



# EMPLOYMENT TRIBUNALS

**Claimant: Ms N Hanson**

**Respondent: Interaction Recruitment Specialists Ltd**

**Heard at Leeds by CVP**

**On: 19 September 2024**

**Before**

**Employment Judge Davies**

## **Appearances**

**For the Claimant:**

**In person**

**For the Respondent:**

**Mr A Gilchrist (Director)**

## **RESERVED JUDGMENT**

1. The complaint of unfair dismissal is well-founded and succeeds.
2. The complaint of unauthorised deduction from wages in relation to the payment of 4 days' accrued holiday pay is well-founded and succeeds.
3. The complaint of unauthorised deduction from wages in relation to the payment of basic wages and car allowance (three weeks at 100% and three weeks at 50%) during the period 11 October 2023 to 24 November 2023 is well-founded and succeeds.
4. The complaint of unauthorised deduction from wages in relation to the payment of bonus and health insurance during the same period is not well-founded and is dismissed.
5. The basic award, compensatory award, wages and accrued holiday pay payable will be determined at a separate remedy hearing.

## **REASONS**

### **Introduction**

1. This was the hearing of complaints of unfair dismissal, unauthorised deduction from wages and failure to pay for accrued holiday on termination of employment, brought by the Claimant Ms N Hanson against her former employer, Interaction Recruitment Specialists Ltd. The Claimant represented herself and the Respondent was represented by Mr Gilchrist, Director.

2. There was an agreed file of documents and I admitted a small number of additional documents into evidence at the hearing. The Claimant gave evidence on her own behalf and Mr Gilchrist gave evidence for the Respondent.
3. At the start of the hearing, we discussed the claims and the issues that arose. Mr Gilchrist confirmed that in relation to the unfair dismissal complaint, the Respondent's case was that it did not fundamentally breach the Claimant's contract and she was not constructively dismissed. If the Tribunal rejected that case, it was not arguing by way of fallback that it had a fair reason for its actions or that the Claimant's dismissal was reasonable in all the circumstances. The unfair dismissal complaint therefore turned on whether or not the Claimant was constructively dismissed.
4. By the conclusion of the hearing, the Respondent accepted that the Claimant was owed holiday pay and did not dispute the figures she had provided.

## **Issues**

5. The issues for me to decide were therefore:

### **Unfair dismissal**

- 5.1 Did the Respondent do the following things:
  - 5.1.1 Mr Gilchrist ignoring the Claimant when she arrived at work on 26 September 2023;
  - 5.1.2 The way Mr Gilchrist spoke to the Claimant on 26 September 2023, including telling her that if she did not want to be there she should leave;
  - 5.1.3 Mr Gilchrist emailing the Claimant's direct reports on 26 September 2023 to award them pay rises without discussing that with the Claimant;
  - 5.1.4 Mr Gilchrist emailing the Claimant's direct reports on 26 September 2023 to say "good to see [the Claimant] getting stuck in today"?
- 5.2 Did that breach the implied term of trust and confidence:
  - 5.2.1 did the Respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent;
  - 5.2.2 if so, did it have reasonable and proper cause for doing so?
- 5.3 Did the Claimant resign in response to the breach? Was the breach of contract a reason for the Claimant's resignation?
- 5.4 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that she chose to keep the contract alive even after the breach?

### **Unauthorised deduction from wages**

- 5.5 What wages were properly payable to the Claimant in October and November 2023 when she was signed off work sick?
- 5.6 Were the wages paid to the Claimant for October and November 2023 less than the wages properly payable?

- 5.7 Was there a series of deductions on 27 October 2023 and 28 November 2023, so that the Tribunal complaint about the deduction on 27 October 2023 was presented within the Tribunal time limit?
- 5.8 If not, was it reasonably practicable to present that complaint within the time limit?
- 5.9 If not, was it presented within a reasonable period?

## Findings of fact

6. The Respondent is a recruitment business, with around 30 offices, 3000 workers and 150 permanent staff. Mr Gilchrist is its owner and Director.
7. The Claimant started working for a predecessor of the Respondent in April 2003. By August 2023, she was working for a company called Hamilton Mayday. She was Northern Regional Operations Manager. She was based out of the Scunthorpe office. There was originally another office in Goole, but by August 2023 that had become an onsite office at the client. The Claimant was responsible for three members of staff. She worked four days per week Monday to Thursday. Her salary was £31,500 per annum. She had a car allowance of £350 per month and benefitted from private health insurance. Her manager was Mr Curtis.
8. The Claimant was paid a discretionary bonus each month, which was a portion of 7% of gross profit for the region. The Claimant had a discussion with Mr Curtis and another Director, Mr Honey, each month, to decide what proportion of the 7% should be paid to her and what proportion to the other team members.
9. The Claimant's contract of employment entitled her to three weeks at full pay and three weeks at half pay, before going onto SSP in the event of illness. The contract said that payments would depend on her producing, if requested, medical certificates.
10. With Mr Curtis's knowledge and agreement, the Claimant sometimes worked from home.
11. On 30 August 2023 Hamilton Mayday went into administration. On 15 September 2023 it was acquired by the Respondent. There is no dispute that the Claimant's employment transferred to the Respondent under the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE"). The Respondent did not write to the Claimant to confirm the transfer of her employment to it.
12. On 20 September 2023, Mr Gilchrist went to the Scunthorpe office to meet the Claimant and her colleagues, Ms Smith and Ms Waite. Mr Curtis was also present. Mr Gilchrist introduced himself. He asked everyone whether there were any issues he needed to be concerned about. Ms Smith said that the office only had two people in it, and they were under pressure.
13. Mr Gilchrist said in his oral evidence that after the meeting he spoke to the Claimant and asked what Ms Smith meant: why had she said there were only two people when three people worked at the branch? He says that the Claimant

told him that she worked from home. When he asked her what she did, she could not tell him. Mr Gilchrist was at pains to make the point more than once that he was being diplomatic: he did not raise this in the team meeting, but raised it afterwards with the Claimant. The Claimant says that they did not have any such conversation on that day. Mr Gilchrist did not ask her what Ms Smith meant, given that there were three people working at the branch. She says that after the meeting, they went to view possible new office premises. Mr Gilchrist agrees that they viewed the premises, but says that the conversation happened before that.

14. Mr Gilchrist's evidence in his witness statement was different from his oral evidence. In his witness statement, he said that when Ms Smith said that she was overworked because there were only two staff members, he was confused and said that there were three of them. The Claimant then announced that she rarely came to the office and worked from home. He was shocked to hear that. When the meeting ended, he took the Claimant to one side and asked her why she did not come to work to share the workload, and what she actually did from home. On this account, far from "diplomatically" not saying anything during the team meeting about there being three staff members, Mr Gilchrist said that he made precisely this point during the meeting.
15. Given the discrepancy between Mr Gilchrist's written witness statement and his oral evidence, I preferred the Claimant's account. I find that Ms Smith did raise a concern about there only being two people in the branch and being overworked. That formed part of a team discussion, to which everybody contributed. Mr Gilchrist did not ask the Claimant, in the meeting or afterwards, what Ms Smith had meant given that there were three people at the branch. It seems to me clear, however, that as part of the team discussion following Ms Smith's comment, there must have been mention of the Claimant working from home some of the time. She was authorised to do so and did so with the knowledge of her line manager (who was present). She also worked onsite at clients' premises sometimes. This could be for a whole week at a time. There is no reason that this would not have been part of the discussion about the pressures facing the branch. It is equally clear that Mr Gilchrist quickly formed the impression that the Claimant "did very little work and left her two colleagues to do the work" and that he was "not happy." He said this in his witness statement. This was apparently on the basis of a "get to know you" team meeting lasting less than an hour with everyone present, and without any proper information about what the Claimant did or proper discussion with her about that.
16. Mr Gilchrist went to the Scunthorpe office again on 26 September 2023. He arrived before the Claimant. She arrived late that day, because she had a medical appointment. It was a busy day because they had arranged for a number of candidates to come in and be interviewed. There were about 8 candidates filling in forms when the Claimant arrived. Ms Smith and Ms Waite were also present.
17. The Claimant's evidence is that she said good morning to Mr Gilchrist three times, but he ignored her. He then told her, in front of her colleagues, "I suggest you go into the meeting room." They went into the meeting room. She attempted to show him her phone with evidence of her medical appointment, but he pushed

it to one side. He said, "I suggest if you don't want to be here that you leave." She replied, "After 20 years of working for the company, the only way I will be leaving is if you make me redundant." The meeting became quite heated. She tried to tell Mr Gilchrist about how she performed her role. The Claimant gave that account in her particulars of claim and her witness statement. She was repeatedly questioned about it in cross-examination, and her answers were entirely consistent with that account each time.

18. Mr Gilchrist disagreed with the Claimant's account, but his evidence was unclear and inconsistent and I preferred the Claimant's. In particular:

18.1 In his witness statement, Mr Gilchrist said that he did not ignore the Claimant although the office was busy and he was speaking to colleagues and the public. In his oral evidence, Mr Gilchrist's answers about this were inconsistent and evasive. He started by saying that it was not true that he had ignored the Claimant, he was excited to be there and had come to say hello but it was a busy office. He was therefore asked specifically what he was saying had happened – was he saying that he had not ignored the Claimant and had said, "Hello" to her, or was he saying that it was a busy office so he may not have said "Hello" to her. He said that it was hard when there were about nine people present to know whether or not he said "Hello" but his evidence was that he did not ignore the Claimant. He added, "I did not come to ignore her." He was asked again to be clear whether he was saying that he had, in fact, returned the Claimant's greeting or whether he was saying that he had not or did not know. He then said that he could not remember whether it did or did not happen, but he definitely said "Hello" to "everyone" in the office. A few moments later he said that he could not remember whether he replied to everyone. The Claimant put to him that she had said "Hello" to him three times and that it was rude to ignore her. He then said, "I can see how that would be rude, but I can also see how it wouldn't be rude if there was a lot of noise and someone was new to the situation."

18.2 It seemed to me that Mr Gilchrist was on the one hand saying that he had not ignored the Claimant and had said "Hello" to everyone, but on the other hand saying that he did not know if he had said "Hello" to the Claimant and offering the explanation that it was a busy office. I found his evidence wholly unconvincing. I accept the Claimant's clear evidence that she said "Hello" to him three times and that he ignored her. I find that that was deliberate. It was implausible that the presence of the Claimant's two colleagues and a number of candidates filling in forms before their interviews would mean that Mr Gilchrist did not notice or reply to three greetings from the Claimant. I also noted that the Claimant said in her resignation email only a few days later on 2 October 2023 (see below) that she had been ignored when she walked into the branch.

18.3 Mr Gilchrist was asked whether this was a pre-arranged visit to the branch on 26 September 2023. He said that he thought he arranged it in advance, although as the Claimant's senior he would turn up unannounced. He was asked whether there was any evidence, such as an email, arranging the visit and he said that there was not. I find that the visit was not prearranged. If it had been, there would have been some evidence to that effect, and, of course, the Claimant would no doubt have informed Mr

Gilchrist about her medical appointment. I find that Mr Gilchrist arrived unannounced because he was checking up on the Claimant and what was happening at the branch following the discussion on 20 September 2023, and that he was unhappy to find that she arrived late for work. That is why he ignored her.

18.4 Mr Gilchrist said in his witness statement that he sat down with the Claimant on 26 September 2023 and said that it was “not fair” that she did not share the workload and questioned her again about what she did from home. She asked him to make her redundant. Although the company’s ET3 response form said that the Claimant asked whether she was being made redundant, that was wrong. Mr Gilchrist explained that this was far from a redundancy situation. There was work to do and they were there to grow. He wanted the Claimant to share the workload and pointed out that she took most of the branch bonus. This could not continue and all hands to the deck were required.

18.5 Mr Gilchrist’s oral evidence was inconsistent with this and contradictory. He was asked how he had opened the conversation with the Claimant. He said that he commented that it was a busy office with a lot going on and asked the Claimant what they needed to do and were there any issues. He then said that Ms Smith had said that they were overworked and that they needed everyone to be in the office. Mr Gilchrist was asked why his witness statement did not say that he started the meeting with general questions about what needed to be done and what issues there were. He said that it was because he had been asked what happened in the meeting. He was reminded that he had been asked how he opened the meeting. He then said that he was putting the key point in his witness statement, not everything that happened. Again, in view of these inconsistencies, I preferred the Claimant’s evidence. I find that Mr Gilchrist had already formed an adverse view that the Claimant was not pulling her weight, he made an unannounced visit to check up on her and was unhappy that she arrived late. He took her into the back room to deal with that. He pushed away her mobile phone when she tried to show him her medical appointment and launched straight into criticism of the Claimant.

18.6 In that context, I prefer the Claimant’s clear and consistent evidence, that Mr Gilchrist said to her that if she did not want to be there, she should leave, and she replied to say that the only way she would leave after 20 years was if they made her redundant. She did not ask to be made redundant, she made clear that she was not about to leave and that if they wanted rid of her they would need to make her redundant.

18.7 I note that the ET3 response said that the Claimant asked if she was being made redundant, not that she requested to be made redundant. That inconsistency is not accounted for by the fact that the Respondent had not yet received the particulars of claim when it put in its ET3 response. The ET3 set out a positive account of what the Claimant had said. That can only have come from Mr Gilchrist. It did not depend on the Claimant giving her account.

19. After the meeting, Mr Gilchrist emailed Ms Smith and Ms Waite, the Claimant’s two direct reports, giving them a pay rise. He did not discuss that with her first. Ms Smith and/or Ms Waite told the Claimant about it on the day. The email to Ms Smith was sent at 11:24am. It said:

Good to catch up this morning.

We don't know each other very well but what I can say is that Simon and I see you as very important to us.

I don't think [the Claimant] knows you have interviews on and I haven't said anything. But I did say that she should talk and see how you are feeling ...

But we want you to stay as we rebuild the team and move offices.

I am happy to give you and [Ms Waite] good pay increases and to put up a better bonus scheme.

I would increase you to £29k effective 1<sup>st</sup> October.

I'm ambitious and always around.

I would love to keep you here as part of our re launch as we try to expand the business in this region."

20. The Claimant said that she felt humiliated that Mr Gilchrist offered pay rises in this way to her two reports, without discussing it with her.
21. Mr Gilchrist said in his witness statement that he gave Ms Smith and Ms Waite pay rises after the Claimant "had asked to be made redundant" and after he found out that they both had other job opportunities and might resign. He did not consult with the Claimant about it because she had "told me she wanted to be made redundant and I thought therefore that she was not engaged with the business. She didn't know how unhappy her staff were. I also had to work very quickly to resolve these two staff who had other jobs on offer and who were unhappy. In normal circumstances yes I would have discussed with the manager but I believe the situation was urgent and that the Claimant had disengaged."
22. Again, Mr Gilchrist's oral evidence was inconsistent and contradictory:
  - 22.1 When the Claimant put to him that he had left the meeting with her, made a call and then emailed her staff with pay rises, he said that that was "not the timing." He was therefore asked what the timing was. He had to be asked three times to answer that straightforward question. When he did so, he said that it was "several hours later" after Ms Smith told him she had a job offer. He went to reflect and "a few hours later" told Ms Smith that he wanted her to stay. The timing on the email is clear – Mr Gilchrist sent it at 11:24am. He clearly did not reflect for a few hours. I accept the Claimant's account. She spoke to Mr Gilchrist after she arrived at work at about 9.50am, he then made a phone call and promptly emailed pay rises to her staff. She was in the office with them when they received the pay rises, about which she knew nothing.
  - 22.2 The Claimant put to Mr Gilchrist that Ms Smith did not have a job offer, she had a second interview. He said that "both were correct". She had a second interview and thought she was going to get a job offer. Having a job offer and hoping to get a job offer are plainly not the same thing.
  - 22.3 When the Claimant asked him why he had not discussed the pay rises with her first, he said that it was because she did not tell him about Ms Smith's job offer, and because the Claimant had "asked me for redundancy." Mr Gilchrist was asked whether he knew if the Claimant was aware of Ms Smith's job interview/offer. He said that he "assumed" she did. I noted that this was the opposite of what he wrote to Ms Smith on the day, when he

said that he did not think that the Claimant knew Ms Smith had interviews on.

- 22.4 Mr Gilchrist was asked about his evidence in his witness statement that he found out that Ms Waite also had other job opportunities. He then said that he, “got the impression she might have”. He was asked again whether he found out that she had another job opportunity and he said that it was, “a feeling.” Again, that is not what his witness statement said.
- 22.5 Mr Gilchrist referred repeatedly to his view that the Claimant had disengaged because she had “asked for redundancy.” As explained above, I found that the Claimant did not ask for redundancy; Mr Gilchrist told her that if she did not want to be there, she should leave, and she told him that the only way she was going after 20 years was if they made her redundant. While the Claimant had not disengaged, I have no hesitation in finding that Mr Gilchrist had disengaged with her. He had plainly formed the view by the end of their conversation on 26 September 2023 that the Claimant had no future with the business. That was not because she had disengaged. I was because he had formed a snap judgment that she was not pulling her weight; had been unhappy that she arrived late at work (following a medical appointment of which he was unaware); and had told her that she should leave if she did not want to be there. When she told him that the only way she was going was if she was made redundant, he determined that she had no future with the business. That is why he offered pay rises to her staff members within an hour and without discussing it with her. The situation was not that urgent. Ms Smith did not have a job offer yet and there was no evidence that Ms Waite had other job opportunities. Mr Gilchrist was not concerned that the Claimant had failed to mention this to him. He simply did not want the Claimant there anymore.
23. Later on 26 September 2023, Mr Gilchrist sent another email to Ms Smith. He said that it was, “Good to see [the Claimant] getting stuck in today” and said that he hoped his deal (presumably his proposed pay increase) was at least a seven out of ten. The Claimant found out about the email to Ms Smith. She felt humiliated that Mr Gilchrist, who had just bought the business and barely knew her or her staff or how she ran the business, was emailing her report behind her back commenting about her in that way.
24. With Mr Curtis’s agreement, the Claimant took Thursday 28 September 2023 as annual leave. Before the Respondent had taken over Hamilton Mayday and that company was in administration, the Claimant had naturally been applying for other jobs. She had been offered an interview by one company, but she turned it down when the Respondent bought Hamilton Mayday. After Mr Gilchrist’s conduct on 26 September 2023, she contacted the company and asked if she could have an interview after all. They agreed, and the interview took place on 28 September 2023. The Claimant was offered the role.
25. On Monday 2 October 2023, the Claimant worked on site with a client of 17 years’ standing, managing their candidates. At 3:04pm, she emailed Mr Curtis to resign. She gave 8 weeks’ notice. She said that since the Respondent had bought the company, she had been made to feel undervalued. She had never been made to feel that way before, from being ignored by a director when she



walked into a branch, to practically being told to resign if she was not happy. Her work ethic had been questioned and her work had been discussed with members of her team that she managed, leaving her feeling undermined and causing her sleepless nights, upset and anxiety. She confirmed in her witness statement that those were the reasons for her resignation. Mr Gilchrist asked her about it in cross-examination. He put to her that she had been offered a new job and “just wanted a payout”. He suggested that the Claimant had been offered a job before 26 September 2023, although that was simply speculation. He suggested that the timescale for the Claimant being offered her new role was very tight. He suggested that she was leaving because she was being asked to come into work and do more and she sensed that things might get “more businesslike.” The Claimant disagreed. She explained that she was able to have an interview on 28 September 2023 because she had taken it as holiday. She said again that she had been humiliated and that she had been made to feel like she did not belong in the team. Mr Gilchrist had told her that if she did not want to be there she should leave and had emailed her staff giving them a pay rise and then saying it was “Good to see [the Claimant] getting stuck in.”

26. I accepted the Claimant’s evidence about how and when she came to be interviewed for her new role and when she was offered it. I also accepted her evidence about why she left, namely because of the way Mr Gilchrist had treated her on 26 September 2023.
27. The Claimant spoke to Mr Curtis following her resignation. She asked to be put on garden leave for her notice period, because of the way she was being made to feel, which was causing her sleepless nights, upset and anxiety. She was covering a client site all week because one of her team was on holiday. Mr Curtis asked her to cover the site and then hand it over on 9 October 2023. She could hand over her laptop, phone etc on 10 October 2023 and would then be on garden leave. The Claimant did as agreed, handing the site over on 9 October 2023 and saying goodbyes and finalising her work on 10 October 2023. She then met Mr Curtis, who told her that Mr Gilchrist would not agree to her going on garden leave and that she should work from home. The Claimant and Mr Curtis spoke about the matters the Claimant had referred to in her resignation letter, and the Claimant said that she would like a grievance meeting about them. Later that afternoon, Mr Curtis emailed the Claimant to say that Mr Gilchrist was not happy with her working from home during her notice period, and wanted her either to come into the Scunthorpe office or work from the corporate hub in Wath upon Dearne. That was where the higher management and directors were based.
28. The Claimant’s evidence was that this caused her anxiety and she phoned in sick on 11 October 2023. She had never been off sick throughout her career but she was too ill to attend. She self-certified until Friday 13 October 2023, then she saw her GP and was signed off work with “anxiety issues” for 3 weeks. She was signed off for a further three weeks on 2 November 2023 and then a further week. She was therefore signed off for the remainder of her notice period.
29. When she received her payslip on 26 October 2023 she had only been paid until 10 October 2023. She had not been paid three weeks’ full pay for the first three weeks of her sickness absence, as provided for by her contract of employment.

She contacted Ms Norman, Payroll and Compliance Manager, who told her she needed to contact Mr Gilchrist. She emailed him that morning. She explained that she was contractually entitled to 3 weeks' full pay and asked why she had not been paid. Mr Gilchrist replied to say that he would pass her email to Mr Holder, who had received complaints about the Claimant. The Claimant replied to say that she had received and responded to Mr Holder's email, but pointed out that this did not affect her contractual sick pay entitlement. The Claimant sent a follow-up email to Mr Holder on 27 October 2023 and a further email to Mr Holder and Mr Gilchrist on 1 November 2023. Neither replied to explain why she was not being paid. The Claimant sent further emails in November. The next month's wages fell due on 28 November 2023. Again, the Claimant was not paid three weeks' half pay, as provided for by her contract of employment. Apart from an email on 30 November 2023 from Ms Norman telling the Claimant that she would confirm about her final pay and asking about arrangements for collecting equipment from the Claimant, she heard nothing more.

30. The Respondent purported to carry out an investigation into "complaints" received about the Claimant during her sickness absence. It also invited her to a meeting to discuss the concerns she had raised in her resignation letter, by way of a grievance hearing. She declined to attend. I do not need to go into the detail of those matters, because neither the raising of concerns about an employee, nor an employee's unwillingness to attend a grievance hearing while on sick absence entitles an employer to stop paying them.
31. In his witness statement, Mr Gilchrist made assertions that the Claimant "couldn't care less about her colleagues and wanted it all her own way"; producing a sick note was a "tactic"; it was "most interesting" to note that she managed to recover ready to start her new job on the due date; she had taken "every opportunity" to "game the system" and "waste her doctors' time"; she was "miraculously" able to start her new job and was asking them to believe that her anxiety "disappeared overnight"; at every opportunity she wanted "a payoff or a free lunch in the form of garden leave"; and she was a "selfish and dishonest person". He said, "We would always pay sick pay where it was genuine." Although not explicitly stated, the inference in the witness statement was that the Claimant was not paid sick pay because Mr Gilchrist did not believe she was genuinely sick.
32. At no stage during her sick absence did Mr Gilchrist or anybody else at the Respondent tell the Claimant that the reason she was not being paid was because the Respondent did not think she was genuinely sick. The Claimant was never asked about that. She was not asked to consent to provide her medical notes or to attend an Occupational Health appointment. The Respondent did not obtain any medical evidence in relation to the Claimant's absence. Nor did it request disclosure of her medical records in preparation for these proceedings. There was nothing more than Mr Gilchrist's assertion that the Claimant's sickness absence was not genuine. He referred more than once to the fact that he could get a sick note if he asked for one.
33. Mr Gilchrist's oral evidence was again inconsistent and contradictory. The Claimant put to him that she had received no response to her emails to him and Mr Holder about her sick pay. He said that he did not know, he did not deal with

payroll and would “look into it.” He was copied into some of the emails and must have known whether or not he replied. When the Claimant put to him that she had been left without pay or communication from 10 October 2023 he said that he did not deal with payroll, was sorry if it was true, and would look into it. The Claimant then put to him that Ms Norman had told her that it was Mr Gilchrist’s decision. He said, “I didn’t believe you were genuinely off sick.” The Claimant then pointed out that he had just given evidence that he did not know whether she had been paid and did not deal with payroll. Later in his evidence, the Claimant asked Mr Gilchrist why she had not been paid her full holiday pay entitlement. He said that he did not know because he did not deal with holiday pay. However, his next answer was that he did not believe the Claimant’s sickness absence was genuine so that Claimant would not accrue holiday during that period. It was pointed out to him that on the one hand he was saying that he did not deal with payroll and did not know why the Claimant was not paid, and on the other hand he was saying that he did not believe that the Claimant was genuinely unwell. He then said that the “team” did not believe that the Claimant was genuinely unwell. He was asked what the basis was for Ms Norman in payroll not believing that the Claimant was genuinely unwell. He said, “we had discussed her seeking redundancy and wanting to work from home. Nobody believed that story. All we had was a doctor’s note. Nobody believed it.” Mr Gilchrist continued to give contradictory answers until, eventually, he accepted that it was his decision, not Ms Norman’s, that the Claimant should not be paid during her sickness absence.

34. The Claimant’s evidence in cross-examination was that she was genuinely unwell. She told the doctor that she could not sleep, was crying all the time and was anxious. They said that the best thing to do was to take time out. She was diagnosed with anxiety and that was what she had. She had never had it before. She did not have anxiety in her new workplace, but she had a great team and felt valued. The anxiety had not miraculously disappeared, in fact she continued to experience it to some degree. Being spoken to as Mr Gilchrist had spoken to her had stuck with her. She agreed that she had initially asked for garden leave. She said that it was because she felt uncomfortable with how Mr Gilchrist had treated her and how he had made her feel with her employees that she managed. She had not requested to work from home, Mr Curtis had told her she could work from home. She went to the doctor after Mr Gilchrist gave her the option of working with members of staff with whom he had humiliated her, or at the corporate hub. She was not well to come in because of the way he had made her feel.
35. I had no hesitation in accepting the Claimant’s evidence. I have accepted her evidence about how Mr Gilchrist behaved on 26 September 2023. He was unhappy with her and critical of her. He told her she did not want to be there she should leave. Once she mentioned redundancy, he essentially determined that she had no future with the Respondent and he acted accordingly. He offered her own direct reports pay rises without discussing it with her and he sent them an email commenting on her performance. This was all after meeting the Claimant twice ever, for possibly two hours in total. The Claimant understandably felt humiliated and she rightly felt that she did not belong and was not wanted. That gave rise to anxiety about attending work at Scunthorpe or Wath upon Dearne, and that is why she was signed off. It was not because she was “gaming” the

system, wanted a “free lunch” or was being in any way dishonest. None of that is undermined by the fact that the Claimant was well enough to start her new job. On her own account, her anxiety was specifically linked with circumstances at the Respondent.

36. The Claimant started ACAS Early Conciliation on 7 December 2023 and received her certificate on 11 January 2024. Her claim was deemed to be presented on 21 March 2024 (following an initial rejection because the name of the Respondent on the EC certificate and the claim form were different.)

## Legal principles

### Unfair dismissal

37. The right not to be unfairly dismissed is set out in section 94 Employment Rights Act 1996. Section 95 of that Act defines what is meant by dismissal. This includes (s 95(1)(c)) what is usually called constructive dismissal, i.e. where the employee terminates the employment contract, with or without notice, in circumstances where he or she is entitled to so without notice by reason of the employer’s conduct.
38. It is well-established (see *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221) that in considering whether an employee has been constructively dismissed, the issues for a Tribunal are:
- 38.1.1 Was there a breach of the contract of employment?
  - 38.1.2 Was it a fundamental breach going to the root of the contract, i.e. such as to entitle the employee to terminate the contract without notice?
  - 38.1.3 Did the employee resign in response and without affirming the contract?
39. It is an implied term of the contract of employment that the employer will not, without reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: *Malik v BCCI* [1997] IRLR 462. The EAT has recently emphasised that this is a demanding test. The employer must in essence demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract: see *Frenkel Topping Ltd v King* UKEAT/0106/15/LA at paragraphs 12-15. Furthermore, individual actions taken by an employer that do not by themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim unfair dismissal. The final act in such a series (or “last straw”) need not be of the same character as the earlier acts but it must contribute to the breach of the implied term: see *Omilaju v Waltham Forest BC* [2005] IRLR 35 CA.
40. The essence of constructive dismissal is repudiation by the employer, which is accepted by the employee. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as being at an end. The employee’s resignation must be in response (at least in part) to the repudiation, which must be the effective cause of it: see

*Nottinghamshire County Council v Meikle* [2005] ICR 1, CA; *Wright v North Ayrshire Council* UKEATS/0017/13/BI.

41. Once dismissal is established, s 98 of the Employment Rights Act 1996 requires the employer to show the reason for the dismissal and that it was a potentially fair one. The reason for dismissal is the set of facts known to the employer, or beliefs held by him, that cause him to dismiss the employee: *Abernethy v Mott, Hay and Anderson* [1974] ICR 323. In a case of constructive dismissal, that is the reason for which the employer breached the contract of employment: see *Berriman v Delabole Slate Ltd* [1985] ICR 526 CA. If the employer shows a potentially fair reason for its conduct, the Tribunal must then consider whether the employer acted reasonably in all the circumstances in treating that as a sufficient reason for dismissing the employee.
42. Claims for unlawful deduction from wages are dealt with by sections 13 to 27 Employment Rights Act 1996. Under s 13(1), an employer shall not make a deduction from the wages of a worker employed by him unless the deduction is required or authorised by statute or the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction. Under s 13(3), where the total wages paid on any occasion is less than the total amount of wages properly payable to the worker on that occasion, the amount of the deficiency is treated as a deduction made by the employer from the worker's wages. Section 23 gives the worker the right to complaint to an employment tribunal about a deduction from wages in breach of s 13. The claim must be brought within 3 months (plus early conciliation extension) of the date of payment of the wages in question. If there is a series of deductions, it must be brought within 3 months (plus early conciliation extension) of the date of payment of the last wages in question. What is meant by wages is defined by s 27. Wages includes any fee, bonus, commission, holiday pay or other emolument referable to the person's employment.
43. It is well-established that the wages must be quantifiable if a claim is to be brought under s 23. That means it must be possible to identify the precise sum that should have been paid on a specific date and was not paid: see e.g. *Lucy v British Airways plc* UKEAT/0033/08/1301 [referred to by the Respondent] and cases referred to in that judgment. That may involve a Tribunal hearing evidence and making findings of fact about whether specific conditions were satisfied, not merely performing mathematical calculations, but the principle remains that the sums must be quantifiable.
44. Mr Gilchrist draws attention in his written argument to a number of cases relating to the fundamental principle that wages are essentially part of the wage-work bargain: an employee's right to remuneration depends on their performing the work they are employed to perform or being ready and willing to do so. That principle is well-established.

## **Application of the law to the facts**

### **Unfair dismissal**

45. Against the detailed findings of fact above, I turn to deal with the issues.

46. As explained in detail in the findings of fact, I find:
- 46.1 Mr Gilchrist did ignore the Claimant when she arrived at work on 26 September 2023. He did so because he was unhappy that she was, in his perception, late for work. He did not know that she was at a medical appointment.
  - 46.2 Mr Gilchrist took the Claimant into the back room and told her that if she did not want to be there, she should leave. He pushed aside her phone when she tried to explain that she was late that day because she had been to a medical appointment. He had already formed the view that she did not pull her weight and was “dumping” all the work on her colleagues and was critical of her for that. He had not had any proper discussion or conversation with her about what work she did, where and when. When the Claimant told him that she would not be leaving and that the only way she would be going after 20 years was if she was made redundant, he determined that she no longer had a future in the business and his subsequent actions were consistent with that.
  - 46.3 Mr Gilchrist offered the Claimant’s two direct reports pay rises, by sending them emails no more than an hour after this discussion, while they and the Claimant were present in the office. He did not discuss this with the Claimant, although it would be usual to do so. That was because he did not see the Claimant as having a future in the business.
  - 46.4 Mr Gilchrist emailed the Claimant’s direct report later that day commenting on the Claimant’s being at work and “getting stuck in.”
47. I find that this was conduct, without reasonable or proper cause, that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent.
48. The context is that Mr Gilchrist was the owner and director of the Claimant’s new employer. His view of her and behaviour towards her were fundamental in the employment relationship. If he decided she had no future in the company, then she had no future in the company. The context is also that Mr Gilchrist had met the Claimant once before. He had been in a team meeting with her for less than an hour and visited possible office premises with her. He had never sat down with her and had a proper discussion about her workload or how and where she performed it.
49. First, I find that there was no reasonable or proper cause for deliberately ignoring the Claimant when she arrived at work, despite her greeting him three times. That is conduct, from the owner and Director of the new employer, that is calculated or likely to undermine trust and confidence. While it might not, by itself, be a fundamental breach of contract, it was capable of contributing to such a breach.
50. Secondly, I find that there was no reasonable or proper cause for refusing to look at the Claimant’s phone or listen to her explanation about being at a medical appointment, and no reasonable or proper cause for telling her that if she did not want to be there she should leave. The Claimant had not done anything to warrant that comment. She was late into the office because she had

a medical appointment. She did not know that Mr Gilchrist was coming, and there was no reason she needed to let him know in advance that she would be late in or that she had a medical appointment. The Claimant had performed her work without complaint or issue under Mr Curtis's management for many years, including working from home sometimes. Further, I find that this behaviour, in particular the comment essentially suggesting that the Claimant should leave, was clearly calculated or likely to destroy or seriously damage trust and confidence. Again, this was the new owner of the business indicating to one of the Regional managers, on the basis of a brief introductory team meeting and a perfectly legitimate late attendance at work, that he has formed the view that she does not want to be there and inviting her to leave. The Claimant had not done anything to suggest that she did not want to be there. When she had tried to explain why she was late in, Mr Gilchrist had refused to listen. This seems to me to be conduct intended to undermine the employment relationship and to cause the Claimant to leave.

51. Thirdly, I find that offering pay rises to the Claimant's direct reports in the way that he did and without reference to the Claimant was conduct without reasonable and proper cause. Mr Gilchrist would normally discuss this with a line manager first. As explained above, I rejected Mr Gilchrist's explanations for not doing so. I find that he did it because he had determined that the Claimant had no future in the business. This was, again, calculated or likely to damage trust and confidence. The new owner of the business was deliberately undermining the Claimant in her line management relationship with her two direct reports. Likewise, there was no reasonable or proper cause for emailing Ms Smith to make a comment about the Claimant getting stuck in. It was unprofessional and undermining. While these last two acts may not, by themselves, have amounted to a fundamental breach of contract, they were both capable of contributing to one, particularly in context.
52. Overall, I find that these matters, taken together, amounted to a fundamental breach of the implied term of mutual trust and confidence. I have taken into account that there is a high threshold for establishing such a fundamental breach and that these events took place in a short timescale. I have also taken into account that the Claimant did not pursue her grievance. However, the perpetrator was the owner and Director of the Claimant's new employer. He had clearly reached a snap judgment about the Claimant, as she rightly perceived, and had formed the view that she did not have a future with the company. His conduct reflected that. He did not intend to be bound by the employment relationship going forward and his conduct evinced that.
53. As explained in the findings of fact, I find that the Claimant did resign in response to the breach of contract. Mr Gilchrist's conduct was the reason for her resignation. There is no suggestion that she affirmed the contract and I find that she did not do so. She was, therefore, constructively dismissed.
54. As noted, the Respondent did not advance a fallback argument that, if the Claimant was constructively dismissed, it had a potentially fair reason for its conduct. It follows that the Claimant was unfairly dismissed.

## Unauthorised deduction from wages

55. As explained in the findings of fact, I find that the Claimant was genuinely unwell and as such was signed off work with anxiety by her GP. According to her contract, she was entitled to be paid three weeks' full pay followed by three weeks' half pay in those circumstances. That included her car allowance, which was a fixed sum paid each month. It did not include a payment in relation to health insurance. That was a benefit in kind, but it was not wages.
56. Mr Gilchrist's argument that the Claimant was not entitled to be paid because she was not ready and willing to work is misconceived. By definition, an employee on sick leave is not ready and willing to work. But the Claimant's contract provided for her to be paid certain sums in those circumstances. Those were the wages properly payable to her.
57. However, I find that the wages properly payable to the Claimant for the purposes of an unauthorised deductions claim did not include bonus payments. That is because her bonus was discussed and agreed, month by month, between her and Mr Curtis. It is not possible to say how much it would or should have been. Further, given that the Claimant had given notice, it is possible that no bonus would have been agreed as payable. As such, the bonus is not quantifiable in the way that it needs to be in order for the Claimant to say that it formed part of the wages properly payable to her.
58. The Claimant was not paid in accordance with her contractual entitlement in respect of wages and car allowance. The precise sums owed to her will be determined at the remedy hearing.
59. I find that there was a series of deductions, on 27 October 2023 and 28 November 2023. On both occasions, the Claimant's contractual sick pay was withheld from her on the direction of Mr Gilchrist, purportedly because he did not believe that the Claimant's sickness absence was genuine. That is the paradigm of a series of deductions. The Claimant's complaint of unauthorised deduction from wages was presented within three months plus early conciliation extension of 28 November 2023 and was therefore presented within the relevant time limit.

**Employment Judge Davies**  
**25 September 2024**  
Sent to the parties on:

For the Tribunal Office: