Case No: 3322702/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs J Newitt	**v**	WWAC Automotive Ltd T/A WAC Automotive Engineers

Heard at: Bury St Edmunds **On:** 8,9,10,11,12,15 and 16 January 2024

Before: Employment Judge K J Palmer (sitting alone)

Appearances:
For the Claimant: Mrs D Smith (Claimant's daughter)
For the Respondent: Miss S MacIntosh (Consultant)

JUDGMENT having been sent to the parties on 8 February 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant was employed by the Respondent from 3 March 2008 until her resignation on 18 August 2021. Her resignation took effect immediately. The Respondents accept that the that the employee's continuous employment commenced on 3 March 2008. Factually there was some evidence to suggest that at various points the Claimant had been TUPE'D but that was not an issue for me to determine as the Respondents were clear that they were not disputing the Claimant's continuous employment as having started in 2008.

2. This hearing took place over the course of seven days by virtue of Cloud Video Platform. The parties appeared by CVP in front of me when I was sitting in Bury St Edmunds. I am bound to say that CVP, for a hearing of this length, with a number of witnesses that I heard from, is not entirely satisfactory and hearings of this length really ought to be dealt with in person.

3. I had before me a helpful bundle running to some 343 pages. I heard evidence from many witnesses. I heard from the Claimant and from the Claimant's daughter, who was representing the Claimant before me at this Tribunal. For the Respondents, the principal evidence was given by two

Directors, Mr A J Kara and Mr Dipen Pattni. I also heard evidence from Reet Mann, Finance Manager, and Miss Argent, Operations Manager. I had statements before me from **Yogendra Kumar** and from **A Kumar** and also **Sajee Nightee**. However, these witnesses were not subject to questioning as it became clear that their evidence was not relevant to the issues before me. I did, however, read their statements.

4. The issues before me were as follows:

    4.1. A Claim for unlawful deduction of wages for July 2021, both gross pay and net pay and a claim for unlawful deduction in respect of net pay for August 2021.

    4.2. A claim for an award under s.8 of the Employment Rights Act 1996 for a failure to provide pay slips for July and August 2021.

    4.3. A claim for pay in lieu of accrued untaken holiday in both holidays years 2020 and 2021, up to the date of termination of employment.

    4.4. A claim for notice pay or wrongful dismissal damages as a result of dismissal by way of constructive dismissal.

    4.5. A claim for constructive unfair dismissal.

REASONS

5. In many ways, this is a most unusual case. The Claimant pursued a previous claim against the Respondent for unpaid wages during furlough by way of a claim for unlawful deduction of wages. My colleague, Employment Judge Cassel, gave an extemporary judgment on 29 July 2021 awarding the Claimant the sum of £11,659.64. Pursuant to a request from the Respondents for written reasons, these were sent to the parties on 5 October 2021 by EJ Cassel. As a result of that, the Respondents pursued an appeal to the Employment Appeal Tribunal which was heard by His Honour Judge Auerbach. That appeal was unsuccessful. As a result, therefore, the judgment of E J Cassel remains in place, as does all of EJ Cassel's findings. That judgment covered the period up to and including the Respondent's payment in June 2021. At para 22 of his findings under the heading Conclusions, EJ Cassel found that the Respondents had been underpaying the Claimant by the sum of £631.83 each month. The Claimant was being paid at a gross rate of pay of £1,053.05 when they should have been paying the Claimant the sum of £1,684.88. The Respondent still appears to dispute this finding but it is a finding that cannot be disputed or relitigated in these proceedings. It is a finding made by EJ Cassel and has been confirmed by the Employment Appeal Tribunal.

6. After the first hearing was over on 29 July 2021, the Claimant was dismayed to notice that in July 2021, a month not covered by EJ Cassel's Judgment, which went up to the end of June 2021, she had still been paid at the gross rate of £1,053.05. That, of course was the wrong rate as it should have been £1,684.88. The Claimant chased the Respondent for her July salary on the very day judgment was handed down by EJ Cassel. She sent a text to Dipen Pattni, indicating that she was expecting to be paid at the rate of £1,684.88 less deductions. She also asked for holiday pay. She then sent an email on

10 Aug 2021, reiterating this point. She had by then been paid for July but had still been paid under the old incorrect rate. Of course she had previously challenged that rate and that rate had been subject to the hearing and the findings of EJ Cassel. She also indicated that despite having just won her claim relating to unlawful deductions and for the non-production of pay slips, she had received no pay slip for July. This letter was sent direct to the Respondent's Directors, Dipen Pattni and A J Kara. She received a response acknowledging her email from the Respondent's then legal advisors but no substantive response was ever forthcoming. Pursuant to that, the Claimant then sent a letter of resignation dated 18 August 2021. The Claimant was, of course, up to that point, still on furlough. That letter reads as follows:

> "Dear AJ and Dipen
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> At the Employment Tribunal hearing of 29 July, the Judge ruled that you should be paying me £1,684.88 gross as 80% of my salary for the months I am on furlough. This amount is then subject to tax and the net amount to be paid to me. I was due to be paid on 28 July but received no wages. I emailed you on 30 July asking for my July wages and outstanding holiday pay. On 2 August I received £824.24 based on the incorrect gross amount of £1,053.05, no holiday pay and no pay slip. I emailed you on 9 August requesting that you correct my July wages as per the Tribunal Judgment to pay me outstanding holiday pay and supply a pay slip. To date I have received no additional money or pay slip and only received an acknowledgment of the email from your solicitor. I find your failure to abide by the Tribunal Judgment, failure to pay me correctly since March 2020 and on time, and supply pay slips intolerable. This is further compounded by you not responding to my email of 9 August. I regard this behaviour as a breach of the implied term of trust and confidence between us. In these circumstances I have no alternative but to resign with immediate effect and consider myself to have been constructively dismissed. Please pay me all my monies due up to 18 August 2021, including outstanding holiday pay for 2020, accrued holiday pay for 2021 and provide me with a pay slip and P45. Please advise when I will receive the £11,659.64 awarded by the Judge on 29 July 2021. As my employer I have sent this letter of resignation due to constructive dismissal to you directly and not through your solicitor but feel free to forward this to him."

7. Pursuant to this A J Kara then sent an email to the Claimant dated 10 September 2021 which was incorrectly marked without prejudice. If, and in so far as that label effected any 'without prejudice protection', those representing the Respondents before me indicated at this hearing, that any such protection had been waived as they wished to rely on that document. That document failed to deal with the issues raised by the Claimant save to say that the Respondent had applied for written reasons of the Judgment of EJ Cassel. It indicated pay slips would be sent and salary, up to date of termination, would be paid.

8. On 14 September 2021, the Respondents sent various documents to the Claimant including pay slips, the subject of the previous claim before EJ Cassel and the pay slips for July and August which included the calculation of holiday pay to be paid by the Respondent, indicating that the Claimant was entitled to a sum for holiday pay. This was calculated only for 2021 up to 18 August and was at the old wrong pay rate and was at 80% of that old wrong pay rate. The sum specified to be paid by way of holiday pay was £575.08. The Claimant has always maintained that she never received this payment. The Respondents maintained, throughout the early part of this

hearing, that the sum of £575.08 had been paid. They continued with that assertion during these proceedings until they were asked by me to show evidence that it had been paid during the giving of evidence of Mr Kara. They were then able to find, after a short period, that in fact the sum had not been paid to the Claimant's account and had in fact been paid elsewhere. It is therefore accepted by the Respondents that no holiday pay was paid to the Claimant at termination. The Respondents also agree and accept, that they continued to pay the Claimant incorrect furlough pay, even after the Judgment of Judge Cassel for the month of July. The reason given in evidence by Mr Kara, Mr Pattni and Miss Mann, was that they disagreed with the findings of EJ Cassel and were appealing those findings. However, the written reasons were not sent to the parties until 5 October 2021 and the appeal, not lodged until some considerable time later, many months after the Claimant had resigned due to the post judgement underpayment in July.

9. The Claimant then presented these proceedings before this tribunal on 3 November 2021. She claims the sums I have set out plus she claims constructive unfair dismissal and wrongful dismissal based on the Respondent's alleged breaches of contract.

10. She relies on the breaches of contract set out in her resignation letter being the continued failure to pay her the correct amount, even after the first judgment of EJ Cassel. She also relies on a series of historical acts being part of the cumulative chain of breaches which result in the last straw being that final breach. That series of historical acts are set out in detail in an agreed list of issues. These include many of the sequence of facts that was before EJ Cassel in the first claim when the Claimant was seeking to prove the underpayment and a failure to provide pay slips. They go back as far as 2018. There are 17 such alleged breaches in the list. Those lettered P and Q occur after her resignation and O is her resignation. The 14 prior to that include number 14 being the last straw, that is the failure to correct her monthly pay, even after EJ Cassel's Judgment. Some, such as J, K and L relate to failures by the Respondent to comply with Case Management Orders in the previous case. It is worth noting that in the previous case the Respondent was ultimately struck out for such failures and the Respondent was only allowed to take part at the Full Merits Hearing before EJ Cassel with the indulgence of that trial Judge. It was also worth noting that EJ Cassel, in his findings of fact at para 15 and 16 of the reasons sent on 5 October 2021, found that when the Claimant sough to query and raise issues concerning her underpayments and lack of pay slips, Mr Pattni was evasive and unhelpful. He found that this was the case on two occasions which led to the Claimant presenting that first claim. I cannot demure from those findings.

11. The principal evidence before me was put by the Respondents was that of Mr Kara and Mr Pattni. I am bound to say that I have reason to treat the evidence of both Mr Kara and Mr Pattni with some considerable caution. Mr Kara's witness statement was short and perfunctory. It failed to deal with significant allegations of a serious nature which the Claimant had put in her ET1 in the list of issues and in detail in her evidence. This was also the case with Mr Pattni. I can draw no other conclusion than that they have come to this tribunal somewhat unprepared and perhaps have not taken the

matter sufficiently seriously.

12. The Claimant had had a hip operation in he early part of 2021. It is common ground, and accepted by the Claimant, that she was well treated by the Respondents during that period and was in fact paid several goodwill payments over and above her entitlement to statutory sick pay. She was due to return to work and had a meeting on 12 March to discuss this. At that meeting her daughter, Mrs Smith, was present. Findings of fact made in the previous tribunal hearing specified that at that meeting Mr Kara was present and the meeting was in open plan. The purpose of the meeting was to discuss the Claimant's return to work after sickness. The Respondent's position was that the Claimant agreed that on return, by way of phased return, she would, going forward, only want to work part time. The Claimant's position was, that subject to a phased return to work she was always intending to return to work ultimately full time. A finding on this was at the heart of the case before EJ Cassel. He made a finding that there was no discussion or agreement that the Claimant wished to return part time, only that after a phased return she would return on a full time basis. This was confirmed as a finding on appeal before His Honour Judge Auerbach. Covid then struck and the Claimant, along with many other at the Respondent's was furloughed. She was then only paid on the basis of the part time, which had led to the underpayments, the subject of the first claim.

13. I am bound to say that I found the evidence of Mr Kara to be given somewhat evasively in cross-examination. It was necessary for Mrs Smith and for clarification myself, to put aspects to Mr Kara, which formed part of the Claimant's evidence but which he had ignored in his witness statement. In particular, there was a meeting between the Claimant and Mr Kara on 29 October 2020 at which the Claimant alleges Mr Kara told her that if she continued with her ET claim then she could not return to work after furlough. This was the first claim. He also said that the Claimant should have retired at 65 and that if she didn't like it she should resign and claim constructive dismissal. Whilst Mr Kara was extremely evasive when this was put to him, he did deny that such things were said to the Claimant at that meeting. The Claimant, on the other hand, gave evidence that she was extremely upset and went home in tears and told her partner and her daughter. She was then asked to go back to the Respondents for an evening meeting with Mr Pattni. I find it very unusual that Mr Kara had chosen not to deal with these allegations in his evidence before us. I found his responses, when questioned, to be highly evasive and defensive. I therefore treat his evidence with caution.

14. The Claimant, on the other hand, was clear and definitive in her recognition of the events of 29 October and had dealt with those events extensively in her written witness statement. On the balance of probabilities, therefore, I prefer the Claimant's evidence as to the events that took place that day.

15. I was also unimpressed with the evidence of Mr Pattni who was also very unprepared. He too was evasive and vague. He denied resiling on Mr Kara's behalf in the evening meeting from the things Mr Kara had apparently said in the morning. When pressed, however, he was inconsistent in his replies on this point. When questioned about a detailed

letter sent by the CAB on 5 June 2020, setting out the Claimant's detailed grievances, he said he had replied to it but that the reply was not in the bundle. I gave him and his advisors time to locate that reply but none was forthcoming. I treat his evidence with extreme caution. I accept, on the balance of probability that there was a lengthy list of occasions when the Claimant raised grievances about her pay, holiday pay and lack of pay slips and that these went substantively unanswered over a lengthy period of time.

16. Mr Kara and Mr Pattni said that they would have replied, mainly verbally, to these grievances but they could give no cogent evidence that they did or the nature of those replies or when they took place. I find, therefore, that the letter of 5 June 2020, emails of 12 and 26 November 2020, a text of 15 December 2020, an email of 2 February 2021, the email of 10 August 2021 and the email of 9 September 2021, all went without any cogent response. There were also countless texts and emails which were ignored by the Respondents. Even when the Claimant resigned on 18 August, once again, raising grievances about underpayment, lack of payslips, lack of holiday pay, the Respondents did not seek to rectify the position, even though the failures continued after the Tribunal judgment.

17. The Claimant also alleged in her evidence that at a meeting on 7 October with Mr Pattni and Mr Kara, that Mr Pattni told her she did not accrue holiday pay during furlough. Surprised by this, the Claimant followed this up immediately with an email addressing this and other points, dated 9 October 2020. This also went unanswered. I accept the evidence of the Claimant that she was told that holiday didn't accrue during furlough. I reject the denial of Mr Pattni and Mr Kara on this point. The Claimant said she did not seek to attempt to take holiday in 2020 and 2021 and made no request to take holiday during furlough at all. Mr Pattni, in his evidence, refuted the suggestion that he told her that holiday did not accrue during furlough but that denial is, in my judgment, not credible.

18. Throughout the Respondents evidence and throughout the Respondents case presentation, much has been made of the fact that the Respondents say that they always had a good relationship with the Claimant. They say there was no animosity between Mr Kara, Mr Pattni and the Claimant. The Claimant herself accepts that. She says that she was always treated well by the Respondents and was even paid additional goodwill payments during her sickness period in early 2020. She said that until the issue of the pay slips and underpayment during furlough arose there was little problem. Of course, it must be remembered that all of the events, the subject of the Claimant's grievances, took place during the Covid pandemic and the recent aftermath after it. This was an extraordinarily difficult time for all concerned particularly those who were trying to keep small businesses afloat. However, it is a fact that the Respondents failed to deal with entirely legitimate issues raised by the Claimant which were of a fundamental nature, including pay, pay slips and holiday. Even after the Claimant had tried time and time again to resolve these issues with the Respondent by raising them in writing, the Respondents failed to deal with them and in most instances, just ignored the Claimant's complaints. The Claimant felt she had no choice but to recourse to law. She pursued the first claim and was, of course, successful. She obtained a Judgment. However, not only

was that Judgment not satisfied for some considerable time, straight after the Judgment was delivered and for the very month in which the Claimant was in receipt of that Judgment, the Respondents deliberately continued to pay the Claimant at the reduced rate despite the clear Judgment of EJ Cassel that this was an incorrect rate and constituted an unlawful underpayment. As a result the Claimant resigned within a short period of time, raising with the Respondent and once again receiving no substantive reply.

19. In her letter of resignation she clearly cites that the continued underpayment post judgment, the lack of pay slips despite the Judgment and holiday pay as the reasons for her resignation.

20. I heard detailed submissions from both parties and their advocates for which I am most grateful. I do not propose to repeat those here.

The Law

Unlawful deduction of wages.

21. The law with respect of unlawful deduction of wages is governed by s.13 and s.23 of the Employment Rights Act 1996. Section 13 sets out the right of the employee not to suffer unlawful deductions and s.23, the basis of a complaint to the ET as a result of such deductions. Where such a deduction is found, the Tribunal must make a declaration to that effect and order the employee to pay the underpayment. This is under section 24 of the Employment Rights Act 1996.

Failure to provide itemised pay statements.

22. This is governed by s.8 of the Employment Rights Act 1996. The statement must be given at or before the time at which payment is made. That is s.8(1). Where the Tribunal finds that the employer has failed to do this, they must make a declaration to that effect. Section 12, sub-section 3 of the ERA 1996, the Tribunal has power to order the repayment of any deductions made in that pay slip in respect of which the declaration is made.

Holiday pay

23. Payment in lieu of holiday falls under the general principle that statutory annual leave cannot be replaced by a payment in lieu. The main exception to this rule is where the worker is owed outstanding holiday on the termination of his or her contract of employment, that is, at termination of employment. This is governed by Regulations 14.1 and 14.2 of the Working Time Regulations 1998 as amended. The worker is paid a sum in lieu of holiday at termination based on untaken holiday in that calendar year. Generally, unused holiday cannot be carried over from one year to the next and fall into the computation of holiday pay at termination. However, there are exceptions and these have been examined extensively by case law over recent years. Much of the law in this arena has arisen out of the interpretation of the European Directive and is enshrined in European cases. The use it or lose it principle in many employer's handbooks and contracts of employment, still holds good in some instances.

24. However, there are exceptions. The principal exception is where the worker is not able to take holiday in a given holiday year due to sickness absence. A further exception is where a worker is actively prevented from taking holiday by the employer. The authority for this is the case the case of King v Sash Windows Workshop and another [2018] ICR693. This authority only applies to carry over of the basic four week statutory holiday governed by the European Directive. The position has been clarified by the Court of Appeal in the case of Smith v Pimlico Plumbers Ltd [2022] IRLR347CA. Here, the Court of Appeal confirmed that the employer must give the worker the opportunity to take holiday and, it goes further to state, that it is the responsibility of the employer to explain to the employee or worker, that holiday is accruing and encourage the worker to take it. A failure to do this means that untaken holiday in a holiday year does not lapse at the end of that holiday year and can be carried over into the next holiday year.

Uplift for a failure to follow ACAS grievance procedures.

25. In proceedings before an Employment Tribunal relating to claims contained in the list set out at Schedule A2 to the Trade Union and Labour Relations Consolidation Act 1992, where it appears to the Tribunal that the code applies and that there has been a failure to follow that code and that failure has been unreasonable, the Tribunal may increase any award under those claims by up to 25%. The list at Schedule A2 includes claims under s.13 for unlawful deduction of wages, claims for holiday pay under Working Time Regulations, unfair dismissal and wrongful dismissal. The section does not apply to claims under pay slips under s.8 of the ERA 1996.

Unfair dismissal.

Constructive unfair dismissal.

26. A constructive dismissal is a dismissal by virtue of s.95 (1)(c) of the Employment Rights Act 1996 which states that it is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. The burden of proof remained on the Claimant and if he or she is to succeed they must prove three things:

    a. That there was a fundamental breach of the employment contract by the employer;

    b. That the employee resigned in response to that fundamental breach; and

    c. That the employer did not delay too long in resigning in response to that breach and thereby affirm the contract.

27. The Tribunals are guided by a number of authorities in considering the threshold as to whether a breach of contract is repudiatory or not. The leading case remains a Lord Denning Case in the Court of Appeal case called Western Excavating (ECC) Ltd v Sharp [1978] ICR 221. Lord Denning, in that Judgment, summarises the position as follows:

"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, he then terminates the contract by reason of the employer's conduct. He is constructively dismissed".

28. In this case the Claimant relies on the implied term of 'Trust and confidence'. The case of Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, Browne-Wilkinson Judge tells us:

> "In our view it is clearly established that there is implied, in a contract of employment, a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated, or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

29. In the case of In Courtauld's Northern Textile Ltd v Andrew [1979] IRLR 84, we are told :

> "To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract. The Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that it's effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

Unreasonable behaviour by an employer is not in, and of itself a repudiatory breach of contract and cannot, by itself, found a basis of a claim for constructive dismissal unless that unreasonableness also satisfies the test of repudiatory breach.

Last straw cases.

30. Last straw cases occur where there has been a series of breaches which either individually or cumulatively satisfy the repudiatory breach test. Authorities on last straw cases include - Cower v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978. The Claimant must prove that the event that caused them to resign contributed to a series of events which, taken as a whole, amounts to a repudiatory breach of contract. Cower also refers to the case of Omilaju [2005] ICR 481 which says that the act being relied upon as the last straw must be, of course, a conduct comprising several acts and omissions which, viewed cumulatively, amount to that repudiatory breach. As always, it must be remembered that the employee must resign in response, or at least partly in response to that breach. Omilaju points out that if the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. It says that:

> "Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence but the employee does not resign his employment, instead he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he relies is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle".

31. It follows, therefore, that the last straw must not be entirely innocuous and must, in some way, be related to the obligation of trust and confidence. The

test in respect of this remains an objective one and it is not sufficient that a claimant perceives the act in such a way. It must be judged reasonably and sensibly as having contributed to the fundamental breach.

Wrongful dismissal

32. If the Claimant succeeds in showing that she was constructively dismissed as a result of the Respondent's repudiatory breach then she would be entitled to be paid damages for the period of time she would otherwise have been paid during a notice period. Where this happens in circumstances where the Claimant was receiving reduced pay due to being on furlough, there is clear authority for the proposition that such damages should be calculated at the full 100% salary and not 80%. The same authority confirms that any holiday pay relating to a period of untaken holiday at termination must also be calculated at 100% of salary and not at 80%. The cases tha/20t are authority for this proposition are the case of Bailiff v Fileturn Ltd 2304837.

33. With respect to the notice pay, this is the case where the notice is statutory notice under sections 86 and 87 of the Employment Rights Act and is not at least one week longer than that statutory notice by virtue of a written contract.

CONCLUSIONS

Arrears of pay.

34. The Respondent has admitted in evidence that they continued to pay the Claimant on the basis of their miscalculation highlighted by EJ Cassel in his Judgment and that this continued for the month of July. In August they used the same underpayment calculation but due to the fact that the Claimant left just over half way through the month, the August payment resulted in a slight overpayment. The Claimant, in her Schedule of Loss, calculates the underpayment for July and the slight overpayment for August and sets one off against the other.

35. The Respondents have not, at any point, challenged these figures. I therefore make a declaration to the effect that there was an unlawful deduction of wages for July 2021, this is offset to an extent by the overpayment in August. The sum awarded is the sum of **£557.10.**

36. I also consider that there was a failure to enact and follow the grievance procedures unreasonably and accordingly I add a markup of 25% under the provisions of 207A of TULRCA 1992.

37. The Claimant clearly raised this as a grievance in writing on 10 August and 18 August 2021. I therefore awardee the sum of **£139.28** in this respect.

38. The Respondent has not challenged the other unlawful deductions for being an underpayment of the net sum envisaged in the Respondent's pay slips when they were ultimately produced, even though those pay slips were wrongly calculated by reference to incorrect gross amounts. The net amount showed in those pay slips was not paid both in July and August, leaving a shortfall of £174.90. These figures have not been challenged. I make a declaration to that effect and award the sum of **£174.90**. I also make an uplift

on these for the same reasons are as outlined above of 25%, that amounts £43.73. The total sum therefore awarded under both headings for unlawful deduction is **£915.01**. This sum must be paid gross to the Claimant without any deductions.

Failure to provide itemised pay statements.

39. No pay slips were sent to the Claimant until 14 September 2021. This constitutes a breach of s.8. Breaches of those earlier pay slips were dealt with by EJ Cassel in the first Judgment. However, there was a failure by the Respondent to provide pay slips for July and August in breach of s.8. I make a declaration to that effect. The sums to be awarded under s.12 have not been challenged by way of calculation and therefore deductions made amounted to **£457.16**. I award this sum. This must be paid without deductions.

Holiday pay.

40. The Claimant was entitled to be paid pay in lieu of untaken holiday at termination of employment. The Respondent did a calculation and came up with the sum of £575.08 but did not pay it to the Claimant. That sum was based on the continuing underpayment so was wrong anyway. It was also based on 80% and not the full amount. The Claimant was entitled to full pay for accrued untaken holiday in 2021. She took no holiday. She is therefore entitled to be paid 20 days, multiplied by 97.20 which is £1,944.00. This has not been challenged by way of calculation by the Respondent. There was also a failure under s.207A of Tolrika 1992 as this was also part of the grievance raised. That failure was, in my judgment, unreasonable. I therefore award an uplift of 25%, that amounts to £486.00. That makes a total of **£2,430.00** for 2021. This should be paid without any deductions.

Carry over.

41. I made a finding of fact that the Respondents attempted to prevent the Claimant from believing that she was accruing holiday whilst on furlough. The Pimlico Plumbers case tells us that there is an obligation on the employer to tell the employer to tell the employee about holiday entitlement and then encourage them to take it. The Respondents did not do this. Accordingly, untaken holiday from 2020 can carry over to 2021 and should have been paid at termination. The calculation put forward by the Claimant in the Schedule of Loss has not been challenged. I therefore award holiday pay for 2020 of £1,749.60 with a consequent uplift of 25% because she raised this as part of her grievance and the failure to follow the grievance process was, in my judgment, unreasonable. That uplift amounts to £437.40 and therefore holiday pay for 2020 should be **£2,187.00.** This must be paid without any deduction of tax or national insurance.

The unfair dismissal claim.

42. In my judgment the Respondents committed a repudiatory breach of contract when they deliberately failed to correct the underpayment in the July payment to the Claimant after having attended a tribunal and heard the Judge give a

judgment in the Claimant's favour that the sums being paid to the Claimant whilst on furlough, were an underpayment and therefore unlawful under s.13. The Claimant, who had for over a year, been complaining of the underpayment and lack of pay slips, had no alternative but to pursue a redress of the matter before the Employment Tribunal. At that tribunal she was successful. The Judge made a declaration that she had been underpaid and awarded her the underpaid sums under sections 13 and 23 of the ERA. Even then, the Respondents continued to underpay the Claimant in July. As soon as the Claimant realised this it was in direct reliance upon this underpayment that the Claimant resigned and pursued this claim for constructive dismissal. That continued underpayment post-judgment of EJ Cassel amounts to a repudiatory breach of the implied term of trust and confidence, entitling the Claimant to resign in reliance on it and treat herself as dismissed. The objective test is satisfied. She resigned promptly, indeed she resigned very promptly and she did in reliance on the breach. The dismissal was therefore unfair.

43. For the avoidance of doubt, the Claimant did seek to pursue this claim on the basis of the last straw doctrine and indeed, the contumelious failures that I have set out in my findings of fact, do constitute a series of breaches which would have constituted an entitlement to the Claimant to rely on that doctrine with the final straw being the failure to apply a change to the July payment after the Respondents knew those payments had been found to be unlawful by the Employment Tribunal. However, in my judgment, that cumulative totting up breaches is not necessary as the final breach alone was sufficient to constitute a repudiatory breach on its own. The Claimant's claim for unfair dismissal therefore succeeds.

44. The Claimant's claim for damages for failure to give notice, therefore the claim for wrongful dismissal also succeeds. She is awarded the sums claimed on the basis of 12 weeks net pay being **£4,718.76**. I do not consider that s.207A Grievance Procedures is engaged however, and therefore I award no uplift. That sum must be paid without deduction of tax or national insurance as it is calculated as a net sum.

45. It was then necessary to have a separate remedy hearing to determine compensation to be awarded pursuant to the judgment that there was a constructive unfair dismissal. In that respect, I heard evidence from the Claimant, who did not produce a separate witness statement but relied on a paragraph in her original witness statement at paragraph 98 and there were also other documents which the Claimant produced.

46. There was some confusion about these documents.

47. Mrs Smith, for the Claimant, said that she forwarded certain documents to the Tribunal yesterday, on 15 January, but sadly these had not arrived in the Clerk's inbox. As a result my Clerk then requested those documents from Mrs Smith and a tranche of documents was sent through yesterday which was headed up "Evidence of mitigation of losses" – this consisted of a two paragraph narrative followed by a list of applications which the Claimant says she made between the dates of 9 March 2022 and 30 November 2022. This list was identical to the list that is contained in the bundle at pages 310-312. There was also then attached to that list, some evidence of email exchanges

between the Claimant and prospective employers.

48. Once the hearing had started it emerged that there was a second tranche of documents which Mrs Smith wanted to put before the Tribunal and this hadn't been forwarded to me albeit that Mrs Smith had sent it through to the Tribunal at close to 5.00 pm last evening. I then had that forwarded to me and it was also sent to Miss MacIntosh for the Respondents. This included further evidence of applications and principally seem to include applications made through an Agency or a Job Board called Indeed.

49. In essence, the Claimant's position is that after her resignation on 18 August 2021 she started to look for other work immediately. She did this by using her daughter, Mrs Smith's computer at her business and continued to do that using that email address and that computer through to March of the following year 2022. Sadly, as a result of difficulties within that business, the email address which the Claimant was using became discontinued and the computer that she had been using was wiped because it contracted a virus and therefore the Claimant was unable to put before us, detailed evidence as to applications that she had made during the period between her resignation, and the period when she joined Indeed and started to use her own phone email to process applications.

50. She said that she had made a number of applications between August 2021 and March 2022 but the that she couldn't provide any evidence of those save for the fact that some are referred to clearly in the list that is in the bundle as taking place very much towards the end of 2021.

51. The Claimant was cross-examined by Miss MacIntosh and I also had questions for her. One further aspect that merited some explanation was that the evidence before us only extended to applications which appeared to have been made up to 30 November 2022 and that there was no evidence of any applications made thereafter. In the Claimant's witness statement, it is her position that she continued to apply for roles until February 2023 when she decided to retire.

52. It is therefore accepted by the Claimant that she is not seeking compensation in her calculation of her compensatory award to cover a period that goes beyond February 2023, that is despite the fact that the hearing before me is not taking place until January 2024. She is therefore looking to be compensated for the period between the date of dismissal, namely 18 August 2021 and February 2023.

53. Evidence however before me only extends to the end of November. When questioned about this, the Claimant said she had continued to apply but was losing heart towards the end of 2022 and made a number of applications, perhaps between 6 and 10 from the end of the period of November 2022 through to February 2023.

54. I heard submissions from both parties, from Mrs Smith briefly and more fulsome submissions from Miss MacIntosh. Miss MacIntosh endeavors to persuade me that the Claimant has failed to mitigate her loss in that much of the evidence before me, of applications for jobs, is somewhat sketchy. There was also evidence that there were a number of positions which the Claimant might have been successful in pursuing, had she been prepared to

travel a little further than the Reading area in which she lives. Miss MacIntosh quite rightly points out that this rather limited the Claimant's possibilities of finding work elsewhere but one in particular we examined was a garage which was some 15 miles away. The Claimant said that she wasn't a particularly confident driver, particularly at night time and therefore did not want to be travelling that 15 miles from her home in Reading to the garage at night time. This obviously placed some limitation on the prospects of her finding work.

55. However, there is in the list that is in the bundle at pages 310-312, a considerable number of applications which the Claimant has clearly made throughout the period in question up to the end of November.

56. I therefore must consider the legal position with respect to mitigation and the duty to mitigate. Certainly, claimants have a duty to mitigate their loss and cannot just expect to be compensated for a period of time when they are not seeking to mitigate that loss. Having said that, the duty and the bar for discharging that duty is a low one. The law is essentially summed up in the case of Cooper Contracting Ltd v Lindsey [2016] I.C.R D3 in the Employment Appeal Tribunal where Mr Justice Langstaff, then President of the EAT, summarised a number of principles drawn from the earlier case law that Tribunals must use as a guide when considering whether there has been a failure to mitigate loss. He observed that there were considerable dangers in approaching the matter as though the duty to mitigate required the taking of all reasonable steps to lessen loss. Such an approach risked diverting focus away from the legal principles that applied to mitigation and might lead erroneously to the conclusion that if the employer could show a single reasonable step that was not taken, it would inevitably succeed in its submission that there had been a wholesale failure to mitigate. He said that to avoid such mistakes it was imperative that the following guidance be firmly borne in mind.

    1. The burden of proof regarding a failure to mitigate is on the wrongdoer. A claimant does not have to prove that he/she has mitigated the loss.

    2. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to look for that evidence or draw inferences. This is how the burden of proof works in this context.

    3. The employer must prove that the Claimant has acted unreasonably. The latter does not have to show that what he/she did was reasonable. What is reasonable or unreasonable in this regard is a question of fact to be determined after taking into account the wishes of the Claimant as one of the relevant circumstances although it remains the Tribunal's own assessment of reasonableness, not the Claimant's that counts. The Tribunal should not apply a standard to the Claimant that is too demanding. He or she should not be put on trial as if the losses were his or her fault. Given that the central cause of those loses was the act of the employer in unfairly dismissing the employee in the first place.

    4. The relevant test can be summarised by saying that it is for the

wrongdoer to show that the Claimant has acted unreasonably in failing to mitigate.

5. In a case where it might be reasonable for a claimant to have taken a better paid job, this fact does not necessarily satisfy the test. It is simply important evidence that might assist the Tribunal to conclude that the employee has acted unreasonably.

57. Applying that test and bearing in mind that that makes it very clear that the bar is a relatively low one for a claimant to show that they have discharged the duty to mitigate, there were some lacuna in the evidence which I have before me from the Claimant but on the balance of probabilities having questioned the Claimant I am satisfied that she has discharged her duty to mitigate, certainly in the early part that she found herself in after her dismissal, I have no difficulty in accepting her evidence that she continued to apply for jobs during the period from August 2021 through to March 2022 when she signed up with Indeed and started using her own email.

58. The list that I have before me is extensive. She did receive a number of interviews, some in person and some remotely and the vast majority of her applications sadly fell on stoney ground and she was not selected or, in a number of instances, very rudely, did not receive a response. I am satisfied that applying the test the Claimant has discharged her duty to mitigate her loss up to the period at the end of November 2022.

59. I am not convinced that she continued with great vigour to continue to apply for work through to February 2023 and therefore I am applying a cut off in the compensatory award up to the end of November 2022.

60. That is in accordance with the submissions before me in the Schedule of Loss put forward by the Claimant and accordingly I make the following awards. I should just point out that I put the calculation of the basic award to Mrs MacIntosh and she agreed with me that it appeared to have been calculated correctly and had no issues with it.

61. She had asked me to consider awarding a lower period, perhaps six months due to the difficulties the Claimant had in producing evidence but, as I have said, applying the tests as set out by Langstaff in the case I have cited, I do consider that the low bar has been cleared by the Claimant and she has mitigated her loss.

62. Accordingly, I make the following award for compensation for unfair dismissal.

Basic award

13 x by 1.5 x gross weekly pay of £486.02 a basic award of £9,477.39

Compensatory award

I am awarding 55 weeks at net weekly pay of £393.23 which comes to £21,625.65, add to that, loss of statutory rights at £500.00, that is £22,127.65

If you add those two together, the total award for unfair dismissal is £31,605.04. It is therefore necessary to gross up that sum as the sum is over £30,000.00, it will be treated as a termination payment for taxation purposes and it is necessary to gross up that part of the sum which exceeds the tax free £30,000.00 exemption to compensate the Claimant for tax which she will have to pay on that sum over and above the £30,000.00. That is a relatively small sum and therefore the sum of £1,605.04 needs to be grossed up to £2006.30, therefore that makes a total award, including grossing up of **£32,006.30**.

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Employment Judge K J Palmer

Date: 18 March 2024

Judgment sent to the parties on
3 April 2024

For the Tribunal office

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/