Case No: 1311862/2024

EMPLOYMENT TRIBUNALS

Claimant:	**Mrs Noppawan Mann**
Respondent:	**DAPV Ltd**
Heard at:	Midlands West Employment Tribunal
On:	27th, 28th & 29th May 2023 (by Cloud Video Platform)
Before:	Employment Judge Gidney (sitting alone)

Appearances

For the Claimant:	Mr Thomas Mann (the Claimant's husband)
For the Respondent:	Mr Nehi Aimufua (Litigation Consultant)

JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant's claim that she was constructively unfairly dismissed succeeds and is upheld.
2. The Claimant's claim for unlawful deduction of wages / breach of contract in respect of her tax rebate for the financial year ending 2023/2024 succeeds and is upheld.
3. The Claimant's Basic Award is assessed in the agreed sum of £3,500.00.
4. The Claimant's unlawful deduction of wages / breach of contract in respect of her tax rebate for the financial year ending 2023/2024 is assessed in the agreed sum of £628.87.

Full Written Reasons

Introduction

5. This is the Judgment in Claim No. 1311862/2024 Mrs Noppawan Mann v DAPV Ltd. The case was heard on 27th, 28th May and 29th May 2026 before me, Employment Judge Gidney. Mr Aimufua, a litigation consultant from Cromer acts for the Respondent and the Claimant's husband, Mr Mann, acts for the Claimant.

6. The Claimant commenced her employment with the Respondent on 25th July 2019, latterly in the role of Head of Financial Planning and Analysis. Her employment ended on 30th August 2024, following her notice of resignation provided to the Respondent on 2nd August 2024 **[192]**[1].

7. The Claimant notified ACAS of a dispute with the Respondent on 21st October 2024 and she received her ACAS Early Conciliation certificate on 2nd December 2024 **[51]**. She submitted an ET1 Claim Form **[52]** on 9th December 2024 which presented the following claims:

   7.1. Unauthorised deductions from wages for the period 1st January 2024 until 30th August 2024;
   7.2. Accrued but untaken holiday pay;
   7.3. Breach of contract related to unpaid pension contributions;
   7.4. Constructive unfair dismissal; and,
   7.5. Unauthorised deductions from wages / breach of contract related to unpaid tax rebate from the tax year 2023/2024.

[1] Page numbers refer to the PDF Reader page numbers within the trial bundle rather than the physical numbers on documents.

8. Following a hearing on 17th July 2024 Employment Judge Connolly sent a Judgment to the parties on 25th July 2025 **[SB9]**[2] which upheld the following claims:

   8.1. Unauthorised deductions from wages for the period 1st January 2024 until 30th August 2024 in the sum of £16,473.88;
   8.2. Accrued but untaken holiday pay in the sum of £1,266.67;
   8.3. Breach of contract related to unpaid pension contributions in the sum of £1,168.67.

9. I am told that the Respondent has not yet paid any sums to the Claimant as the Judgment is subject to an appeal to the Employment Appeal Tribunal, which has not yet been sifted.

10. Following the hearing on 17th July 2024 Judge Connolly case managed those parts of the Claimant's claim that remained **[SB1]**. She identified the remaining claims and issues, for determination today:

Claims & Issues

11. The Claims and the List of Issues that remain are as follows:

   Constructive unfair Dismissal

   11.1. Did the Respondent fail to pay wages between 1st January 2024 and 30th August 2024? Judge Connolly noted that the failure to pay those wages had been admitted by the Respondent and Mr Aimufua confirmed the admission at the start of the hearing.
   11.2. Did the Respondent fail to pay to the Claimant a tax rebate received by the Respondent in the period 1st January 2024 to 31st March 2024? Mr Aimufua confirmed that the tax rebate has not been paid by the

[2] Refers to the PDF reader pages within the Supplementary Bundle.

Respondent to the Claimant because it had never been received by the Respondent from HMRC.

11.3. Did either [8.1] or [8.2] amount to a breach of an express term of the employment contract or a breach of the implied term of mutual trust & confidence.

11.4. Was the breach fundamental?

11.5. Did the Claimant resign in response?

11.6. Did the Claimant affirm the breach of contract?

11.7. If the Claimant's resignation amounted to a dismissal pursuant to s95(1)(c) Employment Rights Act 1996 what was the reason for the breach of contract?

11.8. Was it a potentially fair reason?

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

Unauthorised deductions

11.10. Regarding the tax rebate, were the wages paid to the Claimant from 1st January 20024 to 31st March 2024 less than was properly payable?

11.11. Did the Respondent receive a tax rebate for the Claimant for the period she overpaid tax, namely 1st January 2024 to 31st March 2024?

Breach of Contract

11.12. Was the claim for the tax rebate outstanding at the Claimant's effective date of termination?

11.13. Did the Respondent fail to pay the tax rebate to the Claimant?

11.14. If so, was that a breach of contract and, if so, how much should be awarded?

<u>The Evidence</u>

12. The Tribunal was provided with an agreed joint trial bundle which ran to 250 pages. The bundle was missing the Judgment and Case Management Order of Employment Judge Connolly. A separate supplementary bundle

containing those documents was collated by the Respondent. The Respondent had previously applied to add a counterclaim against the Claimant and had indicated a wish to add documents and amend the content of its witness statements. Judge Connolly had refused the Respondent's application to add a counterclaim. However, Mr Aimufua confirmed that the Respondent no longer pursued those matters, so it is not necessary to say anything more about them here.

13. The Tribunal was provided with the following witness statements:

13.1. Noppawan Mann, the Claimant. She gave oral evidence and was cross examined on her statement;

13.2. Thomas Mann, the Claimant's husband. He gave oral evidence and was cross examined on his statement;

13.3. Ms Lucy Reed, the Respondent's former Head of Financial Operations. She gave oral evidence and was cross examined on her statement;

13.4. Mr Araud Curchod, the Respondent's former Lead Designer. He did not attend the hearing or give evidence under oath. This limited the weight that I could attach to his evidence. I did however note that (i) his statement bore a signed statement of truth, (ii) Dominic Portman accepted some of what Mr Curchod said in his statement and (iii) Mr Aimufua was given the opportunity to identify any parts of his statement that he either accepted or disagreed with. He asked for time to undertake that task, but in the end made no further submissions on that point.

13.5. Mr Dominic Portman, the Respondent's director. He gave oral evidence on behalf of the Respondent and was cross examined on his statement.

Findings of Fact

14. I have not recited every fact in this case or sought to resolve every dispute between the parties. I have limited my analysis to the facts that were relevant to the Issues that I was tasked to resolve. I made the following findings of fact on the basis of the material before me, taking into account contemporaneous documents, where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities, taking into account its assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts. The key findings of fact are as follows:

15. The Respondent trades on Amazon. The Claimant commenced employment with the Respondent on 25th July 2019 in the role of Finance Manager, working at its premises in Copenhagen Street, Worcester, pursuant to a Summary of Employment Terms **[90]** and a Contract of Employment **[92]**. Clause 4 of the Contract of Employment contained the following term:

> *'4. The Company shall pay you at the rate and intervals stated at paragraph eight of the summary. The company reserves the right to alter the time, method, and frequency of payment by issuing you with reasonable notice of any such change. The Company shall review your pay annually at its discretion. Receipt of a pay increase in one year creates neither the right nor the expectation of a pay increase in any subsequent year.'*

16. The Summary of Employment Terms set out the following:

> *'8. Rates of pay. £30,000 per annum pro rata, payable in arrears by credit transfer to your bank account at monthly intervals on or about the last working day of every month.'*

17. On 20th March 2023 the Respondent confirmed in writing a pay increase for the Claimant **[228]**. The letter stated:

> *'Salary Increase. This letter is to confirm that upon review with your manager, Dominic Portman, Managing Director your full time salary has been increased £40,000 per annum, effective as at the 20th March 2023. Thank you for making a significant contribution to Blvd.'*

18. On 19th October 2023 Amazon took the decision to withhold trading revenue from the Respondent pending an audit. Despite Mr Portman telling me that the audit was resolved quite quickly, he said that there remained payments issues with Amazon, who conducted sporadic audits with account freezes in 2024 which caused significant disruption to the Respondent's cashflow and operations. Mr Portman took the decision to stop paying his employees in January 2024.

19. It is an admitted fact that the Respondent ceased making payments to its staff, including the Claimant, in January 2024. It is a further admitted fact that the Respondent withheld the Claimant's pay in the months of February, March, April, May, June, July and August. This is also demonstrated by the Claimant's payslips for the months of January to August 2024 **[212-219]**.

20. On 20th February 2024 the Claimant was promoted to the role of Head of Financial Planning and Analysis **[120]**. The promotion did not entail any increase in pay.

21. The Tribunal heard evidence from Ms Lucy Reed, the Respondent's former Head of Financial Operations. The Tribunal found Ms Reed to be an honest and compelling witness, whose evidence was to be preferred over that of Dominic Portman, on the occasions that there was a difference in account between them. Ms Reed told the Tribunal that the Claimant's tax for the financial year commencing on 5th April 2023 was calculated on the assumption that the Claimant would remain employed and paid for the whole year, and that her annual tax (based on that assumption) was spread equally across the 12 months of the year. As things turned out, the Claimant was not paid any income from January 2024. This meant that the tax deducted between the months of April 2023 and December 2023 was too high, as it had assumed payment of salary through to March 2024. This necessitated a tax rebate be paid to the Claimant in the sum of £209.57 for each of the months of January, February and March, as is recorded on each of those payslips **[212-214]**. As such the Respondent should have paid the

rebate back to the Claimant via PAYE. It did not do so, as Ms Reed told us, and Mr Portman admitted, that Mr Portman instructed Ms Reed to apply a deduction to each rebate, cancelling it out. This, I find, amounted to a deduction from the Claimant's wages. Ms Reed told us that the rebated tax would have been deducted by HMRC from any tax that would otherwise have been due to be paid by the Respondent. The effect of all this was that the Respondent was able to offset the staff rebates from its own tax bill but did not pay the rebates, via PAYE to its employees.

22. Mr Portman told me in evidence that the Respondent did not receive a payment from HMRC for the staff rebates. I accept this to be true; however I also accept Ms Reed's evidence that the Respondent benefitted from the rebates in its own tax calculations. Mr Portman did dispute this but accepted that he had adduced no evidence to support his version of events, and I accept the evidence of Ms Reed on this issue. Ms Reed also told the Tribunal that Mr Portman stopped her wages from January 2024 onwards. She told the Tribunal that Mr Portman promised to pay the staff wages (including the Claimant and her own wages) after an investment had been received by the company, or after receipt of a Research and Development Tax Rebate, to be processed at the Respondent's year end of May 2024. In answer to a question from Mr Aimufua asking what support Mr Portman had offered Ms Reed during the non-payment of her salary, she told the Tribunal that Mr Portman had told her to sign on for welfare benefits, whilst still working for him. Mr Portman denied having that conversation with Ms Reed, but, assessing that evidence on the balance of probabilities, the Tribunal concludes that the comment was made by Mr Portman to Ms Reed. In the end Ms Reed resigned in June 2024 on account of the withholding and non-payment of her wages. She gave notice and her last day was 26th June 2024. The Claimant was the sole remaining member of the Respondent's finance team from that point.

23. The effect of the sudden stopping of her wages caused the Claimant enormous difficulty. She told me, and I accept, that she could no longer

afford to keep her son in nursery and was obliged to take him out. She was also obliged to put her house on the market and sell it. The Claimant and her husband were obliged to move from Malvern to Cheshire in order to move into Mr Mann's parent's home. I find that the Claimant was in a terrible position. She had worked for the Respondent well for 5 years. In her role she may well have felt that she could assist with the Respondent's finances such that she could be paid. The Claimant told me, and I accept, that Mr Portman told her that he would pay her outstanding wages, either from an expected external investment or from a research and development tax rebate that was due to the Respondent. On the strength of those promises from Mr Portman the Claimant elected to stay in the hope that she would be paid. By staying she did not 'accept' the non-payment of her wages. She stayed because funds were inbound and she was assured she would be paid.

24. By April 2024 the financial pressure on the Claimant was such that she agreed that she would reduce her hours to 3 days a week. This was to give her the opportunity to obtain a temporary income from somewhere else, pending the payment of her wages. This arrangement was encapsulated into a variation of contract letter dated 9th April 2024 **[172]**. It recorded the change of hours but made no mention to a change of pay. This was a financial necessity for the Claimant, in much the same way that selling her house and removing her son from nursery were necessary acts. I reject any suggestion made by the Respondent that this agreement indicated an acceptance of the non-payment of her salary or an affirmation of that breach. She continued to work with Mr Portman in the hope that income would be forthcoming and that he would honour his promise to pay her. This is demonstrated by the WhatsApp exchanges between them over the period June to August 2024.

25. On 30th May 2024 the Respondent's payroll administrators, Payfit, confirmed that the Claimant and others in her position should have received their tax rebates **[238]**. The email said:

> *'With regard to the points you asked:*

1. *These rebates shouldn't have been withheld from the employees so will need to be paid in full to them via a net payment.*
2. *The SL payments will be inflated as these are calculated on a month by month basis based on the gross pay within that month.*
3. *We are unable to manually change any tax and figures as these are calculated on the employees' tax code and the year to date figures.*
4. *We would recommend that contact with HMRC is made by yourselves and to the employee to ensure HMRC is aware of what is happening and how this is being processed.*

> *You will need to ensure that all gross payments owed to the employees are paid within the payroll and then all tax and NI contributions were made accordingly.'*

26. In July the Claimant switched from three days a week to 1 day per week, after a conversation that she had had with Mr Portman in June 2024. She still believed and relied on Mr Portman's promises to pay her salary with either an external investment or the Respondent's research and development tax rebate. A start date had been agreed of 15th July 2024 for this change but this was delayed until 30th July 2024. On 3rd July 2024 Mr Portman wrote a 'to whom it may concern' letter for the Claimant to use **[190]**. It recorded her salary as £40,000.00 pa or £3,333.33 gross per month for the months of January to June 2024. It concluded by saying '*Mrs Mann has accrued the above in unpaid wages due to temporary cash flow issues with the company. The company is unable to give a date of payment due to the unknown nature of expected payments being made to the company*'. During that June conversation Mr Portman assured the Claimant that she and the other staff would be paid as soon as the R&D tax credit was received.

27. On 23rd July 2024 the Claimant was able to commence employment with an organisation that would pay her wages, on a 4 day a week basis. The Claimant told the Tribunal in evidence:

> *'I am still with that company working 4 days a week. I took a demotion and a pay cut, I took a lower position, I needed a job quickly to help my family, as I had had to borrow money which I needed to payback and had to pay for my poorly father in Thailand. The net pay is just under £1,900 per month'.*

28. As already stated, by 2nd August 2024 the pressures on the Claimant were such that she could wait no longer. She resigned, effective from 30th August 2024 **[192]**. Her resignation email set out the sums that she believed the Respondent owed her, that she calculated in the sum of £20,300.21.

29. Over the next few months Dominic Portman suggested a payment plan could be agreed in respect of the Claimant's salary. On 20th September 2024 the Claimant asked Mr Portman when the payment plan would be set up and when the R&D tax credit would be received by the business. Mr Portman replied by saying that he was working on the payment plan which he would share the following week and that there had been no material news from HMRC about the R&D tax rebate **[181]**. During September 2024 Mr Portman continued to seek the Claimant's help with financial queries **[232]** notwithstanding that he had not paid her wages since December 2023 and she had been forced to leave the Respondent.

30. Mr Portman told the Tribunal in evidence:

> *'The tax credit was received on 11th October 2024. It was for less than we hoped. It was for £169,000.00. It was necessary that it was paid to existing staff first. It was not feasible to pay everyone all at once. We paid the staff that were still in the business, not those that had left'.*

31. On 12th October 2024 the Claimant asked again about the R&D tax rebate **[232]** as she had heard that it had been received by the Respondent. Mr Portman replied but made no mention to the tax credit. I think that the failure to mention the tax credit was an attempt by Mr Portman to obstruct the Claimant's efforts to find out the up to date position and to get paid. The Claimant called Mr Portman out on the fact that she knew the R&D tax credit had been received. He replied **[232]**:

> '*I'm getting disappointed by how you are communicating as a friend who understands and has witnessed how much we have struggled first hand and*

always doing things in good faith. I've always been open about having a sensible discussion. I am not sure who you are speaking to and as that is how misinformation spreads. Uunfortunately we did not receive from HMRC anywhere near what we had hoped and I've only been able to make a payment to those who have no access to income as they're still working for the business. I have promised a payment plan and will send that through to you, but I've been clear that it will take time for the business to recover and pay you. You must not rely on anything other than I communicate.'

32. It was at this stage that the Claimant spoke to ACAS and started conciliation on 21st October 2024. She obtained her ACAS certificate on 2nd December 2024. On 4th December 2024 Mr Portman asked the Claimant to return to work on the basis that she was paid one week in advance **[232]**. He made no offer to repay the 8 months of salary that he owed her. Mr Portman emailed her again that day in an 'open email' **[201]**. In that email Mr Portman said:

> *'I would therefore like to understand if your intentions are to continue with the Employment Tribunal? If you wish to proceed to Tribunal, I would like to make you aware of what that means, both as to what we incur, but also the usefulness of an outcome.*
>
> *If you wish to proceed on this course of action we therefore have no choice but to cancel your payment plan.*
>
> *It is my hope therefore that you are able to agree to continue the payment plan provided and cancel the legal action against the business.*
>
> *If the regrettable circumstance is that you do not wish to speak to me and have decided you will proceed to the Tribunal despite the above, please notify me of this by Friday the 6th of December so I can appoint our solicitor and formally cancel the payment plan.'*

33. The Claimant presented her Claim Form on 9th December 2024.

34. In his witness statement Arnaud Curchod told the Tribunal that he had had to present an Employment Tribunal claim against the Respondent for his unpaid wages. He also referred to two other ex-employees, Mrs Rodgers and Mr Vincent, both of whom had also presented Tribunal claims against the Respondent for their outstanding wages. By a reserved decision handed down by Employment Judge Smart following a hearing on 18th-19th September

2024 the Tribunal upheld Mrs Rodgers claim for constructive unfair dismissal and unlawful deduction of wages. By a Judgment handed down on 27th September 2024 by Employment Judge Perry the Judge upheld Mr Vincent's claim of unlawful deductions from wages.

35. In his evidence Mr Portman told me that the Respondent was now on a good footing. He said:

> *'We have raised £1.8m in equity funding and improved trading and made significant progress. I started to take a salary again in September 2025, it would have been about the same time. We have made payroll for 9 months; we made payroll from September 2025'*.

36. Despite the Respondent's improved financial position, no further payment has been made to the Claimant in respect of her outstanding wages. I now turn to the relevant law in this case:

The Legal Principles

37. **Constructive Dismissal**. The statutory basis for constructive dismissal is set out in section 95(1)(c) of the **Employment Rights Act 1996** ('the **ERA**') which states:

> ***95 Circumstances in which an employee is dismissed.***
> *(1) For the purposes of this Part an employee is dismissed by his employer if:*
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

38. 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: **Western Excavating (EEC) Ltd v Sharp** [1978] IRLR 27 CA. The employer shall not without reasonable and proper cause conduct itself in a manner calculated and/or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

39. The conduct relied on as the breach must, *objectively*, be likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer' **Mahmud v Bank of Credit and Commerce International SA** [1997] IRLR 462 HL. An employment tribunal will err in upholding a claim for constructive dismissal where it had failed to ask itself whether the employer had acted in a way which was calculated or likely to destroy or seriously damage the relationship: **Tullett Prebon plc v BGC Brokers LP** [2011] IRLR 420.

40. The legal test is whether looking at all of the circumstances objectively, that is from the perspective of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract. In assessing the issue of repudiatory breach of contract the objectively assessed intention of the alleged contract-breaker towards the employees is of a paramount importance.

41. The employee must be entitled to say 'you have behaved so badly that I should not be expected to have to stay in your employment' and the Tribunal must be prepared to conclude that overall that the faults of the employer were so egregious that no reasonable employer could have acted in that way: **Claridge v Daler Rowney Ltd** [2008] IRLR 672, Elias P at paras 38 and 52. Conduct which is 'so intolerable' that it amounts to a repudiation of the contract will qualify. The Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: **Woods v WM Care Services (Peterborough) Ltd** [1981] ICR 666.

42. The Claimant must resign in response to the breach (causation) and not delay too long in terminating the contract in response to the Respondent's breach (waiver): **BG v O'Brien** [2001] IRLR 496. In respect of the causation question, it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. It is not sufficient if he leaves in circumstances which indicate some other ground for his leaving other than the breach of the employer's obligation to him: **Norwest Holst v Harrison** [1984] IRLR 419.

43. It is open to the employer to show that such a dismissal was for a potentially fair reason. If he does so, it will be for the Employment Tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within a range of reasonable responses and was fair: **Sainsbury v Hitt** [2003] IRLR 23.

44. Lawful conduct is unlikely to be capable of constituting a repudiation even though it may be unwise or unreasonable in industrial relations terms: **Spafax Ltd v Harrison** [1980] IRLR 442, CA. The activity of the Respondent, subject to the criticism, must be without cause or justification in order for it to constitute the relevant breach: **BG v O'Brien** [2001] IRLR 496. Employer conduct which is prima facie repudiatory will not breach the term of trust and respect if the employer has reasonable and proper cause for it: **Hilton v Shiner Ltd** [2001] IRLR 727, EAT. Delays in responding to a grievance can amount to a breach of the implied term of trust and confidence.

45. A course of conduct by an employer can, when looked at as a whole, amount to a fundamental breach of contract even if the 'last straw' incident which prompts the employee to resign is not in itself a breach of contract: **Lewis v Motorworld Garages Ltd** [1986] 157 CA. For cases concerning the last straw doctrine, there are five questions to be posed:

45.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

45.2. Has he or she affirmed the contract since that act?

45.3. If not, was that act (or omission) by itself a repudiatory breach of contract?

45.4. If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? If it was, there is no need for any separate consideration of a possible previous affirmation.

45.5. Did the employee resign in response (or partly in response) to that breach?

46. For a resignation to amount to a dismissal under s95 **ERA**, the following must be answered following the case of **Kaur v Leeds Teaching Hospitals** [2018] EWCA Civ 978:

46.1. What was the most recent act on the part of the employer which the Claimant alleges caused her resignation?

46.2. Has the contract been affirmed since that date?

46.3. If not, was it a repudiatory breach of contract?

46.4. If not, was it part of a sequence of events that collectively breached the contract? Did the employee resign in response to that breach within a reasonable time?

47. **Kaur** is also authority for the principle that even if past breaches of contract were affirmed by the employee who continued to perform the contract, a subsequent breach can then amount to the last straw and revive the previous breaches, so as to amount to a cumulative breach. The last straw must be at least part of the reason for the resignation **Omilaju v Waltham Forest London Borough Council** [2004] EWCA Civ 1493.

48. In **Cantor Fitzgerald International v Callaghan** [1999] IRLR 234 the Court of Appeal held that any deliberate failure to pay any element of remuneration will constitute a repudiatory breach. This was applied in **Singh v Metroline West Ltd** [2022] EAT 80 (8 March 2022, unreported).

49. If there is breach of the obligation to pay wages, that in itself can establish constructive dismissal; unlike breach of the implied term of trust and confidence, there is no employer defence of 'reasonable and proper cause' (e.g. through financial difficulties) after **Mostyn v S&P Casuals Ltd** UKEAT/0158/17 (22 February 2018, unreported).

50. The acceptance of the breach of contract by the innocent party must be clear and unequivocal **Hunt v British Railways Board** [1979] IRLR 379. The repudiatory breach must be at least part of the reason for the resignation but does not need to be the principal or operating cause of the resignation **Meikle v Nottinghamshire County Council** [2004] IRLR 703. However, in employment contracts a series of acts that are not of themselves repudiatory can be relied upon cumulatively with the final incident being the last straw as stated above. The focus of the enquiry into a constructive dismissal is the employer's conduct not the employee's reaction to it: **Tolson v Governing Body of Mixenden Community School** [2003] IRLR 842.

51. **Burden of Proof**. In the case of constructive dismissal, it is for the Claimant to prove they were constructively dismissed.

52. In the case of the breach of contract claims, it is for the Claimant to prove there was a binding contract, that the contract was breached and that the damage from the breach was contractually foreseeable after Hadley **v Baxendale [1854] EWHC Exch J70**.

53. When considering the burden of proof more generally, the burden usually rests with the person who is asserting something to be a factual allegation and the standard of proof is on the balance of probabilities as

summarised by HHJ Auerbach in **Hovis Limited v Louton [2021] UKEAT/1023/20/LA.**

54. **Breach of contract.** Breach of contract is a common law claim not based on statute. If a contract is breached, then damages are payable to place the parties where they would have been had the contract been fulfilled properly in the normal course of the relationship. The damages must be a probable result of the breach **Hadley (above)**.

55. **Unlawful Deductions From Wages**. The relevant provisions within s13 **ERA** state:

> ***13 Right not to suffer unauthorised deductions.***
> *(1) An employer shall not make a deduction from wages of a worker employed by him unless (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

56. For such a claim to succeed under s13 **ERA**, there first need to be a proven deduction of wages from what would otherwise have been properly payable. That deduction must have been an unlawful one to make and there must have been no excepted reason to make the deduction.

The Tribunal's conclusions

57. I now turn to my conclusions:

Constructive Unfair Dismissal

57.1. Did the Respondent fail to pay wages between 1st January 2024 and 30th August 2024? The Respondent accepts that it failed to pay the Claimant her wages for this period.

57.2. Did the Respondent fail to pay to the Claimant a tax rebate received by the Respondent in the period 1st January 2024 to 31st March 2024? Mr Aimufua confirmed that the tax rebate has not been paid by the Respondent to the Claimant. Did either the non-payment of wages or the non-payment of the tax rebate amount to a breach an express term of the employment contract or a breach of the implied term of trust & confidence? The payment of salary in return for labour is set out in an express written term of the Summary of Terms and Conditions and the Contract of Employment. Whilst the payment of a tax rebate was not an express term, it was, in my judgment an implied term that all rebates issued to the Respondent by HMRC would be paid to the employees by PAYE. It is necessary to imply this term to make the contract and the payment of the correct salary work. Applying **Canter Fitzgerald,** it is clear the Claimant was constructively dismissed. The payment of any part of the remuneration package goes to the heart of the contract and in my view both the failure to process the tax rebate via PAYE and/or the failure to pay wages are fundamental breaches when focusing on the employer's conduct**.** No 'reasonable and proper cause' arguments arise after **Mostyn** because the failure to pay wages was a breach of an express term in the contract.

57.3. Was the breach fundamental? In my judgment it was. Mr Portman did himself no credit at all by firstly refusing to accept that it was a fundamental term, choosing to describe it as a serious term instead. He then attempted to resile from that position and suggested that the payment of salary was not even a serious term in a contract. The payment of salary is the most fundamental term that a contract of employment contains.

57.4. Did the Claimant resign in response and/or did the Claimant affirm the breach of contract? I have taken these points together. It is clear that the first non-payment of salary occurred in January 2024 and continued for 8 months until the Claimant resigned at the end of August 2024. The Claimant delayed resigning following the January non-payment for a period of 7 months and then delayed by each subsequent month by one month less. Did that amount to an affirmation of the breach of contract and/or did the Claimant's agreement to work 3 days a week from April and 1 day a week from July and/or her continued willingness to provide work for the Respondent and Mr Portman affirm the breach of contract, ie does it prove that the Claimant accepted the Respondent's breach of contract by failing to pay her salary from January? The Respondent's core defence to this claim is that by reason of the delay and the Claimant's actions in accepting a variation to the terms of her contract, the Claimant affirmed or accepted the breach of her contract. I reject this submission. It is clear that the Claimant raised her concerns at an early stage but chose to stay and assist the Respondent because Mr Portman had assured her that she would be paid either out of an investment expected in quarter one of 2024 or by a research and development tax rebate in the 2nd half of 2024. The Claimant was obliged to take a number of serious steps to mitigate her position, namely remove her son from nursery, sell her house and move in with her husband's parents and reduce her hours to try and find some employment that would pay her salary. Given that she was in a position to try and assist with the finances and relied on Mr Portman's promise to her that she would be repaid, I find that her actions did not affirm the contract.

57.5. Furthermore the Respondent would be unjustly enriched if it were to make promises to the Claimant that it would pay her if she stayed and then seek to rely on the Claimant's reliance on those promises (which it breached) as a defence to her claim. Delay in leaving employment and any steps of affirmation of the contract both are capable of evidencing an acceptance of the Respondent's breach. However for the reasons stated the Claimant did not accept the breach, she believed Mr Portman's promise to pay her and it would not be just or equitable to allow the Respondent to benefit from its own broken promises as a defence to the Claimant's claim.

57.6. In any event, each non-payment of salary was a new fundamental breach of contract and the Claimant was entitled to say 'enough is enough' following the non-payment of the July salary and end her employment at the end of August.

57.7. If the Claimant's resignation amounted to a dismissal pursuant to s95(1)(c) Employment Rights Act 1996 what was the reason for the breach of contract? In my judgment the reason plainly was the breach of contract of salary.

57.8. Was it a potentially fair reason and did the Respondent act reasonably in all the circumstances in treating the reason as a sufficient reason to dismiss the Claimant? The Respondent has not advanced a case that the dismissal was nonetheless fair, and I can see no basis for making that finding.

Unauthorised deductions

57.9. Regarding the tax rebate, were the wages paid to the Claimant in the period 1st January 2024 to 31st March 2024 less than was properly payable? In my judgment the tax rebate should have been processed via PAYE. The only reason it was not processed was because Mr Portman instructed Lucy Reed to stop it. The tax paid by the Claimant over the months of April to December 2023 was higher than it ought to have been, given that no payment at all was received between January and March 2024. The Respondent, on the direct instruction of Mr

Portman, unlawfully deducted those sums that were properly payable to the Claimant.

57.10. Did the Respondent receive a tax rebate for the Claimant for the period she overpaid tax, namely 1st January 2024 to 31st March 2024? I accept Mr Portman's evidence that the Respondent did not receive a tax rebate from HMRC, however I also accept the evidence of Ms Reed that the tax due to be paid by the Respondent to HMRC was reduced to reflect the value of the tax rebates of the affected employees (including the Claimant) in the first quarter of 2024. Accordingly I find that the Respondent should have processed each of the January, February and March 2024 payslips by passing on each monthly rebate to the Claimant via PAYE.

Breach of Contract

57.11. Was the claim for the tax rebate outstanding at the Claimant's effective date of termination? Plainly the tax rebate was still outstanding as at the date of the Claimant's effective date of termination.

57.12. Did the Respondent fail to pay the tax rebate to the Claimant? The rebate was not paid, as the Respondent admits.

57.13. If so, was that a breach of contract and, if so, how much should be awarded? For the reasons stated above I consider that this did amount to a breach of contract. The calculation of losses shall be determined at the remedy hearing.

Judgment

58. It is the Judgment of the Tribunal that:

58.1. The Claimant's claim that she was constructively unfairly dismissed succeeds and is upheld.

58.2. The Claimant's claim for unlawful deduction of wages in respect of her tax rebate for the financial year ending 2023/2024 succeeds and is upheld.

58.3. The Claimant's Basic Award is assessed in the sum of £3,500.00.

58.4. The Claimant's unlawful deduction of wages / breach of contract in respect of her tax rebate for the financial year ending 2023/2024 is assessed in the sum of £628.87.

59. The remaining Remedy shall be determined at 10am on 22nd July 2026.

Employment Judge Gidney

Judgment delivered orally on 28th May 2026

Written reasons approved on 9th August 2026