EMPLOYMENT TRIBUNALS

Claimant: **Mr M. Bruza**

Respondent: **Libby's London Ltd**

Heard via Cloud Video Platform (London Central) On: 17 May 2024

Before: Tribunal Judge Peer acting as an Employment Judge

Representation

Claimant: In person
Respondent: Simon Wolanski of the respondent

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claim for unfair dismissal is dismissed upon withdrawal.

2. The complaint in respect of holiday pay is not well-founded and is dismissed.

3. The complaint of breach of contract in relation to notice pay is well-founded.

4. The respondent shall pay the claimant £2,450.00 as damages for breach of contract. This figure has been calculated using gross pay to reflect the likelihood that the claimant will have to pay tax on it as Post Employment Notice Pay.

REASONS

CLAIMS AND ISSUES

1. The claimant is Mr. Martin Bruza. The respondent is Libby's London Ltd, a bakery. The claimant worked for the respondent as a store manager from 1 November 2022 until his dismissal on 9 January 2024. Early conciliation with ACAS started on 26 January 2024 and concluded on 5 February 2024. The claimant presented his claim for unfair dismissal, holiday pay and breach of contract in relation to notice pay on 6 February 2024.

Unfair dismissal

2. The claimant was informed by way of correspondence from the tribunal dated 25 March 2024 that a person needed two years' qualifying service to pursue a claim of unfair dismissal and asked to set out in writing any reasons why the claim should not be struck out. At the hearing on 17 May 2024, the qualifying condition of two years' service to bring an unfair dismissal claim was discussed. As the claimant had only worked for the respondent for just over a year, he did not have sufficient qualifying service to bring a claim of unfair dismissal. It was explained that in those circumstances if the claim was not withdrawn, it would be struck out on the basis that the tribunal had no jurisdiction to determine the claim. The claimant withdrew his unfair dismissal claim.

Holiday pay

3. The claimant claims pay in lieu of accrued but untaken annual leave. The respondent's defence is that the claimant did not have any accrued but untaken annual leave on termination and in fact had taken more leave than accrued when his contract terminated on 9 January 2024.

Breach of contract – notice pay

4. The claimant claims that he was not paid notice pay in breach of contract in relation to the termination of his employment on 9 January 2024. The respondent's defence is that the dismissal was for gross misconduct being dereliction of duty and deceit such that the claimant is not entitled to any notice pay under the contract. The respondent further contends that the claimant owes the respondent £800 taken as an advance of salary to be repaid at £100 per month and this should be deducted from any amount awarded.

THE HEARING

5. The hearing was a remote public hearing, conducted using the cloud video platform (CVP). The parties agreed to the hearing being conducted in this way.

6. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal.

7. Neither the claimant nor the respondent had legal representation. The claimant attended in person. Mr. Simon Wolanski attended on behalf of the respondent. I took care to explain certain procedural matters in the circumstances.

8. Evidence was heard from the claimant and from Serena Sorrentino on the claimant's behalf. Evidence was also heard from Simon Wolanski.

9. There was no bundle before the tribunal. At the hearing there was discussion as to the available documentary evidence. The claimant had provided separate documents by way of email attachments which had not been uploaded to the tribunal system. The documents included the

claimant's contract of employment and documents associated with his dismissal together with various supporting statements including from the claimant and Serena Sorrentino. The respondent did not provide any documents or written statement of evidence in advance of the hearing and at the hearing Simon Wolanski said that he believed he had set out what was relevant in his response. The respondent said he could print off work records. At the hearing the respondent produced a screenshot of an email about the claimant's leave from one of his managers and an excel spreadsheet listing dates and hours of work for the claimant for 2023. I was content to admit these into evidence. The claimant did not object to the admission of these documents. The claimant also provided his pay slips by email during the hearing, and these were admitted into evidence. I read the documentary evidence to which I was referred during the hearing and where documents are relied upon in reaching my decision they are cited below.

FINDINGS OF FACT

10. I considered all of the evidence before me and I found the following facts on a balance of probabilities. I have recorded the findings of fact that are relevant to the legal issues and so not everything that was referred to by the parties before me is recorded.

Background

11. The respondent, Libby's London Ltd is a gluten free bakery. The claimant worked for the respondent as a store manager from 1 November 2022 until his summary dismissal on 9 January 2024.

Contract of employment

12. A contract of employment was signed by the claimant on 7 October 2022 and the respondent on 1 November 2022. Clause 6 provides for a working week of 45 hours and holiday entitlement of '28 days/5.6 weeks per year' and that 'At the end of your employment any remaining holiday pay will be processed in your final pay run-should you have taken more holiday than you have accrued this will be deducted for your final pay.' Clause 14 provides that 'We may end your employment by giving you 4 weeks or the statutory notice, whichever is longer.' Clause 15 provides that there are no collective agreements. Clause 17 provides that 'The disciplinary rules which apply to you are attached to this statement.'

13. The contract is therefore silent as to the leave year. The contract is further silent as to any provision for carry over of leave. In addition, the contract is silent as to whether the entitlement of 28 days' leave includes bank and/or public holidays.

Annual leave

14. The claimant sets out in his claim form that 'I did take only 10 days out of 28 for the last year' and explains that he had booked leave from 29 December 2023 to 5 January 2024 but was away from work from 24 December 2023 to 8 January 2024 due to store closure. At the hearing, the claimant said he was thus owed pay in lieu of 18 days of leave.

15. The respondent relies on a screenshot of an email from a manager sent on 14 December 2023 setting out that 'so far this year Martin has taken 26 days of holiday (including bank holidays). He has worked an extra three days; therefore, he has 5 days holiday left to take. This means he will not be paid for half the time off over Christmas.' This email is unclear. It is unclear why working an additional three days would give rise to an additional three days of annual leave. The reference to 'this year' most likely means calendar year rather than leave year given it unlikely the claimant had taken 26 days of annual leave between 1 November 2023 and 14 December 2023. In addition, the respondent has produced a schedule of hours worked by the claimant in 2023 which includes dates worked during November and December such that on the records relied upon by the respondent the claimant cannot have taken 26 days leave between 1 November 2023 and 14 December 2023. The respondent thus appears to be operating a calendar year as the leave year. The schedule of hours worked is not a record of time taken as annual leave and does not directly record time taken as leave or absence from work for any other reason.

16. Simon Wolanski accepted in evidence that the schedule did not show the days taken as leave but the total hours worked for 2023 were recorded as 1854.75 which was less than the required total. Simon Wolanski gave evidence that there were no workplace practices or agreements and I accept this evidence. Simon Wolanski explained that he understood that the 28 days leave was 20 days plus bank holidays and that it was possible the claimant was not factoring in leave for bank holidays or public holidays. He said the only bank holiday they opened was the Easter Friday but acknowledged that the business did not open on Mondays and staff worked 45 hours across Tuesday to Sunday. He explained that they were a small business in the hospitality sector which meant they had to be flexible. Simon Wolanski said that however you analysed or looked at the data, the claimant was not owed any leave.

17. There was no explanation or evidence as to why the respondent did not have clear records of leave taken and the reasons for any leave for staff or as to the lack of clarity around arrangements contractual and otherwise and the administration of annual leave.

18. The claimant disputes that he had taken 26 days of leave during 2023 and did not agree the contents of the manager's email were accurate. The claimant claims he is owed pay in lieu of 18 days accrued untaken annual leave. The claimant gave evidence that he had taken 10 days in total during 2023. He said he took 5 days in August and the 5 days at the end of the year. The claimant said the excel spreadsheet did not show the holidays taken and there was no proof he had taken 26 days. The claimant said that he did not know if he was allowed to carry over leave. The claimant said he took 4 days in January 2024.

19. There are no gaps in the dates worked of more than a couple of days other than in August 2023 recorded on the respondent's schedule. This offers some support for the claimant's oral evidence that he took 5 days' leave in August 2023. There was no evidence provided to suggest that the claimant

was prevented from taking annual leave for any particular reason such as sickness or by his employer.

20. I find that the claimant took at least 10 days leave in 2023 including 5 days taken in December. I further find that the claimant took 4 days leave in 2024.

Dismissal

21. The claimant's written statement sets out that before he went on leave, he had the information that the shop would potentially open on 9 January 2024 but he could not get an exact date from management. The claimant was told on 21 December 2023 that the shop would reopen on 4 January 2024. The claimant was concerned as the only person available in the UK was Serena Sorrentino and one person would not be able to manage the shop. The claimant says he agreed with a manager, Keri, that she and Richard would help Serena and also new colleagues could be asked to help. The claimant told Serena by voice message about the oral arrangement made with the manager that she would work and new colleagues could help.

22. Serena's statement sets out that she spoke with the claimant who told her about the plan to cover shifts on opening week. Serena gave evidence that her email with a laughing emoji to the claimant about Simon not being on time was because people were saying the renovations would not be done on time.

23. The claimant's written statement sets out that the claimant was contacted on 2 January 2024 by Richard who asked where the schedule was for the opening week commencing 4 January 2024. The claimant sets out in his statement that he told Richard there was no rota as there was only Serena available and he did not feel the need to create a schedule. The claimant was contacted by Serena who told him Keri and Richard were confused that there was no schedule.

24. On 9 January 2024, the claimant met with Simon Wolanski of the respondent. The claimant's written statement sets out that Simon Wolanski told the claimant that he was terminating his contract immediately for gross misconduct. The claimant's written statement sets out that Simon told him he was careless about the business and his job responsibilities. The claimant said he was sorry for creating confusion but it was not his intention and it was not fair to fire him for that and he should get four weeks' notice.

25. Serena Sorrentino and the claimant gave evidence that they were not aware of any circumstances in which they would not get given notice if their employment was being terminated. Neither the claimant nor Serena were aware of any disciplinary rules. Simon Wolanski gave evidence that he couldn't think of any such document and that he did not think they were given any disciplinary rules.

26. It was put to the claimant in oral evidence that he knew the re-opening was on 4 January 2024 as he had put a sign in the window to that effect. In oral evidence, the claimant accepted that he had said to Simon Wolanski that he did not know they were re-opening on 4 January 2024 which was why there was no rota for that week. The claimant said that he was in shock at

the beginning of the meeting which is why he had said something that wasn't true and tried to explain the circumstances as the meeting progressed. The claimant said that he had only come to know the re-opening date two days before the shop closed. The claimant accepts that he was not immediately forthcoming at the meeting on 9 January 2024. I accept the claimant's evidence and therefore find that the claimant did initially provide Simon Wolanski with what might be termed excuses as to why he had not provided a rota and was not immediately forthcoming.

27. I accept due to the corroborating evidence of Serena Sorrentino that the claimant had told her she would be working the week of 4 January 2024. I find that the claimant did take some steps to arrange staffing for the week of 4 January 2024. There is however no supporting evidence to the effect that any managers endorsed the informal staffing arrangements for that week. The claimant's own evidence sets out contact by Richard about a rota which indicates the expectation that a rota would be produced by the claimant and the claimant's awareness of this expectation.

28. Simon Wolanski gave evidence that the most important duty of an assistant manager is to organise the rota and not to do one is a dereliction of duty. Simon Wolanski said he was shocked there was no rota. Simon Wolanski submitted that he didn't think the claimant was clear about the importance of a rota which was not just for those working but also for management. Although there is no job description available and the contract does not set out what the core duties and functions of a store manager are, I am prepared to accept and thus find that in context the preparation of a rota is an important and key function of a store manager.

29. It was put to Simon Wolanski in cross-examination, that he had made his mind up and his decision before he met with the claimant. Simon Wolanski said, 'not 100% no'. He explained that he would not have met with the claimant if he had already made a decision but that he 'couldn't see a way would not need to terminate employment especially as the chat went on'. I accept the respondent's evidence which is coherent that he had not formed a final decision before the meeting. The respondent submitted that it still remained unclear what the real reason for the failure to carry out the important function and duty of preparation of the rota was and that he had received three different excuses from the claimant and a further reason today. The claimant had said he didn't know the shop was re-opening; that he was not sure the shop would be ready to re-open; and that the rota was only Serena Sorrentino. The claimant had also referred to Simon Wolanski being in charge and new people working in January. I also accept the respondent's evidence that the chat or discussion during which the claimant was not forthcoming and made excuses contributed materially to the decision to terminate.

30. There is no real dispute that the claimant was summarily dismissed on 9 January 2024. I find that the respondent communicated a decision to dismiss the claimant without notice on 9 January 2024 and the claimant was therefore summarily dismissed on that date. The contract of employment was therefore terminated on 9 January 2024.

31. The respondent offered the claimant to continue working as a barista whilst he looked for a new job and advised him that if he wanted a career in management, it would be better to work in a larger company where good management training would be offered. I note that this information is indicative of a concern around capability and a need for training to improve capability in the role rather than as to misconduct. The claimant rejected the offer due to the different status and reduction in pay. The respondent submitted that the claimant could have mitigated his losses by working as a barista even thought that would be a reduction in pay and status. Simon Wolanski initially gave evidence that he wasn't sure about the contractual position of the barista offer but then clarified that this was the opportunity to keep working as a barista in the scope of the existing employment albeit in a different role.

32. On 25 January 2024, the claimant met with Simon Wolanski again to discuss his appeal against the decision to dismiss him but the appeal did not alter the respondent's decision.

33. The claimant and the respondent both agree that the claimant had a loan of £800 in August. The claimant gave evidence that this was a personal loan from Simon Wolanski. The respondent says it was a loan from the company that the claimant was to pay back at £100 per month. I had no documentary or written evidence before me regarding any such agreement.

34. The claimant's payslips for the last few months of employment record a gross monthly wage of £2750. They do not show any £100 deductions such as might be expected if an advance of salary from an employer was being paid back over time.

35. The evidence available to me does not establish to the balance of probabilities that there was a loan made by the respondent business to the claimant in the amount of £800.

36. The claimant says he was entitled to four weeks' notice under the contract. If he had been dismissed with notice on 9 January 2024, his notice period would have expired on 6 February 2024.

LAW
Holiday pay

37. The Working Time Regulations 1998 ("the Regulations") provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for a total of 5.6 weeks leave per annum. The Regulations do not provide a right to take leave on bank or public holidays. The leave year begins on the start date of the claimant's employment in the first year and, in subsequent years, on the anniversary of the start of the claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year. The Regulations make no provision for carry over of annual leave although case law addresses circumstances in which a worker has been prevented from taking annual leave due to sickness. There will be an unauthorised deduction from

wages if the employer fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave.

38. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions in sections 221-224 Employment Rights Act 1996, with some modifications. There is no statutory cap on a week's pay for this purpose.

Breach of contract

39. A dismissal without notice or with inadequate notice is wrongful unless an employer can show that there was a repudiatory or fundamental breach of contract by the employee justifying summary dismissal or there was a contractual right to make a payment in lieu of notice. Even if there is a fundamental breach of contract by an employee, an employer can choose either to affirm the contract and treat it as continuing or accept the breach and terminate the contract.

40. In **Laws v London Chronicle (Indicator Newspapers) Ltd 19591 WLR 698, CA,** the Court of Appeal held that there must be a 'wilful' or 'deliberate flouting of the essential contractual conditions' for behaviour to amount to a fundamental breach of contract justifying summary dismissal. In **Briscoe v Lubrizol Ltd [2002] EWCA Civ 508,** the Court of Appeal approved the test in another case (**Neary and anor v Dean of Westminster 1999 IRLR 288**) that behaviour relied upon as amounting to a breach of the implied term of trust and confidence 'must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment' and held that conduct is to be viewed objectively such that an employee can repudiate the contract without any intention to do so.

ANALYSIS AND CONCLUSIONS

41. I turn to apply the law to the facts that I have found in this case.

Holiday pay

42. The claimant submitted that there was no proof that he had taken more than 10 days' leave. The respondent submitted that no holiday pay was owed on any measure and the claimant could not justify how he arrived at 18 days. The respondent relied on the spreadsheet which showed total hours worked of 1854.75 against a requirement of 2340 or 2088 if 5.6 weeks or 252 hours are deducted.

43. I refer to my findings above. The contract is silent as to the leave year. I have accepted the respondent's evidence that there were no workplace practices or agreements. I have therefore concluded that the leave year runs from the anniversary of the start date which was 1 November in accordance with the Regulations. I have therefore concluded that when the claimant's employment terminated part way through his final leave year on 9 January 2024, he had accrued 5.4 days of leave. I have accepted the claimant's evidence that he took 5 days towards the end of 2023 and 4 days in January 2024. I have therefore concluded that the claimant was not

entitled to any pay in lieu of accrued but untaken annual leave when his contract terminated on 9 January 2024.

44. I have also concluded that if the claimant's contract had been terminated on four weeks' notice on 9 January 2024 and thus expired on 6 February 2024, he would have accrued 7.5 days of leave. On his own evidence, which I have accepted, the claimant had already taken 9 days of leave. Accordingly, there is no entitlement to pay in lieu of accrued but untaken annual leave.

45. At the start of the hearing, the parties discussed whether there was any agreement as to matters such as the leave year. The respondent said he would be content to agree a leave year of the calendar year as that made sense. As set out above, the spreadsheet and manager's email relied on by the respondent appears to approach matters on the basis of a calendar year. There was discussion that on the basis of a calendar year, the claimant had accrued 0.7 days of leave as of 9 January 2024. I have found that the contract was silent and therefore made no provision for carry over of leave. In those circumstances, the claimant had no entitlement to carry over leave accrued but untaken at the end of a leave year save potentially by reference to case law in circumstances none of which were pleaded or set out in evidence where leave cannot be taken either because of sickness or because an employer has prevented the taking of leave. Accordingly, and for completeness, if the leave year is the calendar year, my conclusion remains that the claimant is not entitled to any pay in lieu of accrued but untaken leave.

Breach of contract

46. The claimant contends that his dismissal without notice was wrongful in the circumstances and that he felt the decision to fire him had been taken before the meeting on 9 January 2024. The claimant accepted and I have found that he was not forthcoming with Simon Wolanski when they met on 9 January 2024. The claimant said he didn't do a rota but he had agreed everything with Serena and Keri and as such he had taken steps to have staffing in place. The respondent contends that the termination of the claimant's employment without notice was justified due to the claimant's actions which amounted to gross misconduct and a repudiatory breach of the contract.

47. I turn to assess whether there was a repudiatory breach of contract by the claimant justifying summary dismissal. I acknowledge that serious or 'gross' misconduct will usually amount to a repudiatory breach and it can therefore be useful to consider whether the conduct amounted to gross misconduct but the issue is not whether there was gross misconduct but whether there was a fundamental breach of contract. The reasons relied upon by the respondent are therefore not wholly relevant and not determinative as to whether or not there was a fundamental breach. I remind myself that the case law provides that there must be an element of wilful or deliberate disregard of fundamental terms of the contract.

48. I refer to my findings above. I refer to the finding above that the business had no disciplinary rules or other agreements which might set out what might be considered gross misconduct within the business justifying

summary dismissal. I refer to my findings above that it was a key function of the claimant's role as a store manager to ensure adequate staffing and produce a rota and that the claimant did not produce a rota on this occasion. I am not convinced that in context this is conduct amounting to gross misconduct. As set out above, comments made during the meeting indicate that capability concerns were in mind and there is no evidence that this was other than a single occasion. I have concluded that the claimant was casual as to the arrangements for staffing week commencing 4 January 2024 although he did take some steps.

49. The respondent considers the claimant to have engaged in deceit. In considering whether the claimant was dishonest, the standard is an objective one and based on what ordinary reasonable people would consider to be dishonest. I refer to my finding that the claimant was not forthcoming when he met with Simon Wolanski on 9 January 2024. I do not find the explanation that he was shocked at the meeting is a sufficient explanation for providing excuses or not being forthcoming at that meeting although I accept that the claimant was confused that he was being fired on the spot for the failure to produce a rota.

50. I refer to the case law above. I acknowledge that the rota was key to the running of the store and as a record for management. The claimant did take some steps albeit careless and casual ones with regard to staffing. The claimant did not abdicate all responsibility or ignore the need for staffing the store for week commencing 4 January 2024. There is no evidence that this was other than a single occasion. I am therefore not persuaded that the claimant's conduct evinced a deliberate flouting of essential contractual conditions such that it can be concluded that his conduct amounted to a repudiatory breach of the contract of employment.

51. In so far as there was a breach of the implied term of trust and confidence, this is to be viewed objectively and objectively the claimant displayed a basis for loss of trust in him by his excuses and not being forthcoming at the meeting on 9 January 2024 even if that was not his intention. It is also the case that the lack of rota and the approach to staffing does not readily instil confidence or reassure as to the claimant taking responsibility and having the capability to manage the store although this was a single lapse. The claimant was offered to continue working in a different role and advised as to management training if he wanted to work in a management role. Behaviour relied upon as amounting to a breach of the implied term of trust and confidence is behaviour that goes to the root of the relationship and undermines trust and confidence such that the employer should not have to retain the employee in that employment.

52. I have reflected on whether objectively the circumstances were such at the time of dismissal that trust and confidence was so undermined that summary dismissal was justified. I have accepted there was a basis for some loss of trust and confidence. I acknowledge that in offering for the claimant to work as a barista in the store, the respondent considered he was being reasonable and had sympathy towards the claimant. There is however a lack of coherence in reliance on circumstances amounting to breach of implied term of trust and confidence justifying dismissal as so

undermining the employment relationship whilst concurrently offering to maintain employment.

53. For these reasons, I have concluded that in all the circumstances there was no fundamental or repudiatory breach of contract and the respondent was not justified in dismissing the claimant without notice. The dismissal was therefore wrongful.

54. Accordingly, the claimant is entitled to four weeks' notice pay in accordance with the contract. As the claimant's annual salary was £33,000.00 based on monthly salary of £2750.00 at the time of dismissal, the weekly salary was £635 and I have therefore decided that the claimant is entitled to £2,540.00 in damages for the breach of contract.

Tribunal Judge Peer acting as an Employment Judge

Date 11 June 2024

JUDGMENT SENT TO THE PARTIES ON

17 June 2024

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FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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