foreman's evidence. I do have reason to doubt Mr Bains' credibility, not least because of the above mentioned apparent lackadaisical attitude towards the accuracy of his evidence and his witness statement. I find that in the context of reference to Miss Foreman's weight, on a number of occasions during her employment, he suggested that she should go to the gym. .

46. On Saturday 5 November 2022, Miss Foreman sent a text message to Mr Bains to say that she would not be in to work because,

"Can't hardly walk, I had to crawl to the toilet. Tried to ring you twice".

47. Mr Bains acknowledges that Miss Foreman had attempted to telephone him and he had been unable to take the call, twice.

48. Miss Foreman was not scheduled to work on Sunday 6 November 2022.

49. Miss Foreman attended work as usual without any apparent issues, on Monday 7 November 2022.

50. On 8 November 2022, Miss Foreman sent a text message to say that she would not be in to work because she had a Doctor's appointment. Mr Bains asked for a screenshot of confirmation of the Doctor's appointment, which Miss Foreman provided. It strikes me as extraordinary that an employer should be asking for proof of a Doctor's appointment, but this is not something about which Miss Foreman complains. Subsequently on 8 November 2022, Miss Foreman attended work and presented to Mr Bains a fit note from her Doctor certifying her as unfit to work until 14 November 2022 because of, "muscle sprain / leg pain".

51. On 11 November 2022, Miss Foreman contacted ACAS raising the issue of lack of statutory sick pay, (both above mentioned contracts simply refer to sickness as being unpaid, "due to independent business") and lack of holiday pay.

52. I accept Mr Bains' evidence that he was not contacted by ACAS until after Miss Foreman's resignation on 21 November 2022. He gave that evidence under oath.

53. Miss Foreman returned to work on 15 November 2022 and Mr Bains conducted a Return to Work Interview which is recorded at page 55. The note observes that this was the fifth incident of sickness absence and the total numbers of days absence for the year was 11. He asked about the cause of absence and Miss Foreman is recorded as saying that it was not

known and that she would be more careful in the future. She explained those remarks to me, saying that she had stumbled and triggered her leg pain. She is recorded in the note as stating that there was nothing else the organisation could do to support a return to work; one would have expected her to have raised reduction in hours as a possibility, if that was what she wanted, she does not suggest that she did so.

54. Subsequently, Mr Bains served Miss Foreman with a letter inviting her to a Disciplinary Hearing, page 56. This was said to be with regard to her level of absences in the previous three months totalling 10 days and for notifying of her absence by text.

55. A Disciplinary Hearing took place on 21 November 2022. There is a formal minute of that at page 57. These very abbreviated notes seem to record that Miss Foreman had no questions, she considered the suggestion she should be issued with a warning as silly because she had provided a sick note and she refused to sign an acknowledgment of the warning. The notes record that after an adjournment, she returned and resigned her employment.

56. The warning with which she was issued is at page 58. It is described as a first written warning. Miss Foreman says that she was told orally that it was a final written warning, Mr Bains denies that. The written document clearly refers to a first written warning and I accept that is the disciplinary measure that was arrived at and what she was told.

57. Subsequently, Mr Bains wrote by text and in an email on 22 November 2022, to acknowledge and accept Miss Foreman's resignation. Her response was to ask for her wages upon receipt of which, she said, she would hand in her uniform. She wrote nothing about her reasons for resignation.

58. Turning to the WhatsApp messages with Mr Cockerell, one can see that Miss Foreman explained to him she has a problem with the muscles in her legs, which is why she was off work. That corroborates that her absence was genuine, (not that Mr Bains ever sought to challenge that she was genuinely unwell, he did not challenge the fit note). I can see from 8 November 2022 at page 126, Miss Foreman expressed her unhappiness at the way Mr Bains had been speaking to her on the telephone. On 21 November 2022, she was asked by Mr Cockerell how it has come about that she had resigned? Her answer was,

> *"Because how he treated me today so I walked out."*

59. I note that on 8 November 2022, Miss Foreman referred to being annoyed that Mr Bains had told customers she was skiving and she indicated that she was looking for other jobs.

60. On 30 November 2022, Miss Foreman was paid the eight days holiday she had taken in October 2022. On 31 December 2022, she was paid a

further 20 days holiday, (page 112). I make the observation that when she issued these proceedings on 19 December 2022, those 20 days holiday were accrued due but not taken or paid, they were outstanding.

61. Miss Foreman's evidence was that she took five or six days unpaid holiday a year prior to 2022. When I asked her why she had not taken more, her answer was that she did not have many places that she wanted to go to and she did not want to leave Mr Bains in the lurch, because he did not have many staff.

62. On a final happier note, Miss Foreman fell pregnant in January 2023 and her healthy baby was born in October 2023.

Conclusions

Constructive Unfair Dismissal

63. During the course of the hearing, we clarified that the reference to Miss Foreman's personal life at paragraph 3.1.1.1 of Employment Judge Graham's List of Issues is a reference to Mr Bains bringing up in response to these proceedings, references to Miss Foreman's sister and their home.

64. Similarly, we established that the references to Miss Foreman's Facebook page and her being accused of going to her sister's birthday party after she had called in sick, relate to actions taken by Mr Bains after Miss Foreman's resignation and in response to the issue of these proceedings. It was accepted that Mr Bains had not investigated Miss Foreman's Facebook page and the birthday party before he issued the warning.

65. Those two matters cannot therefore have been reasons for Miss Foreman to have resigned because, they post date her resignation.

66. Miss Foreman raised in evidence two matters which do not appear in the List of Issues: that Mr Bains had made her cry and that she'd had enough of having to work so many hours. She had not made reference to those matters in her Claim Form nor, more importantly, when Employment Judge Graham was seeking to identify the issues. If they were reasons for her resignation, she would have mentioned them before. I find that they were not.

67. That leaves me with Miss Foreman's case as founded on comments by Mr Bains to the effect that she should go to the gym, in the context of her weight, and the alleged issue of a final written warning.

68. She was not issued with a final written warning, she was issued with a first written warning.

69. It is in my view unsatisfactory and contrary to good industrial relations practice, to deal with sickness absences which are not suggested to have been anything other than genuine, as a disciplinary matter. Such

absences go to capability. That said, an employer is perfectly entitled to manage absence. This is a chip shop with four operatives, including Mr Bains. Two people work at any one time. Plainly, one person being absent through illness, particularly at short notice, causes disruption. Mr Bains is entitled to want to manage absence levels and seek to minimise or avoid absences that create problems, not just for himself but for the work colleagues of the person who is absent.

70. It is unsatisfactory that there is no policy in place which clearly spells out how absence would be managed. However, one has to bear in mind this is a small business.

71. Miss Foreman will have been aware, from the warning that she had received in February 2020, that too many periods of absence were likely to be a problem.

72. It is a mistake on Miss Foreman's part to take the view that a person cannot be warned that repeated periods of absence will ultimately lead to termination of employment, just because those absences are genuine and fit notes are produced. That is not the case.

73. My task is to view the facts objectively. Arguably, with a three year lapse since the last warning, Mr Bains might have issued an oral warning in 2022, but equally I do not think that one can say his decision to issue a first written warning, (and I find that he identified it as a first written warning) could be said to be conduct likely to destroy or seriously damage the relationship between employer and employee. He had reasonable cause to issue a warning, to issue a first written warning.

74. That brings me to the comments about going to the gym. There is no suggestion that he was rude or abusive. It is clear from the documentary evidence, from text messages to which I was referred and indeed, from some of Miss Foreman's own oral evidence, that Miss Foreman had a good relationship not just with Mr Bains Mother, but with Mr Bains himself. This was corroborated by the evidence of her colleagues. That there were such remarks has not and was not calculated to, destroy or seriously damage the relationship between employer and employee. Nor do they constitute a series of more minor events that ultimately contribute to a, "last straw".

75. I find that the reason Miss Foreman resigned was the first that she offered, that she had been issued with a warning, not because of Mr Bain's references to her using a gym. There is no suggestion that he had made any such remark immediately prior to her resignation.

76. Miss Foreman's resignation was based on the misapprehension she could not be issued with a written warning when she had produced a fit note.

77. For these reasons, the complaint of constructive unfair dismissal fails.

Holiday Pay

78. Miss Foreman was paid cash in hand without paying Tax and National Insurance until 1 September 2016. I find that she and Mr Bains knew that was illegal. They are equally culpable. To award her holiday pay before that date, would be to condone the illegality. Miss Foreman cannot seek to rely on the unwritten Contract of Employment that prevailed at the time which was being performed illegally.

79. I therefore consider the holiday pay claim in respect of the period after 1 September 2016 only.

80. Miss Foreman was expressly and wrongly told that she was not entitled to holiday pay. Such holiday as she took, was unpaid. Although she made reference in evidence to not taking holiday because she did not have anywhere she wanted to go and did not want to leave Mr Baines in the lurch, (evidence of their good relationship) it was clear to me that she did not take holiday because she thought it was unpaid and that she would have taken her entitlement had she known that it would be paid.

81. In relation to the 4 weeks, (20 days) a year paid leave entitlement under regulation 13, in circumstances where Mr Bain has expressly stated in writing that there is no entitlement to holiday pay and has not set out any entitlement to leave at all, he cannot discharge the burden of showing that he specifically and transparently gave Miss Foremen the opportunity to take paid annual leave, nor that he encouraged her to take such leave and that it would be lost at the end of each year. The right to such leave therefore carried over and accumulated until termination of the contract.

82. In relation to the regulation 13A additional 1.6 weeks, (8 days) paid leave, that may not be carried forward, there is no provision in the contract for it to be carried forward and it as it is not a regulation introduced by EU law, it is not rescued by Sash Windows. Miss Foreman is not entitled to those extra 8 days for each year.

83. The rate of pay will be the rate of pay applied in the final payslip as at the termination of her employment and which applied for the last 12 weeks of her employment: £9.50 per hour.

84. The Respondents suggest the claim is out of time, but as at 11 November 2022 when Miss Foreman went to ACAS, it was all outstanding. Further, as I have noted during dictation, the last 20 days holiday was not paid until the end of December. These proceedings were issued on 19 December at a time when the full 20 days had been outstanding and should have been paid on termination. In any event, Pimlico Plumbers holds that the right crystallises on termination of employment, 21 November 2022, the claim was issued on 19 December 2022, well in time.

85. Ms Ismail suggests if I find there is holiday pay due, I have to set off payments to the Claimant during the period that the Respondent was

paying her in cash her gross amount and also in addition paying her Tax and National Insurance to HMRC. It is not clear to me that is factually correct. The Respondent suggests I will have to hold another hearing to find out the figures and do the necessary calculations. I do not agree. I am not calculating loss arising out of a statutory tort, I am calculating holiday pay. There is no employer's breach of contract claim before me. There is no legal basis for set off.

86. Miss Foreman's evidence was that she worked a 6 or 7 hour shift. On the basis of her payslips, it looks as if she worked on average, about 5 days per week.

87. The leave year is the anniversary of the start of her employment: 14 January to 13 January the following year. In 2016, from October 2016 to 13 January 2017, she accumulated 9/12 x 20 = 5 days paid leave due under regulation 13 but untaken. 6.5 hours a day at £9.50 per hour, is £45.50 per day, multiplied by 5 days is £227.50.

88. For 14 January 2017 to 13 January 2022 is 5 years. The regulation 13 entitlement each year is 20 x £45.50 = £910. Over 5 years, that is £4,550.

89. The total regulation 13 accrued but untaken paid annual leave is therefore £4,777.50.

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Employment Judge M Warren

Date: 19 December 2023

Sent to the parties on:
28 December 2023

For the Tribunal Office.