EMPLOYMENT TRIBUNALS

Claimant: **Miss M. Jowett**

Respondent: **Midland Lettings Limited**

Record of an Attended Hearing
at the Employment Tribunal

Heard at: **Nottingham**

Heard on: **22 October 2025**

Before: **Employment Judge Broughton (sitting alone)**

Appearances:

Claimant: **In person**

Respondents: **Mr Farooq – Litigation Consultant**

JUDGMENT

1. The Claimant's claim of constructive unfair dismissal is well founded and succeeds.

2. The Respondent made an unlawful deduction of wages under section 13 Employment Rights Act 1996 however no compensation is awarded

3. The remaining claims are not well founded and are dismissed accordingly.

4. The Respondent is ordered to pay the following sums to the Claimant in respect of the claim of constructive unfair dismissal:

   4.1 Basic Award: £2,100

   4.2 Compensatory Award

4.2.1 Loss of earnings: £2,600 net
4.2.2 Loss of Statutory Rights: £500

Total payment to be paid to the Claimant: £5,200

The recoupment provisions do not apply.

REASONS

Background

1. The Claimant was employed by the Respondent as a Property Portfolio Manager from 15 February 2021 until she resigned with immediate effect on 18 October 2024.

2. The Claimant represented herself at today's hearing. The Respondent was represented by Mr Farooq, a litigation consultant.

The Claim Form

3. The Claimant presented a claim on 10 February 2025 following a period of ACAS early conciliation from 26 October 2024 to 7 December 2024.The Claimant also issued a claim on 13 November 2024 which included an additional claim of whistleblowing which she subsequently withdrew and which was dismissed in a judgment by Employment Judge Hutchinson dated 25 July 2025.

The Evidence

4. The parties produced an agreed bundle of documents numbering 319 pages. In the afternoon the Respondent produced some additional documents and made an application to adduce those into evidence The Claimant confirmed that she had no objection. The documents appeared relevant and by agreement were added to the bundle [pages 320-324].

5. The Claimant had prepared a brief witness statement and a fairly brief witness statement had also been prepared by Mr Ka Shing Cheung, Director of the Respondent and Mr Joshua Garbett, Property Accounts Manager employed by the Respondent.

6. I heard evidence from the witnesses sworn under an affirmation or oath.

Employment Background

7. It is agreed between the parties that the Claimant was employed part time by a company called Midland Capital Limited under a contract of employment dated 8 February 2021 (**Contract**) [p. 64- 80]. Following a transfer of the business pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006/246 (TUPE) to the Respondent, the Claimant's employment transferred to the Respondent and the Claimant was issued with a new contract of employment (**Second Contract**) dated 3 April 2023 [p.81 – 97] which she

signed.

8. It is common between the parties that the Claimant resigned without serving notice and her employment ended on 18 October with immediate effect. The Claimant started new employment on 23 November 2024 which paid her a salary of £35,000.

Constructive Unfair Dismissal Claim

9. The Claimant confirmed at the outset of the hearing, that in relation to her complaint of constructive unfair dismissal she was relying upon the following 5 acts:

   9.1 alleged failure to pay her salary on time

   9.2 the conduct of the Respondent in correspondence sent to her on 9 October 2024

   9.3 being told while an leave that the Respondent had dismissed her

   9.4 colleague accessing her personal information via a work email account

   9.5 failure to provide pension information when requested

10. The Claimant also claims the following:

   10.1 Breach of contract in that she was not paid dividend and salary in accordance with the Second Contract and this resulted in an increase in taxable income for the year.

   10.2 Unlawful deductions in that salary was paid late.

   10.3 Deduction for annual leave from her salary.

   10.4 Failure to make pension contributions under the contract

   10.5 An award for injury to feelings for breach of the implied term of trust and confidence

The Issues

11. The issues for the Tribunal to determine are therefore*:*

   11.1 ***Unfair dismissal***

      11.1.1 Was the claimant dismissed?

      11.1.2 Did the Res[pendent breach the implied term of trust and confidence? The Tribunal will need to decide:

         11.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

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

11.1.3 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

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

11.1.5 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep

11.1.6 If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract?

11.1.7 Was it a potentially fair reason?

11.1.8 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant, including following a fair procedure?

11.3 Holiday Pay (Working Time Regulations 1998)

11.3.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

11.3.2 What was the claimant's leave year?

11.3.3 How much of the leave year had passed when the claimant's employment ended?

11.3.4 How much leave had accrued for the year by that date?

11.3.5 How much paid leave had the claimant taken in the year?

11.3.6 Were any days carried over from previous holiday years?

11.3.7 How many days remain unpaid?

11.3.8 What is the relevant daily rate of pay?

11.4 Unauthorised deductions

11.4.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted when the Respondent paid the Claimant's wages late between the dates 1 September 2022 to 30 September 2024 and made deduction for holiday pay ?

11.4.2 Were the wages paid to the claimant on less than the wages she should have been paid?

11.4.3 Was any deduction required or authorised by statute?

11.4.4 Was any deduction required or authorised by a written term of the contract?

11.4.5 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

11.4.6 Did the claimant agree in writing to the deduction before it was made?

11.4.7 How much is the claimant owed?

11.5 Breach of Contract

11.5.1 Did this claim arise or was it outstanding when the claimant's employment ended

11.5.2 Did the respondent fail to pay the Claimant's remuneration in accordance with her contract of employment?

17.2.1 Cause the claimant to have an increased year to tax table pay ?

17.2.2 Was that a breach of contract?

17.2.3 How much should the claimant be awarded as damages?

Legal Principles

Working Time Regulations

12. Regulation 15 of the Working Time Regulations 1998 SI 1998/1833 (WTR) sets out the notice requirements that apply when a worker wishes to take leave, or when an employer wishes to instruct a worker to take or not to take leave, on particular dates. The requirements apply to basic leave under Regulation 13, additional leave under Regulation 13A, and leave for irregular hours and part-year workers under Regulation 15B:

15.— Dates on which leave is taken

(1) A worker may take leave to which he is entitled under regulations 13, 13A and 15B on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

(2) A worker's employer may require the worker–
(a) to take leave to which the worker is entitled under [regulation 13 13A or 15B; or
(b) not to take such leave,
on particular days, by giving notice to the worker in accordance with paragraph (3).

(3) A notice under paragraph (1) or (2)–
(a) may relate to all or part of the leave to which a worker is entitled in a leave year;
(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and
(c) shall be given to the employer or, as the case may be, the worker before the relevant date.

*(4) The **relevant date**, for the purposes of paragraph (3), is the date–*
*(a) in the case of a notice under paragraph (1) or (2)(a), t**wice as many days in advance of the***

earliest day specified in the notice as the number of days or part-days to which the notice relates, *and*

(b) in the case of a notice under paragraph (2)(b), ***as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.***

(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

13. Regulation 15(5) WTR provides that the notice requirements in Reg 15 may be varied or excluded by a relevant agreement. A relevant agreement may include the written terms of an employment contract. Employers may therefore vary the statutory notice provisions by stipulating in a relevant agreement that the worker should give reasonable notice of proposed holiday dates and the employer who will decide whether the request can be accommodated. It is not strictly necessary that the clause expressly states that it varies the rules in Reg 15. ***Industrial and Commercial Maintenance Ltd v Briffa EAT 0215/08*** but a relevant agreement purporting to vary or exclude the notice provisions should be clear and unambiguous: ***Bignell v Royal Bank of Scotland plc ET Case No.2301403/0.***

14. Even in the absence of a relevant agreement varying the notice period, an employer retains a discretion to waive the Reg 15 notice that would normally be required from a worker. In ***NHS Leeds v Larner 2011 ICR D27, EAT*****, the** EAT appeared to accept that the notice requirements in Reg 15 are not mandatory, since this would lead to the 'curious' result that a worker would not be using his or her annual leave entitlement under the WTR whenever a request was not compliant with Reg 15 e.g., where the employer accepted an oral leave request on short notice.

Constructive Unfair Dismissal

15. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there 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.

16. The leading case is ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*****,** where the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it:

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

17. To succeed in a claim of constructive dismissal, the employee must therefore establish that:

    17.1 there was a fundamental breach of contract on the part of the employer

17.2 the employer's breach caused the employee to resign

17.3 the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

198 However, a constructive dismissal is not necessarily an unfair one :***Savoia v Chiltern Herb Farms Ltd 1982 IRLR 166, CA*.**

199 A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract: ***Lewis v Motorworld Garages Ltd 1986 ICR 157, CA*.**

200 Whether the breach is fundamental is essentially a question of fact and degree and a key factor for the tribunal to take into account is the effect that the breach has on the employee concerned however, where an employer breaches the implied term of trust and confidence, the breach is 'inevitably' fundamental: ***Morrow v Safeway Stores plc 2002 IRLR 9, EAT*.**

201 It makes no difference to the question of whether or not there has been a fundamental breach that the employer did not intend to end the contract: ***Bliss v South East Thames Regional Health Authority 1987 ICR 700, CA*.**

202 The circumstances that induced the employer to act in breach of contract are irrelevant to the issue of whether a fundamental breach has occurred: ***Wadham Stringer Commercials (London) Ltd v Brown 1983 IRLR 46, EAT*.**

203 ***Leeds Dental Team Ltd v Rose 2014 ICR 94, EAT*,** the Appeal Tribunal confirmed that the test of whether there was a repudiatory breach of contract remains an objective one.

204 ***Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA*,** where the Court upheld the decision of the EAT that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

205 ***Tullett Prebon plc and ors v BGC Brokers LP and ors 2010 IRLR 648, QBD***: where Mr Justice Jack stated that: 'The ordinary position is that, if there is a breach of a contract by one party which entitles the other to terminate the contract but he does not do so, then the contract both remains in being and may be terminated by the first party if the second party has himself committed a repudiatory breach of the contract.'

206 A tribunal must determine whether the employer's repudiatory breach was **an effective** cause of the resignation however, the breach need not be 'the' effective cause: ***Wright v North Ayrshire Council 2014 ICR 77, EAT*.**

207 As Mr Justice Elias, then President of the EAT, stated in ***Abbycars (West Horndon) Ltd v Ford EAT 0472/07*,** 'the crucial question is whether the repudiatory breach played a part in the dismissal'.

208 In ***Weathersfield Ltd t/a Van and Truck Rentals v Sargent 1999 ICR 425, CA*,** the Court

of Appeal held that it was not necessary for an employee, in order to prove that a resignation was caused by a breach of contract, to inform the employer immediately of the reasons for his or her resignation.

209 There must clearly be sufficient evidence from which a tribunal can infer the reason or reasons for the employee's resignation : ***Mruke v Khan 2018 ICR 1146, CA*.**

210 Lord Denning MR in *Western* Excavating *(ECC) Ltd v Sharp 1978 ICR 221, CA* :the employee '*must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged.'*

211 In ***Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA*,** Lord Justice Jacob observed that, given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there really has been an affirmation.

212 ***Leaney v* Loughborough *University 2023 EAT 155*,** the EAT noted that affirmation may be expressly communicated or may be implied from conduct.

213 In ***WE Cox Toner (International) Ltd v Crook 1981 ICR 823,*** *EAT*, held that ere delay by itself did not constitute an affirmation of the contract but if the delay went on for too long it could be very persuasive evidence of an affirmation.

214 ***Hoch v Thor Atkinson Steel Fabrications Ltd ET Case No.2411086/*18** H resigned nearly three weeks after receiving an email accusing him of not doing his job properly, which was the last straw following several incidents of harassment on the grounds of race and sexual orientation. The tribunal found that he could not be said to have affirmed his contract by not resigning earlier as he had been on holiday

215 ***Reid v Camphill Engravers 1990 ICR 435, EAT*,** The EAT determined that the employer had been in continuing breach of contract. Even if the claimant had not reacted to the first breach, it was open to him to rely on it when his employer committed further breaches.

'Last straw' cases.

216 A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident, even though the last straw by itself does not amount to a breach of contract : ***Lewis v Motorworld Garages Ltd 1986 ICR 157, CA***. The Court of Appeal in that case stressed that it is immaterial that one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach and that the employee did not treat the breach as such by resigning.

217 There is no need for there to be 'proximity in time or in nature' between the last straw and the previous act of the employer: ***Logan v Customs and Excise Commissioners 2004 ICR 1, CA*.**

218 In ***Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA*,** the Court

of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test.

219 The EAT in ***Chadwick v Sainsbury's Supermarkets Ltd EAT 0052/18*** rejected a tribunal's finding that a threat of disciplinary action was 'an entirely innocuous act' that could not constitute a last straw.

220 In ***JV Strong and Co Ltd v Hamill EAT 1179/00*****, EAT** gave guidance that where there is a series of unpleasant incidents about which the employer does nothing, it could not see how the breach of contract by the employer could be permanently waived simply by the employee continuing to work. The EAT acknowledged that such behaviour is normally an example of waiver, but in cases where there has been a course of conduct, the tribunal must consider whether the last straw incident is a sufficient trigger to revive the earlier ones.

221 Court of Appeal in ***Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA*****,** which held that, if the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign.

Unlawful Deduction of Wages

222 Section 27(1) of the Employment Rights Act 1996 (ERA) defines 'wages' as 'any sums payable to the worker in connection with his employment'.

223 'Wages' includes 'any fee, bonus, commission, holiday pay or other emolument referable to the employment': S.27(1)(a).

224 Certain payments by employers to workers are specifically excluded from the definition of wages by S.27(2) and (5) ERA including any payment by way of a pension

225 Pension contributions do not fall within the definition of wages: ***Somerset County Council v Chambers EAT 0417/12*****,** where it held that a tribunal did not have jurisdiction to hear a claim that the Council was obliged to make contributions into a superannuation scheme on his behalf. The EAT thought it clear from the wording of S.27(1)(a) that it covers sums payable to the worker in connection with the worker's employment, not contributions paid to a pension provider on the worker's behalf.

226 Where a claim is made in respect of a 'series of deductions', the three-month time limit starts to run from the date the last deduction in the series was made: S.23(3). This is subject to the condition that a tribunal cannot consider any part of a claim relating to deductions from wages which occurred more than two years before the claim was brought : S.23(4A)

227 Section 23(4A), which was inserted into the ERA by the Deduction from Wages (Limitation) Regulations 2014 SI 2014/3322 (DWLR), imposes a two-year limit on the backdating of unlawful deduction from wages claims presented on or after 1 July 2015. This means that a claimant can now only claim in respect of a series of deductions going back two years/

228 **Supreme Court in *Chief Constable of the Police Service of Northern Ireland and anor v Agnew and ors 2023 UKSC 33, SC***. The Court noted that there was no definition in the ERO of what amounted to a series of deductions. In its view, the word 'series' is an ordinary English word that, in the present context, means 'a number of things of a kind which follow each other in time'. Hence, whether a claim in respect of two or more deductions constitutes a claim in respect of a 'series' of deductions is essentially a question of fact. In answering that question, all relevant circumstances must be taken into account, including the deductions' similarities and differences; their frequency, size and impact; how they came to be made and applied; and what links them together. In its view, it was wrong to assume that a gap of more than three months between an act of which complaint is made and any acts which preceded it will necessarily extinguish the claimant's ability to recover in respect of the earlier acts. Such an interpretation ignored the fact that the 'series' extension was an exception to the general rule that claims must be made promptly and the protection it was intended to confer.

Breach of Contract

229 The contractual jurisdiction of employment tribunals is governed by S.3 of the Employment Tribunals Act 1996 (ETA) together with the Employment Tribunals extension of Jurisdiction

230 Under S.3(2) ETA and Article 3 of the Order, for an employment tribunal to be able to hear a contractual claim brought by an employee, that claim must be one that a court in England and Wales would have jurisdiction to hear and determine.

The Findings of Facts.

Late Payment of Wages

231 The Claimant alleges a persistent failure to pay her salary on time during the course of her employment by the Respondent.

232 It was not in contention between the parties that the Second Contract provides that salary will be paid in arrears at the latest on 29th of the month however, at the outset when discussing the issues with the parties the Claimant explained that her case was that the payments should have been made on 28th of each month and Mr Farooq confirmed that this date was not in dispute. There was clearly some confusion however because the Contract and Second Contract include the following provision:

Salary

7.2 Your salary will be paid monthly in arrears direct into your bank account on the 29th *(or 28th if this is the last day of each month or before if the 29th falls on a weekend or bank holiday…" (Tribunal stress)*

233 The Claimant had been operating she confirmed on the understanding that she would be paid on 28th of each month. When giving evidence under oath, Mr Cheung gave evidence that for whatever reason, he had been operating on the understanding that the Claimant's salary was payable on the first day of the month. The Second Contract however is clear.

234 It was accepted at the outset of the hearing, and before hearing any evidence, by the Respondent's representative that there had been numerous occasions, as confirmed by the Claimant's bank account statements [p.303 316] and some exchange of WhatsApp messages between her and Mr Cheung [p.151 &p.143] , that her salary was paid late albeit by no more than 2 or 3 days.

235 The Claimant does not allege any particular difficulties caused by the late payments. In July 2023 the Claimant asked for her wages and Mr Cheung sent it the next day on 31 July 2023, and the Claimant replied; "*No worries I've got it now. Thank you x."* There is no evidence that before matters became strained around 8th October 2024 between Mr Cheung and the Claimant, that the Claimant raised any actual formal complaint.

236 I went through with the Claimant at the outset the dates when she alleges the payment of salary was late and those that she can evidence as set out in her bank statements and it is not in dispute that these are the dates when payments were made late:

- 1 September 2022 [p.311] – salary should have been paid on 29 August – 3 days late
- 1 November 2022 [p.312] – salary should have been paid on 28 October -4 days late
- 31 January 2023 [p.309] – salary should have been paid on 27 January – 4 days
- 31 July 2023 [p.314] – salary should have been paid on 28 July – 3 days late
- 31 August 2023 [p.310] – salary should have been paid on 29 August – 2 days late
- 1 December 2023 [p.315] - salary should have been paid on 29 November – 2 days late
- 30 December 2023 [p.308] – salary should have been padi on 29 December – 1 day late
- 2 February 2024 [p.316] – salary should have been paid on 29 January – 4 days late
- 1 March 2024 [p.205] – salary should have been paid on 29 February – 1 day late
- 31 July 2024 [p.313] – salary should have been paid on 29 July – 2 days late
- 30 September 2024 [p.304] salary should have been paid on 27 September – 3 days late

237 The last late payment was September 2024, a couple of weeks before the Claimant resigned.

238 Mr Cheung stated in cross examination that although the salary was paid only a few days later than the Contract provided, it would have been, he accepted, embarrassing for her the Claimant have had to chase the Respondent for the payment.

239 The Claimant complains about an unlawful deduction from her wages both as a freestanding claim and as part of her constructive unfair dismissal claim.

Complaint about increased taxable pay

240 Pursuant to the Second Contract there was an agreement that the Claimant would receive a net payment every month of £2,600, she was told that that would be made up of both salary and a dividend. The second Contract states as follows [p.85]:

> "*7**. Salary***
>
> *7.1* ***Your take home pay is £31,200 per year,*** *£2,600 per month which is equivalent to £40,000 gross salary., you will receive £1,000 salary and £1,600 in bonus dividends every month. We will cover your dividend tax but subject to the annual rates." (Tribunal stress)*

241 It is not in dispute that the Claimant's remuneration was structured in this way to make it as tax efficient as possible.

242 The fact that two separate payments were made to the Claimant, one as salary and one as dividend, is not disputed by the Respondent and its clear from her bank statements that the dividend payment was paid to her on the same date as her salary each month.

243 The Claimant under cross examination stated that she accepted that the dividend payment was subject to the Respondent making a profit and she accepted that she could not be paid a dividend if the Respondent 'was not in profit'. That was her evidence however, she denied being told that if the dividend could not be paid she would receive £2,600 as a salary payment only.

244 The Claimant confirmed while under cross examination that what she is claiming is not the unpaid dividend in October 2024 but the additional tax she will have to pay because of the increase in her taxable pay for the months in 2024 when she worked for the Respondent because her October 2024 payslips now show a significant increase in taxable income for the year to date.

245 The Respondent counsel informed the Tribunal that the Respondent accepts that in October the claimant paid more tax because she was only paid by way of salary, they calculate the difference to be £177.70. The tax paid in October of £193.80 less £16.20 which would normally be payable had the Claimant been paid part dividend and accept that the Claimant paid more NICs of £71 and that while these are statutory deductions the Respondent had to pay, the Respondent would accept that the Claimant suffered this shortfall.

246 The Claimant however is seeking compensation arising from the increase in her year to

date taxable gross pay which in October increased to £21,935.46 and she confirmed that this is her concern, not the tax difference in October 2024.

247 The Respondent's representative asserted that the Respondent's year end is 31 October and that the Respondent would not have been aware whether the Respondent had made a profit until the end of their financial year and when they realised they had not made a profit for that year, *"the Claimant went back to a £40,000 salary"*. It is he explained, the Respondent's position that the dividend was paid as in interim dividend each month until a reconciliation at financial year end. There is no document which shows that this was explained to the Claimant.

248 The sample payslips the Claimant provide show the following payments:

For the months ending 30 June 2024, 31 August and 30 September 2024 [p249-251]
Monthly pay: £1,047.50
Dividend: £1,568.70
Net pay: **£2,600.**

Figures for the taxable gross pay for the year to date were in the earlier payslips as follows:
30 June **2024:**
Year to date
Taxable **gross pay £3,142.50**
Tax £48.40
Employee NI £0.00
Employer NI £119.85

31 August **2024**
Year to date
Taxable **gross pay £5,237.50**
Tax £80.80
Employee National Insurance £0.00
Employer NI: £199.75

30 September **2024**
Year **to date**
Taxable **gross pay: £6,285.00**
Tax £97
Employee NI £0.00
Employer NI: £239.70

Month ending **31 October 2024**: Monthly pay £1,935.48

Net pay: **£1,345.24.**

Final pay **(1 Oct 2024 – 18 October 2024) £40,000 /12/31 x 18 = £1,935.48**

less tax **of £193. 80**
less NI **of £71**
less overtaken **holiday of 2.5 days at £268.82**
less NEST **£56.62.**

Year to date
Taxable gross pay : £21,935.46
Tax £3,033.80
Employee **NI £1,167.98**
Employer **NI £2,294.83**

249 In his evidence in chief, Mr Cheung set out the position as follow:

"11. …The Claimant's pay was £31,200.00 per year,£2,600 per month in monthly arrears. This was broken down as £1000 in salary £1,600 in bonus dividends every month. The respondent confirmed that they would cover the dividend tax bill, subject to annual rates of tax .I am aware it is worded like this in her contract but maybe I should elaborate that I assured the claimant that she should be receiving £31,200 net per year which is the equivalent to gross £40,000

11.1 Midland lettings did not make a taxable profit to substantiate such dividend and was therefore reverted back to PAYE 40,000 gross salary less the usual PAYE, NIC deductions?"

250 Mr Cheung gave oral evidence under an affirmation that because they had not made a profit they could only pay a salary in October 2024 but that it had no impact on the Claimant because they still made sure that she was paid £2,600 net regardless of the deductions. However, Mr Cheung accepted that the consequence of treating retrospectively the remuneration paid to the Claimant as salary rather than dividend meant that it significantly increased her recorded taxable pay which may mean that she will have a greater tax liability for earnings post October 2024.

251 However, the Claimant had not sought any advice on how to calculate her additional tax liability and although I explained at the outset that she would need to be clear what she is alleging her losses to be, she did not put forward any figure or suggest how she thought it should be calculated.

Annual Leave

252 The Claimant complains that 2.5 days of annual leave have been deducted from her final salary. The Respondent asserts that the Claimant had taken in excess of her accrued entitlement as at the termination date and had produced a spreadsheet, a copy of which had been embedded in an email dated 9 October 2024 [p.321] which Mr Cheung had sent to the Claimant on 9 October at 5:23pm. The Claimant had therefore been in possession of this information for quite some time before this hearing and would have been able to cross refer it to her calendar/diary etc.

253 The holiday year is January to December. The Claimant resigned part way through the year,

254 The Respondent went through in cross examination with the Claimant the dates in the spreadsheet which included a holiday to Lanzarote she accepted she had taken in

February 2024, a holiday to Majorca in May 2024 and leave to attend a number of courses however, the Claimant's argument developed during her evidence into an argument that she had worked more than 37.5 hours per week some weeks and was entitled to take it as time off in lieu and had worked some statutory holidays. The Claimant's evidence on this was vague, in that she could not identify what days she had worked or how many the hours she had worked.

255 The Claimant's evidence was unconvincing and certainly did not establish on a balance of probabilities that she had not taken the leave as set out by the Respondent, that she had worked on statutory holidays or that she was entitled to time off in lieu.

256 The Claimant does not dispute that the Second Contract provides that there will be a deduction from final salary on termination if more annual leave is taken than an employee has accrued (clause 12.6).

Pension

257 The Claimant also complains about her pension. The evidence on this claim was confusing and at times inconsistent.

258 The Claimant had merely stated in her witness statement:

"contractual clauses required auto enrolment (pp.64-97). Despite repeated requests (emails re: pension pp 201, 235:Nest correspondence p.236), the respondent failed to provide accurate records or make consistent contributions.

This is a breach of contract and statutory duty."

259 The Claimant at the outset of the hearing explained that her complaint was that the Respondent had failed to set up an employer NEST pension scheme and she calculated that the employer contributions that they should have made equated to £2246.40 which was the sum she was seeking.

260 After some discussion it appeared that a scheme had been set up in 2021 [p.254] but the Claimant complained that there had been no employer contributions paid into the scheme in 2022 through to 2024 however, she had during this hearing now seen documents the Respondent had disclosed [p.299 -302] which she accepted showed payments made up to April 2023.The Claimant revised her complaint and complained that payments of employer contributions had not been paid in between April 2023 and October 2024.

261 It was put to the Claimant in cross examination that she had opted out of the scheme in 2021 and that appeared to be supported by an email [p.322] but that the Respondent continued to make employer contributions (for reasons which remained unclear). The Claimant did not appear to dispute this. When it was put to the Claimant in cross examination that she had confirmed she did not want to opt in to the NEST pension scheme in 2021 and thus no deductions were made from her salary by way of employee contributions, the Claimant did not deny this but argued that she should have been sent the information to enrol every 3 years. The Claimant appeared to be implying that she had wanted to opt in back in but had not been sent the forms in 2024, albeit there is no evidence of her asking for information before October 2024.

262 The Claimant raised the pension issue with the Respondent in a WhatsApp message to Mr Cheung on 9 October 2024. She gave evidence that she had raised the pension before but was not specific about when and took me to no documents to evidence that. It appears that in response to her query on 9 October, that the scheme should have been set up for her, the Respondent made a payment in to cover the shortfall and made a deduction for employee contributions from her October salary.

263 The Claimant however also complained when giving evidence that a deduction had been made for employee contributions from her final pay when she had not opted back into the scheme. However, her claim as set out in the Claim Form was that the Respondent had failed to enrol her into the scheme and the Respondent did not make the correct payments as per clauses 9.1,9.2 ad 9.3 of her claimant contract of employment. Those clauses provide that the Respondent will comply with its automatic enrolment obligations and if she is enrolled or elects to join the Company's pension plan, her contributions will be deducted unless she notifies them otherwise and she is not eligible.

264 Mr Cheung's evidence under oath was not wholly consistent it seemed with how the case had been put to the Claimant by his representative. His evidence was that the Respondent had made their contributions until July 2023 but after that date her salary was below the required threshold because she was being paid in part in by dividends but when her pay reverted to salary only retrospectively in October 2024, she met the threshold eligibility and the Respondent made a payment to cover the unpaid employer contributions since July 2023. He referred to documents [p.298 - 302] which appear to show payments made to NEST for the period up to July 2023 and then a large payment in November 2024.

265 On the evidence as presented I find on a balance of probabilities, that the Claimant remained in the NEST scheme, employer contribution payments were made up to July 2023 and then stopped when the Claimant was paid under the Second Contract a salary a dividend payment. The Claimant would, I find, have seen that payments were not shown on her payslips and further, there is a document in the bundle [p.147 – 148] dated April 2023 where the Claimant raised questions it seems about the Second Contract and Mr Cheung answers underneath:

Claimant: Do you also have details of the pension, is it the same as the one I'm currently enrolled in?

Mr Cheung: Pension is with nest of which you'll have to make manual contributions if you want to be enrolled as the pay structure falls below the threshold to automatically pay into Nest pensions.

266 The Claimant responds but does not question the treatment of pension.

267 In October 2024 the Claimant then queries the pension situation.

268 Neither party produced any evidence about the NEST scheme and the Claimant did not challenge the evidence of Mr Cheung around her eligibility.

Accessing Person Information

269 The Claimant also complains that a fellow employee, Cindy, was allowed access to personal information on her email at work, by accessing an email account only the

Claimant had ever used when the Claimant was on annual leave and that the Claimant became aware of this on 9 October.

270 The claimant in her evidence in chief puts the allegation as follows:

"The respondent allowed other employees, including Cindy, to log into and use my work email account without my knowledge or consent.

This constituted a serious breach of confidentiality and of my contractual rights under the data protection and confidentiality provisions (PP.64-67, clause 21).

It also undermined implied duty of trust and confidence as I could not be sure that my communications or personal information were secure"

271 My understanding after discussion with the claimant, is that she relies upon this complaint in support of a complaint of constructive unfair dismissal and alleges that her payslips were sent to this email account.

October Correspondence and Annual Leave

272 The Second Contract deals with hours of work at clause 5 and states that:

"5.1 You shall work full time 5 days in the week Monday – Friday , with Saturday/Sunday to be ad hoc hours only if any emergencies are raised by the tenants total of 37.5 hours…"

273 The Second Contract deals with annual leave at clause 12. It does not specify how much notice may be given to request leave or counter notice by the Respondent to cancel it, it states only:

12.6… If at the time of leaving , you have taken holiday in excess of your accrued entitlement the Company will deduct from your final salary the excess holiday pay that you have received…

12.8 Holidays must be taken at times convenient to the Company and must be approved in advance by your manager…"

274 There is also a Handbook [p.98-141] which contains the Respondent's policies and procedures. It provides that:

"your annual holiday entitlement is shown in your individual statement of terms and conditions of employment…Holiday dates will normally be allocated on a first-come first-served basis whilst ensuring that operational efficiency and appropriate staffing levels are maintained throughout the year.

Holidays must be taken at times convenient to the company must be ***approved in advance by your manager.***

Once you have registered your holiday request ***in writing, you will receive a written response from the Director authorising or declining your request…***

You should give at least ***four weeks' notice of your intention to take holidays of a two weeks*** *or more and one weeks' notice is required for odd single days.." Tribunal stress*

275 The Handbook says nothing about notice from the Respondent to require the Claimant to cancel annual leave.

276 The Second Contract however indicates that the policies and procedures are not contractual. Handbook states:

"24.A copy of the Company's policies and procedures are available on the Company's intranet site. New policies, rules or procedures will be added as updates. It is important that you read the policies and procedures carefully and any updates which may be issued from time to time. You will be required to comply with the policies, rules and procedures although ***these are not contractual****. In the event of any conflict between the provisions of this statement or your offer letter and the policies, rules and procedures, the provisions of this statement or your offer list letter shall prevail."*

277 The Claimant gave evidence that she had requested to take some annual leave from **Thursday 10th to Friday 18th October 2024 (7 days)**, she had made this request to Mrs Joey Cheung, who worked in the Respondent's business and is the wife of Mr Cheung.

278 The Claimant gave evidence that Mrs Cheung had informed the Claimant that the annual leave request had been approved and this had been documented through WhatsApp.

279 The Claimant referred to a Whatsapp conversation between her and Mrs Cheung [p.170] dated 1 and 2 September wherein Mrs Cheung asked the Claimant to remind her of the dates when she is going away so that Mrs Cheung can plan the calendar and the Claimant replies confirming the October dates. The Claimant also gave evidence that there had been previous messages between her and Mr Cheung about her leave but she no longer has access to those but believes she first asked hm for this leave around August 2024.

280 Mr Cheung's evidence under oath is that he had not been aware of the Whatsapp messages with his wife on dated 1st and 2nd September and stated the Claimant needed to give a months' notice if she planned to take leave. The Whatsapp message however the Tribunal notes, clearly indicated that there had been an earlier discussion because Mrs Cheung was asking the Claimant to 'remind' her of her annual leave dates. Mrs Cheung did not attend to give her account of these events, for reasons which were not explained.

281 I asked Mr Cheung during his evidence, about his wife's role in the business and he explained she was managed the day-to-day issues, that she had had to step into the business to "*organise everything*" including the office calendar" and;

"…not just holidays, viewings, key dates for inspections, anything day to day in a letting agency".

282 Mr Cheung went on to explain that he actually has no real involvement day to day in the Respondent business.

283 Mr Cheung gave evidence that as far as he was away the office calendar recorded the Claimant on the 10th to 18th October as "*out of office*" as far as he could recall.

284 I asked Mr Cheung whether he had checked with his wife if she had authorised the leave, and his evidence in response to that question was evasive:

"If I am honest, we have 2 children, we don't speak about work. I was not dealing day to day with

the respondent. The only explanation for sending the email at 7pm is I was caught up in the day."

285 Mr Cheung it was clear had made no attempt to check with his wife, who was it seems was the most senior person on site managing the Respondent, whether the Claimant had been told that her leave was approved and could provide no satisfactory or convincing reason for not doing so.

286 The Claimant gave evidence accepted by Mr Cheung, that Mr Cheung asked her to hand in her work telephone on Monday 7th October and leave it with him by way of a handover before she went on leave. It is agreed between the parties that they met on 7th October and she handed in her telephone as requested. Mr Cheung accepts that he knew that the Claimant was planning to be on leave from 10th October and despite meeting with the Claimant on the 7th he accepts he made no mention of her leave not being approved, neither did he check with her or his wife directly, if his wife had approved it. Curiously, Mr Cheung gave evidence that he did not mention this to the Claimant on the 7th October because she was not going to cancel her holiday when she had already booked her flights and was travelling halfway around the world to the Dominican Republic.

287 Mr Cheung referred to a Whatsapp message sent to the Claimant late on 7 October (after they had met and she had handed in her phone) [p.173] where the Claimant was asked to go into the office to help set up a new iCloud to load Whatsapp business on to the company phone so that he had the tenants contact details etc. He complains that she did not respond to that message and he alleges that he made a couple of other attempts to contact her and had no contact from her after 1.59pm on 7 October and refutes that the Claimant was therefore working on 7th, 8th and 9th October.

288 However, the documents do not support Mr Cheung's account, in that there are documents evidencing exchanges between the Claimant and her colleagues on 8th October.

289 On 8 October the Claimant was in communication it appears with colleagues via a WhatsApp group which included Mr Cheung as a member and in which it is clear that the Claimant is meeting a contractor carrying out work for the Respondent [p.171]. She is exchanging messages up to about 4:29pm [p.174]. There are similar messages on 9 October [176 - 177].

290 When I asked Mr Cheung if he could explain why he was alleging that the Claimant was not working on 8th October when he was party to a WhatsApp group in which it is clear that she is sending messages about the work she was doing that day for the Respondent, his response was that he does not always check the WhatsApp group. It would seem that he took no steps to check via the Whatsapp or directly with her colleagues or his wife, whether the claimant was in contact and working that day.

291 Mr Cheung in his witness statement (9 para 40) refers to an email he sent the Claimant on 8 October 2024 15:32 wherein he mentioned that the Claimant had multiple annual leave absences not formally requested and that he believed she had exceeded her annual leave entitlement. The Claimant replied [p.169]:

"please can you provide me with previous cases where requested annual leave in writing before, then can you show me where I have gone over my entitlement?

*Please can you also show **me my enrolment into the company pension** as per my contract and can you also explain why as per my contract payments of my wages are constantly paid late?*

Can I also have the company grievance policy to.

In regards the conversation where you confirm my annual leave this is on the WhatsApp chat between me and you, you have confirmed this and it was also mentioned in the many meetings we have continuously had the past few weeks, this is why you take my phone off me to cover while on annual leave, also I'm sure you will love it on your chat history if you'd care to find it, along with the course dates. Look forward to sending me the documentation over." Tribunal stress

292 The Tribunal note that while the Handbook refers to the annual leave requests be made in writing, this is not referred to in the Second Contract and in any event the Handbook does not prescribe in what format the written request must be made and it is evident that there was an exchange of WhatsApp messages confirming the holiday the claimant wanted to take with Mrs Cheung. While the Handbook refers to the director authorising it the Handbook also refers to the holiday being approved in advance by the manager and the Second Contract makes no reference to director approval only manager approval.

293 There was a further exchange of Whatsapp messages between the Claimant and Mr Cheung on 9 October 2024, querying the position with regards to her pension [p.182]. Mr Cheung confirmed that he made no mention in these messages of the Claimant being AWOL on 7th to 9th October or about her not being able to take her booked annual leave and Mr Cheung attempted to explain this away by asserting that this was because the emails were not related to work. I consider this to be a nonsense, the emails were directly related to work. The Claimant in this message was raising questions about her pension and asked for the company grievance policy. In his reply Mr Cheung stated [p.182]:

"I'll send a copy of the email attachment from Vivian payroll manager to your personal email regarding your other points about pension and grievance sorry to hear you feel; this way but I think best Vivian deal with this directly": Timed 16:50

*"Email has been sent to Hotmail won't be bothering this number until you're back**. Have a nice trip**" Timed at 17:23 (Tribunal stress).*

294 Mr Cheung at no point in this exchange with the Claimant on 9th October asked whether the Claimant had been working for the past few days, what work she had been doing or raise any concerns that she had been absent without leave. Mr Cheung could provide no satisfactory explanation for that other than this particular email was not really about work. If Mr Cheung genuinely believed that the Claimant had gone 'AWOL' for the past 3 days, it makes no sense whatsoever for him not to have raised those concerns with her.

295 At 5.23pm on 9 October Mr Cheung is in direct communication with the Claimant about work-place matters and raises no concern about her not having worked for the last couple of days and wishes her well on her trip. Less than an hour later at 6:17 pm on 9 October [p.179], (the parties referred to the emails being sent at 7pm which is not the timing on the emails but not much turns on the exact timing) he then sent the Claimant two letters by email. In these two letters he is now telling her that her holiday is not approved because she has not given one weeks' notice, that she has to cancel her leave and be in work the following day and in the second letter accuses her of being absent without leave since 7 October. The letters read as follows:

" Unauthorised leave

It has been brought to my attention that you have not properly informed of your intention to take annual leave from despite the fact that your request has been declined.

The reason that we are unable to grant you this period of leave is that your request is in breach of our rules which require one weeks' notice must be given to avoid causing disruption to the business.

The purpose of this letter ii therefore to formally notified you are required to work during the period (10/10/2024) to (22/10/2024) for which you have requested leave.

I sincerely hope that you reconsider your decision in the light of the above information and attend work as required.

This letter an instruction to work has been personally served on you by email.

Yours sincerely

Ka Shing Cheung" [p.180]

18 The second letter reads as follows:

"RE: AWOL

you have been absent from work since 07/10/2024 and we have not received any form of communication from you to explain the reasons for your absence.

We have attempted to contact you by telephone on various occasions, specifically on Monday 07/10/24 13:59, 14:18 via Whatsapp and 15:03 via phone call but without success.

We have now allowed two days for you to attend hours or submit medical certificates to cover your absence or other evidence as required by your terms and conditions of employment.

As we have received no explanation for your absence we have no alternative but to conclude that you are absent without authorisation.

***Unless we hear otherwise by 09/10/2024** we will have no option but to commence disciplinary action against you.*

Yours sincerely

Ka Shing Cheung" [p.178] Tribunal stress

296 I find that the Claimant had at some time prior to 2 September 2024, informed Mrs Cheung that she wanted to take annual leave on 10th to 18th October and Mrs Cheung had confirmed her agreement. The later Whatsapp was Mrs Cheung checking the dates so that she could make sure they were accurately recorded in the Respondent's calendar. Mrs Cheung, I find was the person with the authority to approve annual leave and it was approved.

297 The Claimant was not required to give any particular period of notice under the Second Contract. A relevant agreement is pursuant to regulation 2(1) WTR an agreement in writing

which is legally enforceable as between the worker and is employer, however the Second Contract specifies that its policies are not contractual. However, even if the Handbook was held to be incorporated into the Second Contract and qualified as a relevant agreement which varied the WTR notice requirements, the Handbook does not provide that the Claimant is required to give four weeks' notice, she was not taking a two or more weeks of leave and was only required to give 1 weeks' notice. I find she had given more than a months' notice.

298 If the Second Contract and Company Handbook did not waive the requirements under the WTR, (and the Respondent did not have a position on this and Mr Cheung seemed generally confused about what the Respondent's own notice requirements were), in any event, permission had I conclude been granted on 2 September. The notice under reg 15 the Claimant would be required to give was 14 days (i.e. by no later than 26 September). If the notice was 1 week under the provisions of the Handbook, she had also complied with that.

299 In any event, Mrs Cheung had agreed the leave, thus waiving any requirements under the WTR and also confirming that it was convenient to the Respondent.

300 Neither the Second Contract nor the Handbook provide for a period of counter notice the employer is required to give to a worker instructing them not to take leave. If the WTR therefore applies (not an argument the Respondent makes, its position was put solely on the basis that the leave was unauthorised) then under the WTR the Respondent was required to give notice under Reg's 15 (2), and the 'relevant date' is the date as many days in advance of the earliest day specified in the notice as the number of days (or part-days) to which the notice relates: Reg 15(4)(b). Even if the Claimant had only given notice on 2 September [p.170], that was over 5 weeks-notice. If the Respondent did not want the Claimant to take those 7 days, under the WTR the counter notice was at least 7 days-notice, which it failed to give

301 Mr Cheung did not attempt to argue that there was any particular business need which meant that the Respondent needed to cancel the leave at such short notice and he had taken no steps to check with Mrs Cheung, acting as day to day manager of the business, whether she had granted the leave which had been recorded in the calendar (even if recorded only as the Claimant being out office). Had there been any pressing need to cancel the leave, Mr Cheung could have discussed this with the Claimant on the 7th October or indeed on the 8th or 9th October during their exchanges, instead on 9th October he told her to have a nice trip and circa an hour later, told her to cancel her flights and her holiday.

302 Mr Cheung accepted in evidence that the two letters sent on 9th October were inconsistent with his earlier email of 9th October wishing the Claimant a 'nice trip' and his behaviour on 7th October when he was arranging a handover and he proffered no explanation for his conduct when I asked him about it, other than he wanted to confirm in writing that the leave had not been approved.

303 The evidence of Mr Garbett does not concern directly the events which the Claimant complains about. His evidence relates to his working relationship with the Claimant from July to October 2024 and his alleged observations about unprofessional behaviour by the

Claimant, including alleged complaints from tenants about lack of communication from the Claimant and for criticising him for what he described as shared responsibility and escalating matters to their senior manager, (albeit in his statement he acknowledged that his handling of the tenant communication may not have been 'perfect' given he had only been in position a few months). The most serious allegation is that while on leave in October 2024 the Claimant had deleted the Respondent's internal organisation system (CRM system), which contained important tenant information and internal processes. Mr Cheung repeats this allegation in his statement and also an allegation that the Claimant had misused the company amazon account. Mr Garbett in his evidence during cross examination, explained that an IT person had checked the CRM and was unable to confirm who had accessed and removed the information. This however happened during not before the Claimant started her annual leave and there is no evidence that the Respondent had indicated to the Claimant that there would be any investigation or disciplinary action on her return to the office.

304 Mr Cheung in his statement complains about circumstances involving the return of company property and legal expenses incurred however there is no counterclaim.

305 Given the response form states that if the Claimant is found by the Tribunal to have been dismissed the Respondent submits it had a fair reason for dismissal due to her conduct on the grounds that she refused to engage with the policy around annual leave and related to her performance [p.41 para 32] , I asked Mr Cheung about concerns with the Claimant's performance to which he stated in evidence:

"I had no material concerns, I wanted her to come back but she didn't believe she could due to the events while on leave."

306 Whilst the Claimant was on annual leave she alleges she received a WhatsApp message on 16 October 2024 [p.188] from a contractor who carries out work for the Respondent and who informed her that Mr Cheung had made a comment about dismissing the Claimant. Mr Cheung denies this comment was made and the contractor concerned has not provided a statement. However, in the circumstances I find that it was reasonable for the Claimant to believe that Mr Cheung had made this comment to the contractor given his behaviour on 9 October, including threatening disciplinary action, and on balance and considering the evidence around Mr Cheung's conduct in sending those two letters and his lack of credibility over his motivation for treating the Claimant in this way, I conclude that it is more likely than not that he had made that comment. Mr Cheung's own evidence is that he believed the Claimant had removed data from the CRM, which would provide another reason why he may have told someone that he had dismissed the Claimant.

Submissions

Respondent's Submissions

307 The Respondent made fairly brief oral submissions and I set out a summary. The Respondent sought to argue in submissions that the Claimant had resigned because she had another job because she could not have applied and been interviewed within the short space duration of time between leaving and starting her new role. However, this had not been put to the Claimant in cross examination and I consider that it would be unfair to draw

the inference without this having been put to the Claimant. The Respondent's representative did not carry out any cross examination of the Claimant on the issues of mitigation.

308 It is submitted that cancelling her annual leave at short notice and late payment of wages while unreasonable was not sufficiently serious to amount to a repudiation of the employment contract and that she was not actually subject to any disciplinary action.

309 The late payment of wages had no real impact it is submitted and the Claimant simply notified Mr Cheung and he would pay it if late.

310 The Respondent submitted that with regards to pension, the Claimant accepted she had not wanted to be in the NEST scheme in 2021 and she did not make any contributions, the Respondent continued to make employer contributions and then understood she wanted to opt in and made a deduction for employee contribution from her final salary.

311 It is submitted that a dividend cannot be made under the Companies Act if the company does not make a profit and the Tribunal has no jurisdiction to award the Claimant compensation for the statutory deductions which the Respondent made.

Claimant's submissions

312 The Claimant in summary made some brief oral submissions. The Claimant argued that the Respondent had breached the implied term of mutual trust and confidence which lead her to resign because of the late payments of salary, the cancellation of her leave the evening before she was due to take it, not enrolling her properly into the pension scheme until her employment ended, treating the dividend payments as salary affecting her taxable position and accusing her of being absent without leave. The Claimant also referred to sharing her personal information with the accountancy firm of which Mr Cheung is a director however this had not been raised in her claim or in cross examination of the Respondent witnesses or in her own evidence in chief, she mentioned this only in submissions, and it would not be in the interests of justice to consider it as part of her claim. No application was made to amend the claim to include it as a complaint.

313 The Claimant argues in relation to the treatment of the dividend payments as salary that it is now shown on her last payslip and P45 that she has a taxable income greater than she otherwise would have if she had been paid in accordance with the Second Contract however, she was not able to quantify her losses.

314 The Claimant submits that her pension loss is "zero".

315 In terms of compensation, she seeks a sum for loss of statutory rights of £400, 1 months' pay and a basic award.

Conclusions

Personal Data Accessed

316 The Tribunal does not have jurisdiction to enforce the provisions of the Data Protection Act 2018 or the UK General Data Protection Regulation (UK GDPR) however conduct which

may be in breach can be considered in the context of a constructive unfair dismissal claim.

317 The Claimant did not identify which provision of the DPA/GDPR she alleges has been breached or which provision of the Second Contract, if any, but relies it seems more broadly on a breach of trust and confidence in permitting another employee access to an email which is used to send the Claimant her payslips.

318 The Tribunal has regard generally to the requirements to ensure security of personal data and lawful processing and that a failure to protect personal information on payslips which are sent/processed electronically so that another employee, without lawful reason for doing so, can access them without consent would potentially breach the DPA. This would potentially include a breach of section 66 which deals with security of processing and requires each controller and each processor to implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks arising from the processing of personal data, and breach Article 31 of the GDPR which deals with security of processing.

319 The evidence of Mr Cheung under cross examination was that he understood the Claimant's payslips were sent to her private email address.

320 The Claimant alleges her payslips were sent to the work email she used but produced no evidence to support that assertion and only mentioned the issue of payslips being accessed during this hearing.

321 It appears from the documents that another employee was using the work email account the Claimant used and did have access to the emails the Claimant sent/received [p.184 ,185 and 186] which included it seems an order the Claimant placed for items from Argos [p.186].

322 However, with regards to the email account generally, this is a work email account which the Claimant from the documents provided, clearly used for work business and she does not allege any reason why she had an expectation of privacy with regards to its use and does not assert that any emails she had marked as private had been accessed.

323 On 9 October 2024 9:38am [p.181] the Claimant contacted Mr Cheung (referring to him as Sean), asking why her personal information has been sent to an email address that another employee is currently logged in and using. The Claimant does not mention her personal payslips. The email is attaching a P30 Employer's Payslip and the Claimant accepted when cross examining Mr Cheung, that the P30 did not contain any of her personal information and that what she was now complaining about in this tribunal was access to her personal payslip, and not the P30. However, she makes no mention of her personal payslip in this email.

324 On balance I do not find that the Claimant has established that her payslips were sent to this general email account and could have been accessed by a colleague.

Pension

325 The Claimant appeared to be complaining that the Respondent should have continued to

pay employer pension contributions however, I find that the Claimant had been aware that given the way her remuneration was structured the Respondent would not pay employer's contributions, because it is alleged she did not meet the income threshold and she raised no issue about that until matters became fraught in October 2024 before she went on leave.

326 The Respondent it seems however continued to make contributions until July 2023 (quite why remained unclear) and made a back payment after her employment ended because of the treatment of her salary (i.e. the dividend payments retrospectively treated as salary and) which meant she met the eligibility criteria under the NEST scheme.

327 The Claimant on seeing that payments had been made in the scheme on reviewing the documents in the bundle was then unable to identify what if any shortfall in payments remained owing. In a schedule of loss [p.317] which was simply a table of figures, the Claimant had inserted £2,246.40 as unpaid contributions but given the documents showing payments had been made accepted that this figure was no longer accurate but did not put forward an alternative figure and identify what months, if any, she claimed remained unaccounted for.

328 The Claimant then appeared to argue in evidence that the contribution was taken from her final salary by way of employee contributions should not have been deducted because she had never authorised her enrolment into the scheme. This was not the claim that she had brought and is not consistent with her complaint about the NEST scheme not being set up for her. In any event, she has not put forward any sum that she is claiming or any suggestion as to how this should be calculated. This is the Claimant's case and it is incumbent on her to set out what losses she says she had suffered.

329 The claim is not well founded and is dismissed.

Late Payment of Wages

330 The Respondent argues that the claims are brought out of time but made no reference to the statutory time limits or any case authorities and nor did the Claimant.

331 There is no dispute that the wages were paid late and there is no satisfactory explanation.

332 I conclude that given the pattern of the late payments, they were of the same nature (i.e. late payment of wages), there was no difference in the reason for late payment in each case and given how consistent the late payments were, that they do amount to a series of deductions, the last was 27 September 2024 and the Respondent takes no issue that this last deduction was within time. Acas conciliation started on 26 October 2024 and ended on 7 December 2024 and the claim form presented on 10 February 2025, the Respondent does not submit that there is any time limit issue in terms of the backdating 2-year rule in respect of the identified deductions (above).

333 However, while the Respondent made unlawful deductions in not paying wages on the due date for payment and a declaration is made to that effect, there is no loss as all the payments were made, albeit late. The Claimant has not identified any loss for which compensation is payable and has not identified any financial impact as a result of the late payments.

Deduction for annual leave

334 For the reasons set out above, on a balance of probabilities, I conclude that the Claimant has not established that there has been an unlawful deduction from her wages and/or breach WTR, when a payment for annual leave, which had exceeded her accrued entitlement, had been deducted from her final salary. This complaint is dismissed.

Complaint about increased taxable pay

335 In terms of the impact on her taxable income of retrospectively treating the dividend payments as salary, the Claimant complains about the impact going forward on the tax she will have to pay because of the increase in year to date taxable income as a consequence of the Respondent treating previous dividend payments as salary. Whether or not the Respondent was able to pay the dividend, I conclude that the Respondent breached the terms of the Second Contract with the Claimant in how her remuneration was structured and paid. That was a breach however, it is for the Claimant to put her case and what losses she claims were caused by that breach and she has not been able to do that.

336 The Claimant speculates that she will have to pay more tax but was unable to quantify her claim and did not put forward any sum or propose how this should be calculated or submit any evidence to assist in any quantification of her losses. The claim is therefore not well founded and is dismissed.

Constructive Unfair Dismissal

337 The Claimant under cross examination stated that the main or one of the reasons for resigning was the cancelling of her holiday and the threat of disciplinary action.

338 Mr Cheung's behaviour is really quite inexplicable and I must conclude that on the evidence, the only rational explanation for his conduct in sending those two emails on 9th October, the evening before the Claimant was due to take her annual leave, is because he was aggrieved by the Claimant's reaction when he wrote stating that she had exceeded her annual leave entitlement. The Claimant had mentioned late payment of salary, lack of enrolment onto the company pension and requested the grievance policy and I conclude that it was an act of malice on the part of Mr Cheung to instruct her to cancel what was no doubt, a very expensive holiday to the Dominican Republic and threaten her with wholly unwarranted disciplinary action. If he had any concerns that she had not been working he could have raised those with her on 7th, 8th or 9th October but instead told her to have a nice trip and then circa an hour later told her to cancel it and threatened potential disciplinary action.

339 The Second Contract does not allow expressly for counter notice to be served to cancel holiday where it has been approved, and I conclude that the Respondent also acted in breach of the WTR and Reg 15 (4) (b). This conduct is without doubt I consider, a breach of the implied duty of mutual trust and confidence, it is far beyond mere unreasonableness.

340 The information from the contractor, if a last straw, was not I conclude conduct which of itself would breach the implied duty of mutual trust and confidence but combined with the Respondent's actions of the 9th October, it did so. This conduct was not innocuous, it

continued the Respondent's retaliatory and wholly unreasonable treatment of the Claimant because she had raised issues about her pension etc. She was made aware of this comment 2 days before her leave was due to end.

341 In any event, the actions of the 9th October,(the instruction to cancel her leave and the letter accusing the Claimant of being AWOL), together and separately were sufficiently serious in the context of this case, objectively to breach the implied duty of trust and confidence. even if not revived by a last straw the Claimant had not affirmed those breaches in the short period while she was on holiday.

342 The Claimant had resigned before she received her October pay and payslip and thus before she was aware of the decision to treat the payments she received as dividend retrospectively as salary and the consequential increase in her year-to-date taxable pay. This cannot therefore have formed part of the reason for her decision to resign. For the same reason the deduction for exceeding her holiday allowance in her final salary could not have been part of the reason either.

343 In terms of the late payment of her salary, she does not complain that it gave raise to any particular hardship and given the nature of the delay, I do not consider that it in itself amounts to a breach of trust and confidence although cumulatively, along with the other breaches, it would and while I accept that that it is not a significant issue for the Claimant, (given she had not formally complained in the 2 years it had been ongoing) accept it must have been an irritation. Mr Cheung accepts it would have been embarrassing to have to ask him for her wages to be paid.

344 The Claimant resignation email [p.237] states as follows:

"*Please accept this email as my formal resignation, I am leaving the company under constructive dismissal.*

Following from my annual leave this week, I have taken time to reflect on the recent behaviour shown towards me, by yourself and others in the company. The last few months have left me feeling stressed, emotionally drained, and unwell.

The two letters that were sent to me about "awol" on "annual leave" was totally unnecessary and unfair in the constant late payment of my wages, not to mention the lack of pension information given to me when requested. I do have the proof of written request for the holiday dated 10th to 18 October, once again showing the letter to be totally unnecessary on bully -like behaviour…"

345 The Claimant gave evidence that the main reason for deciding to resign on 18 October were the letters Mr Cheung had sent on 9 October and I accept the Claimant's evidence.

346 I am not persuaded that part of the reason for resigning was how her request for pension information had been dealt with given she had only made the request shortly before going on leave and nor am I convinced that another employee accessing her email account was the reason. I am not persuaded that her payslips were sent to this email account on the evidence as presented. The Claimant makes no mention of a concern over her payslip or Cindy accessing this account in her letter of resignation.

347 The Respondent did not cross examine the Claimant in terms of whether she had already

secured new employment before she decided to resign. It was not put to the Claimant in cross examination that it had been her intention to resign before the events of 9 October.

Affirmation of Contract

348 The Claimant resigned without notice on 18 October, at the end of her 1 week holiday. Affirmation is essentially one of conduct and the Claimant performed no further duties for the Respondent after 9th October up to the date she resigned with immediate effect. The Claimant was on leave and resigned immediately on her return.

349 I do not consider that to wait until the end of her 1-week holiday amounts to an affirmation of the contract in respect of the acts of the 9th October. In any event, the act of a contractor relaying what the Tribunal find Mr Cheung had told him would amount to a final straw.

350 The Respondent put forward no evidence to support a finding that the dismissal was nonetheless fair.

Compensation

351 The Claimant secured employment within a month.

352 In terms of the Claimant's alleged conduct in removing data from the CRM, Mr Garbett in cross examination confirmed that the Respondent had not established who had been responsible and the Respondent's legal representative made no submissions about how this conduct, in the context of the Claimant's claim for compensation, should be considered Mr Cheung's own evidence is that he had no material concerns about her performance and wanted her to return to work.

353 In summary, the Claimant's claim of constructive unfair dismissal is well founded and succeeds.

Compensatory Award

Loss of Earnings

354 The Claimant seeks only one month's loss of pay.

355 The Respondent did not cross examine the Claimant on her attempts to find other employment sooner or on mitigation generally.

356 The Claimant's undisputed evidence is that she did not secure new employment until 23 November 2024 and in the absence of any attempt by the Respondent in cross examination to challenge whether the Claimant had taken reasonable steps to mitigate her position, I consider that the sum claimed is just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal: section123(1) Employment Rights Act 1996 (ERA).

Basic Award

357 The Claimant calculated the basic award at £1,800 but did not set out how she had arrived

at this figure and was unsure if this was correct.

358 The Respondent's representative stated he had not carried out a calculation of the basic award and he was not challenging the Claimant's calculation.

359 I calculate the basic award to be £2,100. I have calculated the basic award pursuant to section 118 (a) and 119 ERA to be £2,100 based on:

359.1 date of termination: 18 October 2024

359.2 The claimant's age of 33 at the date of termination

359.3 Three full years of service as at the date of termination

359.4 Weekly pay before tax of £769.23

Loss of Statutory Rights

360 In terms of loss of statutory rights, the Claimant is seeking £400 and again the Respondent did not oppose that sum proposed by the Claimant.

361 The Claimant is unrepresented and I have considered what I consider to be just and equitable in this case where the Claimant had served more than 3 years with the Respondent and lost the statutory right not to be unfairly dismissed and loss of right to statutory notice. I consider a sum of £500 to be just to reflect the loss to the Claimant of those rights.

Claim for upset caused by the breach

362 The Claimant also sought to claim a payment for the upset caused by the breach of contract and specifically she relies upon the breach of trust and confidence around the treatment of her annual leave. The Claimant seeks a figure by way of injury to feelings of £4,000. The Claimant does not deal in her evidence in chief with the impact of the alleged breach of contract in support of this sum or provides any other evidence in support of it.

Legal Principles

363 It has been held that an employee will get no compensation for injured feelings, distress, vexation or frustration arising from a dismissal even if it could be said to have been in the contemplation of the parties that the breach would cause such distress : ***Bliss v South East Thames Regional Health Authority 1987 ICR 700, CA*.**

364 An employee is not entitled to damages for the stress and anxiety suffered as a result of the employer's breach of the implied term of trust and confidence : ***French v Barclays Bank plc 1998 IRLR 646, CA*.**

"The judge concluded that it was the effect of the general rule in Addis v Gramophone Company Limited [1909] AC 488 as applied in subsequent cases, including Bliss v South East Thames RHA [1987] ICR 700 , that in general no damages in contract will be awarded for injury to the plaintiff's feelings caused by the defendant's breach of contract, save in exceptional cases, where the purpose

of the contract was to protect the plaintiff from distress or annoyance.

Since the decision of the judge the House of Lords in Mahmud v BCCI [1998] AC 20 have suggested that the decision in Addis is of narrower scope.

Lord Steyn in Mahmud, at 51B–D, in a speech with which Lords Goff, Mackay and Mustill agreed, explained the scope of Addis in the following terms: —"It is, however, far from clear how far the ratio of Addis's case extends. It certainly enunciated the principle that an employee cannot recover exemplary or aggravated damages for wrongful dismissal. That is still sound law. The actual decision was only concerned with wrongful dismissal. It is therefore arguable that as a matter of precedent the ratio is so restricted. But it seems to me unrealistic not to acknowledge that Addis's case is authority for a wider principle. There is a common proposition in the speeches of the majority. That proposition is that damages for breach of contract may only be awarded for breach of contract, and not for loss caused by the manner of the breach."

And:

"The judge cited a helpful passage from the judgment of Balcombe LJ in Branchett v Beaney [1992] 3 All ER 910 at 916B as follows:—

"The basic principle is well established. It is succinctly stated by Bingham LJ in the recent case in this court of Watts v Morrow [1991] 4 All ER 939 at 959: 'A contract breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy'.

365 The authorities provide that psychiatric illness caused by the dismissal itself, or the manner of dismissal, will not give rise to a claim for damages, whereas damages are recoverable for psychiatric illness caused by a breach of a contractual term, such as the implied term of mutual trust and confidence, which is not itself the dismissal itself. ***Walker v Northumberland County Council 1995 ICR 702, QBD*.**

366 The Claimant is not alleging actual personal injury but if she were, any claim for damages for personal injury arising from a breach of a contract of employment would need to be brought in the civil courts, however as the limited contractual jurisdiction conferred on employment tribunals does not extend to damages for personal injury under Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623.

367 ***Bliss v South East Thames Regional Health Authority [1987] I.C.R 700 CA*** where it was held by the Court of Appeal that there can be no recovery for mental distress arising from the employer's breach of the implied term pf trust and confidence, and **French v Barclays Bank [1998] IRLR 646** and **CA Gogay v Herfordshire CC [2000] I.R.L.R 703 CA**.

368 I provided the parties with an extract from McGregor on Damages 22nd Edition Chpt 6 and invited their submissions.

Respondent Submissions

369 The Respondent made very brief submissions namely that this is not an exceptional case where an award for hurt feelings should be made for breach of contract and refers out to the case authorities in the extract I had provided.

Claimant's Submissions

370 The Claimant had no oral submissions to make other than she simply stated that she was claiming £4000 as injury to feelings.

Conclusion

371 The general rule laid down by the House of Lords in ***Addis v Gramophone Company Ltd (1909) A.C. 488*** is that where damages fall to be assessed for breach of contract rather than in tort it is not permissible to award general damages for frustration, mental distress, injured feelings or annoyance occasioned by the breach.

372 This is not a case of a contract which was itself a contract to provide peace of mind or freedom from distress: ***Jarvis v Swans Tours Ltd (1973) Q.B. 233*** **and** ***Heywood v Wellers (1976) Q.B. 446*** and the Claimant does not submit that she is entitled damages for distress, vexation and frustration, because it had been in the contemplation of the parties that the breach would cause such distress.

373 I conclude that this is not a case where the general principle should be set aside that damages should not be awarded for any distress caused by the breach of the implied duty of mutual trust and confidence. The Claimant gave no evidence about the impact of the breach on her feelings in any event.

Employment Judge Broughton

Date: 11 January 2026

JUDGMENT SENT TO THE PARTIES ON:

……16 January 2026……

……..……

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