EMPLOYMENT TRIBUNALS

Claimant: **Ms J Cameron**

Respondent: **Jocasta's Group Limited**

Heard at: **Lincoln**

On: **Wednesday, 10th May 2017**
Thursday, 11th May 2017 (In Chambers)

Before: **Employment Judge Heap (Sitting Alone)**

Representation
Claimant: **In Person**
Respondent: **Mr P Maratos - Consultant**

RESERVED JUDGMENT

1. The claim of constructive unfair dismissal and breach of contract relating to the failure to pay notice pay fail and are dismissed.

2. The claim of a failure to pay holiday pay fails and is dismissed.

3. By consent between the parties, the claim of unauthorised deductions from wages contrary to Section 13 Employment Rights Act 1996 succeeds and the Respondent is Ordered to pay to the Claimant the agreed sum of £1,243.24 net.

REASONS

BACKGROUND & THE ISSUES

1. This is a claim by Ms. Jennifer Cameron (hereinafter, referred to as "The Claimant"), against her now former employer, Jocasta's Group Ltd (hereinafter, referred to as "The Respondent").

2. The claim originally encompassed complaints of constructive unfair dismissal; breach of contract with regard to a failure to pay notice pay; a complaint of a failure to pay holiday pay and also of unauthorised deductions from wages. However, during the course of the hearing before me and through their representative, Mr. Maratos, the Respondent indicated that they no longer sought to defend the claim of unauthorised deductions from wages, relating as it

did to non-payment of the Claimant's final salary payment. It was accepted in this regard by the Respondent that the clause of the Claimant's contract of employment upon which they had sought to rely in withholding her final salary payment was unlikely in the circumstances to have permitted there to have been a lawful deduction. Accordingly, following advice from Mr. Maratos it was conceded on behalf of the Respondent that the appropriate sum of net wages should be paid to the Claimant and the parties agreed that that was a matter which should be recorded in this Judgment as having been made by consent. The complaint of unauthorised deductions from wages therefore no longer remained a live issue for me to determine in these proceedings and I say no more about it.

3. Turning then to the remaining parts of the claim, the main complaint advanced by the Claimant is one of constructive unfair dismissal. The Claimant relies upon a series of actions which, it is said, were perpetrated by the Respondent and which either singularly or cumulatively amounted to a fundamental breach of contract.

4. The acts relied upon by the Claimant were clarified and agreed with her at the outset of the hearing as being as follows:

(i) That the Respondent had accused her of causing a loss of £3,000.00 which had been paid into an incorrect bank account and which led to an unfair final written warning being imposed;
(ii) That the Respondent had made unfair accusations against her that she had been two hours short on her contractual working time;
(iii) That the disciplinary process which had led to her final written warning had been unfair in that:
    a. The investigation stages and disciplinary hearing had been dealt with by the same person (namely Stephen Horbury); and
    b. That the disciplinary hearing had been conducted in a rushed and hurried fashion by Stephen Horbury.
(iv) That she had not been paid her wages in September 2016.

5. In the alternative, insofar as any of the above matters are not of themselves a breach of contract, it is the Claimant's case that those actions when taken together amounted to a breach of the implied term of mutual trust and confidence with the "last straw" being the non-payment of the Claimant's salary in September 2016 as referred to at point (iv) above. The Respondent denies any breach of the implied term of mutual trust and confidence or that there was any conduct on the part of the Respondent that entitled the Claimant to terminate her employment and treat herself as having been dismissed.

6. Insofar as the breach of contract claim with regard to unpaid notice pay is concerned, it is agreed between the parties that the Claimant did not give any notice of termination of her employment, and instead contends, that she left employment with the Respondent in circumstances where she was entitled to terminate the contract without notice. It is therefore common ground between the parties that the notice pay claim stands and falls with the constructive dismissal complaint.

7. There is also a complaint of unpaid holiday pay but I say little about that here given that, as I shall come to in my conclusions, I have heard no evidence about the substance of that part of the claim.

THE HEARING, THE EVIDENCE AND CREDIBILITY

8. The hearing of this claim was listed for a period of two days over 10th and 11th May 2017. Shortly prior to the hearing, the Respondent had instructed Peninsula Business Services ("Peninsula") as their representatives. Peninsula had written to the Tribunal shortly before the hearing and although not expressly making the application, the inference from that correspondence was that they were seeking a postponement on the basis of late instructions from the Respondent; problems with availability for some of the witnesses on day two of the hearing and general preparedness of the parties. Insofar as that had been an application to postpone the hearing, I refused it with reasons on 9th May 2017. The reasons for that refusal were contained in the correspondence sent to the parties on that date and I do not therefore set them out again here.

9. That application was not renewed by Mr. Maratos at the commencement of the hearing and he indicated that he believed the Respondent to be in a position to proceed. However, despite that indication it is clear that all was far from well in terms of preparation for the hearing and time had to be taken to deal with those issues. This was not least the fact that the Respondent sought to rely upon the witness statements from a Mr. Paul Horbury and a Ms. Jackie Jinks, neither of which had been disclosed to the Claimant prior to the hearing. Clearly, that was a most unsatisfactory state of affairs and even more so given that the Claimant represented herself in these proceedings as a litigant in person. However, as it transpired and following discussion as to the likely relevance of the evidence of those two individuals, Mr. Maratos elected to call neither and accordingly I did not hear from them. Despite the state of affairs with regard to presenting evidence late being a clearly unsatisfactory one, I am satisfied that this was not a situation which prejudiced the Claimant given that neither witness was called and she did not therefore have to cross examine them. I have not considered the statements of Paul Horbury or Jackie Jinks in reaching my decision on the claim given the decision not to call either of them and, in all events, the relevance of their evidence to the issues that it is necessary for me to determine.

10. A further difficultly arose, however, in respect of the hearing bundle that had been compiled by the Respondent. Although the Respondent indicated that they had sent the bundle to the Claimant, her position was that she had never received the final version. She had received the documents within the bundle but not the bundle itself and had therefore compiled her own which relied on different numbering. That was a matter which we were able to overcome during the hearing and therefore which I am satisfied did not disadvantage the Claimant.

11. In addition to that issue, the bundles had been put together in possibly one of the most confusing ways that they could have been. In this regard, the majority of the pages contained in the bundle were not numbered but those that were appeared to be inserted randomly and without any form of sequential numbering. Clearly, that was a situation which would have led to significant confusion during the course of evidence being given. I accordingly directed Mr. Maratos to attend to resolution of those matters during my reading in of the witness statements and other documents. Although he endeavoured to do so, the way in which the bundle had been prepared still resulted in difficulties

ensuing during evidence with different numbers appearing on different pages and it often being difficult to ascertain which page was being referred to during cross examination. This is a situation which it is sincerely hoped will be avoided in any future cases.

12. There were also some issues in relation to late disclosure of documents. From the Claimant this included a number of character references. Those were not documents that it was necessary for me to consider in order to determine the issues in this case as they did not speak to any of the relevant areas of dispute between the Claimant and the Respondent nor had any of the authors of those references been called to give live evidence. I therefore say no more about those documents.

13. Despite the difficulties referred to above, matters did in fact progress much more quickly than had been anticipated, with the result that evidence and submissions were all completed within the first day of the hearing.

14. This had the result that it was unnecessary for the parties to return to the Tribunal on the second day of the Hearing and by agreement with them as to their preference, the second day (11th May 2017) was therefore spent in Chambers considering the evidence and submissions and making my decision in respect of the case. I apologise to both parties for the delay between that final day of hearing time and receipt of this Reserved Judgment which has resulted from a lack of typing resources and other cases which have come before me to be heard. The patience of the parties has therefore been appreciated and they have been updated following the hearing as to when this Judgment might be expected to be received.

15. During the course of the hearing I heard evidence from the Claimant on her own behalf. From the Respondent I heard evidence from Mr. Stephen Horbury, the former Managing Director of the Respondent Company. As I have already observed above, I was also provided by the Respondent with a witness statement from another former director of the Respondent, Mr. Paul Horbury and an employee of theirs, Ms. Jackie Jinks. As I have already set out above, I have not taken their evidence as contained within their witness statements into account as they were not called as witnesses and in all events it was not relevant to the issues that I was required to determine.

16. I say a word here, however, as to my views on the credibility of those witnesses from whom I did hear. There are disputes of fact as to what occurred in discussions when only the Claimant and Stephen Horbury were present and for which there is little by way of supporting documentary evidence to assist me as to whose version of events is more likely than not to be the accurate one. By and large, I was satisfied that both the Claimant and Stephen Horbury presented largely honest accounts, although I preferred on balance and where necessary, the evidence of Stephen Horbury over that of the Claimant.

17. In this regard, there were some aspects of the Claimant's evidence in respect of which I was not convinced that she was providing to me a genuine recollection of events rather than perhaps what she considered might be the more supportive position to her claim. One issue in that respect, for example, arose with regard to dates of salary payments and I deal with that issue further in my findings of fact below.

18. Whilst there was therefore little to choose from as between the Claimant and Stephen Horbury with regard to matters of credibility, I did ultimately regard him as the more convincing witness and therefore unless I have said otherwise within this Judgment where there are disputes of fact between the Claimant and Mr. Horbury upon which there is no documentary evidence to assist me, I have resolved those in favour of the Respondent.

19. I should observe finally in this regard that I have confined my findings of fact to those matters which are relevant in order for me to make a proper determination of the claim. I have therefore not dealt with each and every point of dispute between the parties if those matters are not necessary for that proper determination.

THE LAW

Constructive Unfair Dismissal

20. The right not to be unfairly dismissed in contained within Section 94 Employment Rights Act 1996 ("ERA 1996"). A dismissal in this context includes a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer's conduct – namely a constructive dismissal situation.

21. An employee will be rendered constructively dismissed in circumstances where there has been a fundamental breach of their contract of employment by the employer and in respect of which they resign in response.

22. Tribunals take guidance in relation to issues of constructive dismissal from the leading case of **Western Excavating – v – Sharp** [1978] IRLR 27 CA and we note in this regard as follows:-

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."*

22. A breach need not be an express breach of the employment contract; it may be an implied breach, such as a breach of the implied term of mutual trust and confidence. There is in this regard a term implied into every employment contract that an employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. Breach of that implied term, if established, will almost inevitably be repudiatory by its very nature.

23. The conduct that is relied on as a breach of the term may consist of a series of acts, some of which may be trivial and which can be looked at as a whole. In cases where a Claimant relies on a "final straw", that act itself does not have to be a fundamental breach or even a breach of contract but it must be a more than minor or trivial occurrence.

24. The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the Respondent employer's conduct on a Claimant employee are only relevant in so far as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.

25. If there is a fundamental breach of contract, an employee must, however, resign in response to it. That requirement includes there being no extraneous reason for the resignation, such as them having left to take up another position elsewhere or any other such reason if that is unrelated to the breach relied upon.

26. However, if the repudiatory breach was part of the cause of the resignation, then that suffices. There is no requirement of sole causation or predominant effect; **Nottinghamshire County Council v Meikle [2004] IRLR 703.**

27. It is possible for an employee to waive (or acquiesce to) an employers breach of contract by their actions, including by delay in tendering their resignation and leaving employment. In those circumstances, an employee will affirm the contract and will be unable to rely upon any breach which may have been perpetrated by the employer in seeking to argue that they have been constructively dismissed.

28. The onus is upon the employee to establish the essential elements of a complaint of constructive dismissal.

Breach of Contract

29. A claim for unpaid notice pay is a complaint of breach of contract. The Employment Tribunal has jurisdiction to entertain such a complaint as a result of the provisions of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. If a complaint is successful, the Tribunal will remedy the breach by putting the employee back into the position that they would have been in but for the breach having occurred.

Holiday Pay

30. Entitlement to accrued but untaken annual leave is provided for by Regulation 14 Working Time Regulations 1998, which provides as follows:

> *"14.—(1) This regulation applies where—*
>
> *(a) a worker's employment is terminated during the course of his leave year, and*

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

where—

A is the period of leave to which the worker is entitled under regulation 13(1);

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise."

31. The burden of proof that monies are owing in respect of unpaid holiday pay rests with the employee.

FINDINGS OF FACT

32. Although I am told that the Respondent is no longer actively trading, at the material time with which I am concerned they were engaged in the event planning and coordination industry. This involved the planning and catering for events such as weddings, birthday parties and the like.

33. The Claimant first came to be employed by the Respondent in or around 2007 as a Wedding and Events Manager. She also acted at the same time as a Personal Assistant to the Directors of the Respondent Company. That included to Mr. Stephen Horbury, who was at the material time the Managing Director.

34. I accept Stephen Horbury's evidence that the Claimant's duties in respect of the Personal Assistant part of her role involved dealing with personnel issues, such as the updating and filing of contracts of employment; some pay roll matters; record keeping and any necessary typing that had to be done for the Directors.

35. In March 2011, the Claimant resigned from employment with the Respondent to take up a position elsewhere. She was persuaded, however, by Stephen Horbury to return to work for the Respondent with the promise of a pay increment and other negotiated terms. The Claimant therefore returned to employment with the Respondent with effect from May 2011.

36. The Claimant had a Contract of Employment with the Respondent, which was updated with effect from March 2015, and which governed therefore, the period of the Claimant's employment with which I am predominantly concerned. The Contract of Employment was before me within the hearing bundle at pages 141 to 144 inclusive.

37. The relevant part of the Contract of Employment relating to the Claimant's hours of work said this.

> *"Hours of work effective: Your core working hours are: 31 hours per week as follows with a 1hour lunch* where indicated.*

Monday	*9am to 5pm*	*8 hours**
Tuesday	*Off Not working*	*0 hours*
Wednesday	*9am to 5pm*	*8 hours**
Thursday	*9am to 4pm*	*7 hours*
Friday	*9am to 5pm*	*8 hours**
Total		***31 hours"***

38. The asterisk denoted that on the days indicated (namely Monday, Wednesday and Friday) the Claimant would have a one hour lunch break. On her other day of work, she would not have a lunch hour as she would work a reduced number of hours that particular day.

39. The Contract of Employment also had provisions with regard to what is referred to as "Wastage" and set out as follows:

> *"**Wastage**: You are required to carry out your duties under this contract with reasonable care and skill. If the Employer suffers financial loss of a consequence of your negligence or as a result of a deliberate act on your part (following a reasonable investigation) the Employer may seek a contribution of up to 100% (to a maximum of £1,000) of that financial loss from you. Any monies owing to the Employer under this clause may be deducted from any payment owed to you whether in respect of wages or otherwise."*

40. The Contract of Employment also deals with entitlement to annual leave and notice entitlement and the relevant portions of the Contract in that regard said this:

> ***Holidays**: The Company's holiday year runs from 1st January to 31st December. You are entitled to 28 days paid holidays inclusive of Bank Holidays (pro rata if part time) and the rules and procedures you must follow are detailed in the Employee Handbook."*
>
> ***Notice**: You are required to give the Company notice as follows:*

After one month you must given 3 months notice to terminate your employment.

You are entitled to receive the following periods of notice from the Company:

More than 1 month but less than 2 years	*1 week*
More than 2 years but less than 3 years	*2 weeks*
More than 3 years but less than 4 years	*3 weeks*

And so on with an extra week for each until:
More than 12 years *12 weeks*

***Termination without giving notice**: If you terminate your employment without giving notice as stated above, the Company reserves the right to recover that amount from any accrued wages and/or holiday pay or by other means it sees fit."*

41. After the Claimant returned to work for the Respondent in March 2011, matters progressed without any significant incident of note. Whilst I accept that there may well have been what might be best described as "niggles" on both sides, there was nothing of particular consequence until the events of 2nd September 2016. This is with the exception of one incident in November 2015 when the Claimant had again resigned from employment. However, relations between herself and the Respondent were restored to what must have been relatively harmonious levels at least, on the basis that the Claimant retracted her resignation and continued to work for the Respondent without notable incident until, as I shall come to below, the events of 2nd September 2016.

42. On that date, the Claimant discovered that a client of the Respondent had paid the sum of £3,000.00, which was due for part payment for event services to the Respondent, into the wrong bank account. This had been paid into the Respondent's old HSBC account, rather than into the new account, which they had set up with the Nat West.

43. The Claimant informed Stephen Horbury, the then Managing Director, about that position. I find it likely that Stephen Horbury was far from best pleased about that turn of events and used words to the effect that he *"was not wearing it"* (i.e. that he was not prepared to accept the position) and that the Claimant needed to come up with a solution. The reason for his angst in this regard related to the fact that, as I shall come to below, he had given an instruction to the Claimant in April 2016 to advise clients about the change of banking institution and the money was likely to be difficult to retrieve from HSBC.

44. I do not accept, however, that there was any indication from Stephen Horbury that he expected the Claimant to replace the £3,000.00 which had been paid into the wrong account nor do I accept that he was as aggressive as the Claimant contends in her witness statement. I consider, having observed both of them interacting with each other in the hearing and having a regard to the background detail as to the relationship which both have provided and which is evidenced in some of their later written communications, that they got into a heated debate about the matter and each gave as good as they got. This had the result that the Claimant told Mr Horbury that she "might as well resign" and

that after that she walked out and did not return for the remainder of that day. This was in fact not the first time that the Claimant had walked out and late resigned from employment following a dispute with Stephen Horbury and I accept that that had also been the position in November 2015 when the Claimant had walked out on the Respondent and had later tendered her resignation (albeit that it was later agreed that the Claimant would retract her resignation). I find it likely that her words on 2nd September with regard to resigning were borne from a fit of pique as was her absenting herself from the workplace thereafter.

45. It is the Claimant's case before me that she did not intend to resign and that indeed she chose her words carefully so that she did not give that indication. In this regard, she had said that she "might as well resign" not that she was actually resigning. However, I accept that as far as Stephen Horbury was concerned the Claimant had resigned. That was the natural understanding of what she said to him, particularly when coupled with the fact that she had then walked out and did not return when she was still contracted to work until 5.00pm that day.

46. Moreover, Stephen Horbury's understanding that the Claimant had resigned was also all the more understandable given that after she had left the building I accept his evidence that he had tried to telephone her at least once, but more likely on 3 separate occasions, and each time the Claimant's telephone switched to voice mail. He thereafter instructed another member of staff, Helen Parker, to try to contact the Claimant. Helen Parker managed to make contact with the Claimant on her mobile telephone by way of a text message and she asked the Claimant to return to work. The Claimant replied with words to the effect of "No way" or words to that effect.

47. Given all of that background, I accept the evidence of Stephen Horbury that his understanding was that she Claimant had resigned from employment did not intend to return. When she did not attend for work on 3rd September 2016, as I shall come to below, the Respondent had to make alternative arrangements for cover.

48. There is a dispute between the Claimant and Stephen Horbury as to whether, in April 2016 (and therefore prior to the events of 2nd September 2016) he had given the Claimant an instruction to notify all clients who still had balances to pay to the Respondent of a change of bank details from HSBC to Nat West. Mr. Horbury's account is that he had instructed the Claimant in the month of April 2016 to tell all clients of the change of bank details at that point. The Claimant's evidence was to the contrary and she contended that she could not recall any instruction of that nature from Mr. Horbury and that her understanding of what he had said was that she should contact clients in the month that their payments were due to tell them about the change of bank details.

49. I find it far more likely on the balance of probabilities that the instruction that Mr. Horbury gave in April 2016 was that the Claimant was to inform all clients about the change in bank details at that time and not only in the month when their payments were due. I therefore prefer the evidence of Stephen Horbury to the Claimant on this point.

50. Whilst the Claimant contended that it would make more sense to tell clients only when their payments were due because, otherwise, they might forget about the new bank details, in reality this is a difficult argument to comprehend.

51. In this regard, it seems a far more cumbersome exercise to have to update different clients each month about the new bank details rather than simply, informing them en block in April 2016 that there was to be a change of banking institution the following month. If the clients were going to remember to make a payment, it seems to me that they would also remember where they had to make that payment to. I find it therefore much more logical that the instruction given to the claimant in April 2016 was to inform all clients, irrespective of when their payments fell due, of the change of banking arrangements and I accept the evidence of Mr. Horbury that that is what he told the Claimant to do.

52. It may be the case that the Claimant had misunderstood what Mr. Horbury had said. Alternatively, it may be that she had forgotten about his instruction or it may be that she had amended that instruction on the basis of her own belief as what she thought would be the more appropriate way of dealing with matters.

53. However, whatever that position I am satisfied that the instruction that was given to the Claimant and which Mr. Horbury expected to be carried out was that she was to tell all clients of the new banking arrangements in April 2016 and that thereafter all monies should be paid into the Nat West account and not into the HSBC account. However, that did not happen.

54. This had the result that for one particular client, who had instructed the Respondent to undertake a preparation for a charitable event, the sum of £3,000.00 was paid into the old HSBC account rather than the new Nat West account.

55. The Claimant had intended to send a payment reminder with the updated banking details to that particular client on 26th August 2016. However, as a result of the pressure of work and prioritisation of other issues the Claimant did not send that reminder. As it transpired, however, that would not have mattered on the basis that the individual making the payment had already transferred the £3,000.00 some days earlier because she was going to be out of the country on the date that the payment would otherwise have fallen due to be paid. She had therefore made the payment early before travelling abroad. Had she been told about the new banking arrangements in April 2016, the payment would in all likelihood have been paid into the Nat West account and not the HSBC one.

56. The Claimant realised on 2nd September 2016 that the payment had therefore gone into the wrong account. Although this is disputed by the Claimant, I accept that that has caused the Respondent some considerable difficulty given that they are in dispute with HSBC who are holding the £3,000.00 in question as set off against monies that it is contended that the Respondent owes to them. Accordingly, and for that reason, I am satisfied that Stephen Horbury was far from best pleased about what the Claimant told him about the error with the payment, particularly in view of the fact that he had given the instruction in April 2016 for all clients to be informed of the new banking arrangements.

57. As I have already observed above, I find it likely that the discussion which then ensued became heated with the Claimant indicating that she “might as well resign” and then to her absenting herself from the office for the remainder of 2nd September 2016 and the following day and Mr. Horbury being under the impression that she had resigned.

58. The Claimant had in fact been due to attend a meeting with a client which had been scheduled for the afternoon of 2nd September 2016. The Claimant did not attend that meeting or make arrangements for anyone else to do so on her behalf. The Claimant similarly did not turn up the following day (3rd September 2016) to manage a birthday party which the Respondent was organising and catering and for which the Claimant should have been responsible for overseeing on the day. That client had been spending a significant sum (around £15,000.00 to £16,000.00) with the Respondent for that event and I accept that the client had therefore been expecting the Claimant to attend and manage the event. She was also the licence holder for the event in question and therefore should have attended as planned. The Claimant did not turn up, however, and alternative arrangements had to be made by the Respondent to provide cover. Again, the Claimant's actions in that regard cannot help but have contributed to the reasonable conclusion drawn by Stephen Horbury that she had resigned from her employment.

59. However, it is common ground that on 5th September 2016 the Claimant telephoned Stephen Horbury to inform him that she was not in fact resigning and would be attending work at 9.00 a.m that day. She enquired whether Mr. Horbury had anything he wished her to give priority to in the office. It is not clear why the Claimant decided to wait until 5th September to take that step given that she was aware that, on 3rd September certainly, she had an event to attend to. I did not accept her evidence that she was told that she had been replaced as event manager prior to her failing to attend.

60. I accept the evidence of Mr. Horbury that the Claimant's call on 5th September this came as something of a surprise to him given that he understood the Claimant to have resigned and left the business. As I have already indicated, that was the natural understanding which flowed from the events of 2nd September and the Claimant's failure to attend the event on 3rd September. I considered Mr. Horbury's evidence in respect of these matters to be credible, not least as he gave a detailed account of the steps that he then took to get in touch with his external Human Resources Consultants, Stallard Kane, to seek advice on what he should do in the circumstances given that the Claimant had now appeared to have done something of an about turn insofar as her resignation was concerned.

61. I accept Mr. Horbury's evidence that the advice that he was given in that regard was that he should suspend the Claimant pending a disciplinary hearing given that at that time the position as Mr. Horbury saw it was that the Claimant had failed to follow his instructions in April 2016, leading to monies being paid to an incorrect account, and thereafter had absented herself from work and the meeting and event that she was due to deal with. I do not consider his actions in later taking the step of suspending the Claimant to have been unreasonable given that factual background.

62. The Claimant attended the Respondent's offices to meet with Stephen Horbury shortly after the commencement of business on 5th September 2016. At that stage, she was told by Mr. Horbury that she was being suspended pending a disciplinary hearing for potential gross misconduct. The Claimant was informed she would need to attend a disciplinary hearing at 3.00pm that day. That clearly, was manifestly inappropriate and gave the Claimant no time whatsoever to properly prepare. The Claimant, perfectly reasonably, therefore made representations that she could not go ahead with a disciplinary hearing that day.

63. Upon those representations being made by the Claimant to Mr. Horbury I accept his evidence that he acknowleged her position and readily agreed to change the date of the disciplinary hearing. He also lifted the Claimant's suspension and allowed her to return to work.

64. On the same date, Mr. Horbury wrote to the claimant inviting her to a reconvened disciplinary hearing on 6th September 2016 (see pages 89 and 90 of the hearing bundle). The relevant parts of the letter from the Respondent to the Claimant in this regard said this:

> *"We refer to your conduct on Friday 2 & Saturday 3th* (sic) *September and as a consequence thereof, I have taken the decision to invite you to attend a Disciplinary hearing.*
>
> *The specific reason for the meeting is it is alleged that you:*
>
> 1. ***Causing loss of money to the Company. (a)*** *Not implementing reasonable management instruction to email all clients (as per my instruction), informing all clients as to the change in bank accounts in May 2016. (b) It was also instructed that we receive confirmation back from the client that they had received this e mail.*
>
> 2. ***Time management (a)*** *Failure to implement emails to clients regarding change of bank and get confirmation of clients in respect of this, as per my instruction.* ***(b)*** *Failure to send out payment reminders to clients on Friday 26 Aug 2016, as per pre arranged agreement (SIC).* ***(c)*** *Tardiness in respect of arriving to work and taking breaks.*
>
> 3. ***Unauthorised absence (a)****Leaving work on Friday 2 September 2016 without authorization from immediate supervisor or director. Loss of 4 work hours.* ***(b)*** *Failure to attend a client meeting/viewing on Friday 2 September 2016 for potential booking.* ***(c)****Failure to attend and manage a clients outside event, without informing a director of the Company, or arrange adequate staffing cover for the event. This also caused loss of money to the company in respect of additional staffing.*
>
> *Witness statements to be supplied by SFH[1] if required.*
>
> *Such actions are to be regarded by the Company as Misconduct".*

65. Despite the earlier reference to gross misconduct by Mr. Horbury, it was made clear within the correspondence that he sent to the Claimant that the range of actions which could be imposed ranged from no further action being taken to the imposition of a final written warning. I am therefore, satisfied that by this stage, the Claimant was aware that she was not at risk of dismissal.

66. The letter also made it clear that if the allegations were found to be proven that the Respondent may look to recover any financial loss caused in accordance with the Claimant's contract of employment. That was a reference to the "Wastage" part of the Contract of Employment to which I have referred above,

[1] Those are the initials of Stephen Horbury and thus it is a reference to him.

which would have "entitled" the Respondent to have deducted a maximum of £1,000.00.

67. Again, the proposed date for the disciplinary hearing of 9.00 a.m. on 6th September 2016 still did not provide the Claimant with adequate time to prepare, but, as I shall come to, the disciplinary hearing was in fact again postponed on further occasions and did not take place until 14th September 2016. The Claimant's evidence before me was that by that time, she had had adequate time to prepare.

68. The Claimant wrote to Mr Horbury on 6th September 2016 dealing with her responses to each of the points set out in the disciplinary letter (see pages 80 to 82 inclusive of the hearing bundle). She indicated in her letter that she hoped that Mr. Horbury would find the explanations satisfactory and that they could draw a line and move on. I am satisfied that those matters were considered by Mr. Horbury as part of the disciplinary process.

69. The Claimant's letter did however, refer to her view that she had been "picked on" and that Mr. Horbury was trying to *"sack [me] constructively"*. She also asked for a copy of the Respondent's Grievance Procedure in the event that Mr. Horbury elected to continue with the disciplinary process. The Claimant was furnished with a copy of the Grievance Procedure and was invited to a grievance meeting as a result. That invitation arose as a result of advice received by Mr. Horbury from Stallard Kane. Upon receipt of the invitation, the Claimant expressed surprise that she had been invited to such a meeting.

70. However, given the content of her letter including references to having been "picked on" and the fact that she had made a request for a copy of the Grievance procedure, it is perhaps not entirely unusual that the Respondent had formed the view that the Claimant was raising a grievance and invited her to a meeting to discuss matters.

71. On 7th September 2016, the Claimant wrote to Mr. Horbury to confirm that she did not have any grievances in respect of either the Respondent or any members of staff. That followed on from a confirmation that she did not have any grievances against Stephen Horbury either (see page 86 of the hearing bundle). Accordingly, the grievance meeting was cancelled.

72. The disciplinary hearing which had been scheduled to take place on 6th September 2016 did not go ahead either as a result of the hiatus with the "grievance" situation being clarified. Mr. Horbury wrote to the Claimant on 7th September 2016 to seek to re-arrange the disciplinary hearing (see page 89 and 90 of the hearing bundle). This letter set out the same allegations as had been included in 5th September letter and invited the Claimant to a disciplinary hearing scheduled for 9th September 2016 at 2.00pm.

73. The Claimant contends that she did not receive that letter (sent by email) until early evening on 8th September 2016 and that despite the date on the letter it had been sent on a time later than the 7th September so as to rush and hurry the disciplinary process along. However, the Claimant's evidence in this regard conflicts with that of Stephen Horbury who contends that the letter was sent by e-mail on the date on which it was written, that is 7th September 2016.

74. I have not been furnished by the Claimant or Respondent with a copy of the e-mail in question which she says that she received late on 8th September. The Claimant was only able to tell me that the date and time that she ascribes to the receipt of the email came from her own notes. It may be the case that the Claimant did not pick up and read the e mail until the evening of 8th September, but I accept the evidence of Mr. Horbury that it was sent on 7th September and therefore that in his view the Claimant would have had adequate time by 2.00pm on 9th September to have prepared for the meeting. That was not least as she had been aware of the allegations against her, which had not changed, since 5th September 2016.

75. On the morning of 9th September 2016, however, the Claimant wrote to Mr. Horbury and indicated that she did not consider that she had had adequate time to prepare for the disciplinary hearing. As a result, the disciplinary hearing was again re-scheduled until 14th September 2016. As I have already observed, the Claimant's evidence in response to a question which I asked her at the hearing was that by the time that 14th September came around, she had had adequate time to prepare. Indeed, as set out above she had been notified of the allegations against her as early as 5th September 2016 and therefore had had a full nine days in order to prepare for the disciplinary hearing.

76. Therefore, there were no further postponements of the disciplinary hearing and the same went ahead as planned on 14th September 2016. The Claimant's case is that the disciplinary process was hurried and rushed by Mr. Horbury. However, that contention does not in fact bear close scrutiny. Whilst the short notice that the Claimant was afforded in relation so some of the scheduled hearings, and thus the adjournments that had to follow, were not perhaps a model of best practice when taken overall and considered in the round the disciplinary process itself was not so unreasonable as to prejudice or cause unfairness to the Claimant.

77. It is common ground that Stephen Horbury chaired the disciplinary hearing and thereafter issued the Claimant with the final written warning to which I shall come in due course. The Claimant contends that to have been inappropriate on the basis that Mr. Horbury had also conducted an investigation into the allegations against her and, in that regard, was something of judge, jury and executioner.

78. However, there was, in fact, no investigation stage undertaken by Mr. Horbury in relation to the allegations against the Claimant. In this regard, it is clear from his evidence that he did not do any investigation on the basis that he did not feel that to be necessary given the nature of the allegations against the Claimant. Particularly, there was no question over the fact that £3,000.00 was paid into the wrong bank account and that the Claimant had been responsible for informing clients about the change in banking arrangements. The Claimant provided her explanation for that matter to Mr. Horbury.

79. There was equally no question that the Claimant had walked out of work on 2nd September 2016 and had not returned to work either that day to attend her meetings or in relation to the event which she was to oversee the following day. The Claimant had also given an explanation to Mr. Horbury for that situation in her letter of 6th September 2016.

80. There was, therefore very little if any investigation that needed to be undertaken and the Claimant has not been able to point to anything that she contends should have been looked into which Mr. Horbury did not do. There was, therefore, no investigatory stage undertaken by Stephen Horbury which conflicted with his ability to hold a later disciplinary hearing.

81. Whilst the Claimant contends that another individual might have implemented a different disciplinary sanction, or no disciplinary sanction at all, for the reasons that I shall come to I do not consider a final written warning to have been one that was unfair or unreasonable in the circumstances. The Claimant does not show that there was any conflict between her and Mr. Horbury that might have been differently resolved by an alternative person hearing the disciplinary case against her and therefore I am satisfied that Mr. Horbury dealing with the disciplinary process against the Claimant did not cause her any unfairness or prejudice.

82. Moreover, this was never a matter which was raised by the Claimant with Mr Horbury (and her correspondence shows that she was not backwards at coming forwards in relation to pointing out matters with which she did not agree, including procedural matters for the disciplinary hearing) and therefore he was not on notice at the material time that the Claimant considered there to be anything amiss with regard to his dealing with the disciplinary process.

83. However, the real question in fact might be better termed as to whether it was appropriate for Mr. Horbury to deal with the disciplinary hearing given that he had been involved in giving the instruction to the Claimant about the bank account details and had been actively involved in the events of 2nd September 2016. He risked therefore potentially being both a witness as well as decision maker in the event of any material conflict between his position and that of the Claimant.

84. In view of that position, it would in my view have been more sensible for an alternative individual to have dealt with the disciplinary hearing (and there were other directors who could feasibly have done so) in order to take account of the problem that might arise if there was to be any conflict of evidence as between the Claimant and Mr. Horbury.

85. However, I accept that that was a matter of inexperience on the part of Mr. Horbury in that he did not identify that potential problem and also perhaps some element of misdirection on the part of Stallard Kane who recommended that course to Mr. Horbury. It cannot reasonably be said, however, given the matters to which I shall come to in terms of the final written warning imposed, that that decision prejudiced the Claimant's position in any way.

86. As I have already observed, the disciplinary hearing took place on 14th September 2016. The outcome of that hearing was that Mr. Horbury determined that he would impose upon the Claimant a final written warning which would remain live for a period of 12 months. Again, he took advice from Stallard Kane when taking that decision.

87. The Claimant was notified of the decision to impose a final written warning by letter dated 19th September 2016. There is no suggestion made that she did not receive that letter on that date, which was five calendar days and three working days after the disciplinary hearing had taken place.

88. Whilst I would observe that that was not an unusual or unreasonable timescale given the need for Mr. Horbury to consider his decision, seek advice and then prepare the outcome letter, the Claimant was nevertheless understandably anxious to receive an outcome to the disciplinary process. Particularly, she wanted confirmation as to whether or not she was going to be dismissed. The Claimant's evidence before me was that she had first raised the question of whether she was to be dismissed on 6th September 2016 and she is critical of Mr. Horbury's failure to provide a formal written response in order to, effectively, put her mind at rest until 16th September 2016.

89. However, I accept that irrespective of any delay in communication of confirmation that she was not going to be dismissed, the Claimant would already have been aware upon a proper reading of the disciplinary invitation to which I have already referred that dismissal was not an option being contemplated by the Respondent. The letter was clear in this regard that the sanctions that might be imposed ranged from no further action at all to the imposition of a final written warning. There was no mention of dismissal as a sanction and it is not unreasonable to assume that the Claimant would have read that letter and been clear on that.

90. However, in all events when the Claimant raised the matter again by email late in the afternoon on 15th September 2017, Mr. Horbury replied first thing the following day assuring her that she was not going to be dismissed and that she would receive the outcome letter the following Monday. He confirmed in the same email that the delay in confirming the outcome was due to the absence of his contact at Stallard Kane.

91. Mr. Horbury subsequently wrote to the Claimant on 19th September 2016 confirming his decision to impose a final written warning. He imposed the warning for a period of 12 months and in respect of each of the three allegations that had been levelled at the Claimant and which are set out above. Curiously, the outcome letter did not set out any findings that had been made on the allegations or rationale for imposing the warning (as opposed to any lesser sanction) within the main body of the letter but rather as what appears to be an addendum and by way of specific reply at the Claimant's request to issues raised in her correspondence of 6th September 2016. The letter is certainly far from a model of best practice in that regard. However, I am satisfied from the evidence of Mr. Horbury and from later portions of the letter (which I shall come to below) that he did take into account the representations of the Claimant made both in her correspondence and at the disciplinary hearing; made findings on those matters following which he considered the allegations proven and without sufficient explanation/mitigation; and that he considered a final written warning to be an appropriate sanction given the Claimant's actions.

92. The outcome letter made it clear that an improvement in the Claimant's conduct was required and set out a number of areas in which it was expected by the Respondent that such improvement was to be seen.

93. The Claimant was offered a right of appeal against the final written warning and, as I shall come to later, the Claimant duly exercised that right of appeal

94. As set out above, the outcome letter also addressed specifically a number of points arising from the Claimant's correspondence of 6th September 2016 and those sections perhaps more usefully record the reasons for the imposition of the final written warning than the earlier content of the letter does. The letter set out the following pertinent conclusions:

(a) That the Claimant had made representations that she had forgotten the time of the client meeting on 2nd September but that that was not accepted as she could have telephoned the office to check. Alternatively, her explanation had been that she had forgotten about the meeting completely because she had been "wound up";

(b) That the Claimant had made representations that she had not attended the event on 3rd September because she had been informed over the telephone by another member of staff that she had taken over the event. That was not accepted by Mr. Horbury on the basis that he was aware that the exchange had been to the effect that the staff member had indicated that she was going to oversee the food aspect of the event, not the event itself, and again the Claimant did not check that position with the office in the event of any uncertainty;

(c) That Mr. Horbury did not agree with the Claimant's account of the meeting of 2nd September 2016 and that she had "changed tack" in her account during the course of the disciplinary hearing; and

(d) That the Claimant's explanation for not notifying all clients in April 2016 about the impending change of bank details because she was not provided with that instruction by email was not accepted as she had previously actioned verbal instructions and had never asked for the instruction to be put in writing at the time.

95. The letter also dealt with what Mr. Horbury referred to as "Time Management" issues and the relevant section in this regard said this:

"I can confirm that you agree that you have been somewhat tardy with your time keeping over the years. You have apologized for this and specify that this will indeed stop (sic).

The meeting has also highlighted the fact that you have in fact not been working your contracted hours. Your contract states that you will work 30 hours a week, yet you have only been working 28. You have also apologized for this over sight (sic).

For the benefit of doubt and to clarify the hours that you have been working.

Monday:	*9am to 5pm, 1 hour for lunch*	*7 working hours*
Tuesday:	*Off*	*0 working hours*
Wednesday:	*9am to 5pm, 1 hour for lunch*	*7 working hours*
Thursday:	*9am to 4pm, no lunch*	*7 working hours*
Friday:	*9am to 5pm, 1 hour for lunch*	*7 working*
Total hours		***28 working hours.***

> *You are 2 hours a week short of your contracted hours and these, effective as of the first Monday after the date of this letter will have to be worked. We can discuss via, this week, how to introduce these into your working week.*
>
> *To conclude please don't feel it necessary to respond to this letter or any of its points unless you are appealing the decision of this final written warning, as none is needed.*
>
> *As far as the Company or I am concerned, this matter has now been but to rest* (sic).

96. Two further points of note arise from the final written warning outcome. The first of these, which is pertinent to events which came later, is that there was no reference at all to the Respondent "clawing back" or otherwise seeking to recover from the Claimant (via the "Wastage" provisions of the Contract of Employment or otherwise), the £3,000.00 in respect of which it had been said that the Claimant had caused the Respondent a loss. The possibility of recovery of any loss said to be attributable from any actions of the Claimant which were found to be proven had been raised as a possible outcome in the disciplinary invitation letters. However, the outcome letter made no reference at all to such matters and I am satisfied from the evidence of Mr. Horbury that this was on the basis that he did not intend to seek to recoup the £3,000.00 "loss" back from the Claimant at this or any other stage. No such suggestion was in fact ever made to the Claimant in this regard irrespective of her contention that this was Mr. Horbury's intention on the basis that he had told her to find a solution (or words to that effect) on 2nd September 2016.

97. The second point is in relation to what were referred to as "Time Management" issues and the narrative set out at the conclusion of the outcome letter. In this regard, Mr Horbury now accepts that he had made a mistake in relation to this issue and that the Claimant was not in fact two hours short on her weekly working hours as he had alleged in this portion of the letter.

98. There had clearly been some confusion in this regard but I accept that at the time of writing the letter Mr. Horbury genuinely believed (albeit that that belief was mistaken) that the Claimant had not been working her contractual hours. Indeed, as the letter records she had in fact apologised for that position during the disciplinary hearing and there was therefore some element of misunderstanding on both sides at that time. However, it is clear from the evidence before me that that particular issue was very much an addendum to the final written warning letter and it was not a reason for the imposition of the sanction in question.

99. The reason for imposing the warning related very much to the events of 2nd September 2016, 3rd September 2016 and the £3,000.00 banking instruction matter. Whilst the allegations against the Claimant had included an aspect relating to "tardiness and taking breaks" that was not, I accept, the same issue as identified with regard to the contractual hours matter. Indeed, the Claimant addressed the separate timekeeping issues in her response of 6th September 2016 and accepted that there were occasions where she did not *"always reach the office at the stipulated start of the working day"*. The Claimant apologised for that issue and confirmed that she would ensure that it did not occur again in the future.

100. The "two hours" issue did not, therefore, impact at all on the level of sanction that Mr. Horbury determined that he would impose as a result of the three allegations against the Claimant. His main concerns were and always had been the Claimant's actions on 2nd and 3rd September and her failure to carry out his instructions in April 2016. Anything other than that was very much a peripheral issue.

101. In fact, despite the indication that there was to be a discussion with regard to arranging for the two additional hours per week to be worked, I accept Mr. Horbury's evidence that nothing further was ever said about the matter again after the letter was sent. Accordingly, the Claimant was not directed to work any additional hours and matters carried on as they had previously with regard to her hours of work.

102. I further accept that after the warning was issued, the intention of Mr. Horbury was to draw a line under matters and resume a professional working relationship. Indeed, those were his sentiments in a covering email to the Claimant attaching the outcome letter (see page 98 of the hearing bundle).

103. The Claimant indicated her intention to appeal against Mr Horbury's decision to issue a final written warning. He accordingly asked her in quite reasonable terms for her grounds of appeal, as those were then to be forwarded to Stallard Kane who the Respondent had instructed to deal with the appeal. That was on the basis that Mr. Horbury as Managing Director had dealt with the disciplinary stage and there was no one more senior than him in the organisation to deal with the appeal. It was therefore determined that external arrangements would be made for the appeal to be heard.

104. A provisional date for the appeal hearing was set for 29th September 2016 (see page 107 of the hearing bundle). In preparation for the same, the Claimant submitted her grounds of appeal on 22nd September 2016 (see page 109 of the hearing bundle). Those focused largely on procedural issues but the main significant ground of appeal was that the Claimant effectively contended that the punishment did not fit the crime.

105. The appeal meeting did not, in fact, go ahead on 29th September 2016 as planned. In this regard, an issue had arisen over transcribing the notes of the disciplinary hearing which had been recorded by the Respondent. Mr. Horbury had asked the Claimant to attend to that but there were difficulties from her perspective in relation to the time allocated to deal with that task and the lack of transcription equipment.

106. Although the request to transcribe the notes is not a matter upon which the Claimant relies in the context of her constructive dismissal claim, it was an issue which caused a certain degree of consternation at the time and also a matter upon which Mr. Horbury was cross examined. Having reviewed the communications between the parties in relation to that issue, I do not consider the request which was made by Mr. Horbury or the way in which it was made to have been at all unreasonable.

107. I accept his evidence that transcription of that nature would have fallen to be part of the Claimant's Personal Assistant duties and that she had work time allocated to deal with the matter. There was no request or expectation that the

Claimant should be undertaking the transcription in her own time, although it was indicated by Mr. Horbury that if she preferred to do this at home then he would pay her overtime to do so (page 106 of the hearing bundle). That was a matter which was left for the Claimant to decide and the manner in which Mr. Horbury approached this issue with her was perfectly pleasant and reasonable. Her approach was perhaps not as constructive as it could have been to this issue and it doubtless did not assist that during the course of debate on the transcription topic she made reference to being able to undertake more lucrative work for a relative rather than receiving overtime to type up the notes.

108. Whilst the Claimant complained about a lack of professional transcription equipment being made available, I accept that Mr. Horbury did not have such equipment to provide to the Claimant and that he had understood her to have already had sufficient equipment by way of a Dictaphone and a laptop to allow her to proceed with his request. Having reviewed the correspondence on the issue it appears to me that Mr. Horbury asked the Claimant to deal with the matter in quite reasonable and pleasant terms.

109. Following the Claimant's objections to undertaking the transcription, however, it is perhaps fair to say that matters began to further deteriorate in respect of her relationship with Stephen Horbury to the extent that e-mail correspondence between them began to be written in terse and perhaps somewhat unhelpful terms and with elongated discussion regarding various frustrations that each had with the other. Those, again, were issues where there was clearly fault and responsibility on both sides and it was clearly not an issue which emanated only from the Respondent. Once again, the Claimant was giving as good as she got in the content and tone of those email communications and, in fact, it appears a reasonable assessment that the Claimant's correspondence was rather the more inflammatory of the two (see for example page 118 of the hearing bundle).

110. As indicated above, the appeal hearing in relation to the imposition of the final written warning did not proceed on 29th September as a result of the transcription issue and, indeed, I am satisfied that it never in fact proceeded at all. There was some confusion at the hearing before me on the Respondent's part as to whether this had been the case with Mr. Horbury indicating his understanding that the hearing had gone ahead at some unspecified point and an appeal outcome having been sent to the Claimant. The Claimant's position was that the appeal hearing did not go ahead.

111. I consider the Claimant's account to be the more accurate of the two in this regard as the Respondent has not been able to supply me with any date on which the appeal hearing was said to have gone ahead nor any letter confirming the outcome of the appeal. It seems to me more likely that the appeal hearing never went ahead as the matter was overtaken by events given that the Claimant tendered her resignation with immediate effect to the Respondent on 30th September 2016. Given that position, it might be said that there was little to be served by continuing with the appeal against the final written warning given that the Claimant was no longer in employment.

112. Prior to the Claimant's resignation, she contends that the Respondent had failed to pay her wages on time. She further contends that this was demonstrative of the fact that they never intended to pay her at all because Mr. Horbury wanted to recoup some of the £3,000 that he said that she had caused

by way of a loss to the Respondent Company and that he intended therefore to withhold her September wages to deal with that. This, it is said by the Claimant, left her with no alternative but to resign and that the non-payment of her wages was the last straw.

113. The Claimant resigned without notice on 30th September 2016. Her evidence was that she had expected to be paid on or around 25th September 2016 but that she did not receive her wages in that regard. The Claimant contends as above that this occurred because the Respondent had no intention of paying her and that this was her belief at the time given that she had checked shortly before her email resignation and noted that her wages had not been paid into her bank account.

114. There is a dispute between the Claimant and the Respondent as to the date for payment of wages. The Claimant contends that the date for payment of wages was 25th of each month as evidenced by her Contract of Employment at pages 141 and 142 of the hearing bundle. That is, quite clearly, what the Contract of Employment says.

115. However, it is the evidence of Mr. Horbury on behalf of the Respondent that an agreement had in fact been made between the Respondent and all members of staff to change the date for payment of wages and that this had changed some considerable time before the Claimant's resignation from 25th of each month to 1st of each month. Although Mr. Horbury told me that the Respondent would always try and pay earlier than 1st of the month (to ensure that staff were paid in preference to other creditors who were generally also paid on 1st of the month) that did not always take place and at the point that the Claimant resigned on 30th September, the date for payment of wages had not yet passed. His evidence was that all staff were in fact paid later than 1st October on that occasion and had the Claimant not resigned, she too would have been paid at the same time. There was, Mr. Horbury told me, no intention whatsoever to withhold the Claimant's pay on account of the loss of the £3,000.00 and, even if there had been, he could in only events have deducted £1,000.00 under the "Wastage" provisions of her Contract of Employment.

116. The Claimant's evidence was that, she did not recall such conversation having taken place with regard to an amendment for the date for payment of wages from 25th of each month to 1st of the month.

117. Ultimately, I preferred the evidence of Mr. Horbury on this point. That evidence is supported by contemporaneous documentation in the hearing bundle relating to discussions between the Claimant and Mr. Horbury after her resignation which clearly refers to an agreement having been made between them to change the date for payment of wages to the 1st of each month and which does not appear to have been challenged at the time. I found Mr. Horbury's account of the issue to be convincing and I was satisfied that there had been an agreement to amend the pay date as he told me. Indeed, that position was set out in correspondence between the parties following the Claimant's later resignation (see page 126 of the hearing bundle) and the evidence of Mr. Horbury at the hearing was entirely consistent with that position.

118. There is also support for that account and that the pay date did not remain 25th of every month within the Claimant's remittance slips to which I refer below. In this regard, having viewed those remittance slips during the course of the

hearing, what was clear was that not one processing date, nor one payment date, in any of the eight months prior to the Claimant's resignation which was on the 25th of the month.

119. In this regard, despite the Claimant's evidence that she had never been paid any later than 29th of the month (and hence when 30th September had come she had concluded that she was not going to be paid at all) that did not bear scrutiny when considering, at my request, copies of all earlier remittance slips and a schedule which the Claimant had completed for the purposes of these proceedings of when salary payments from the Respondent had gone into her bank account. That schedule had only been referred to by the Claimant during the course of the hearing but after her confirmation that she had never been paid later than 29th of the month. At the time that that reference was made, I asked for a copy and the remittance slips to be produced.

120. Upon sight of the same, it was clear that the remittance slips all had different processing dates, ranging from the 28th of the month, 29th of the month and the 31st of the month. Some payments were paid into the Claimant's bank account earlier than the processing date on the remittance slip and some were paid in later. This accorded with the Respondent's evidence that generally, and where possible, payments of salary would be made earlier than 1st of each month. None of the remittance slips had any processing date on 25th of the month.

121. It was also clear from her own schedule of pay received that on occasions salary payments went into the Claimant's account as late as 31st or 1st of the month and that therefore, her earlier evidence that she had never been paid past the 29th of the month was incorrect. Given that the Claimant had used those self same remittance slips and her bank records to complete a schedule of payments as part of her preparation for this hearing (although she had not disclosed that schedule until I requested it during her evidence) she must have known that it was not correct to say that she had never received a payment later than 29th of each month or, at the very least, that she could not be sure about that without checking the schedule itself. Nevertheless, her initial evidence had been clear that she had never received payment later than 29th of the month. I considered that to be a matter of convenience so as to fit with and support the case that she wished to advance given that her resignation on 30th September relied on the non-payment of wages by that date as being the "last straw" for the purposes of her constructive dismissal claim. I considered this to be an aspect of the Claimant's evidence which therefore lacked credibility and that her answer in this regard had been not only inaccurate but designed to support her contention that the Respondent had been withholding her wages for September 2016. In fact, I am entirely satisfied that that was not what had happened and that the Claimant's wages were never due on 25th September but that they had not been due to be paid, by agreement, until 1st October 2016.

122. The processing date set out on the Claimant's September 2016 remittance slip is clear. The processing date in this regard was 30th September 2016. That was a Friday. As I shall come to, the Claimant resigned at 7.57 a.m. on 30th September 2016 and there was no possibility that payment could have been processed and paid to her on 30th September before she resigned.

123. The evidence of Mr. Horbury, which I accept as being logical, was that payments could not be paid at the weekend. That was a matter of which the

Claimant, who had often dealt with payroll matters as part of her Personal Assistant duties, would have been aware. As it was, as a result of that salaries were paid for all members of staff around 2nd or 3rd September. Whilst the salaries were therefore paid later than agreed (i.e. 1st October 2016) this was not something in respect of which the Claimant was singled out as she claimed; there was no intention to withhold her wages to recover some of the £3,000.00 loss and the delay in payment was not an event that had actually occurred at the time that the Claimant resigned nor could it be something that she had actually anticipated at that juncture.

124. At the time of the Claimant's resignation, the Respondent was not therefore in breach of their obligations to pay salary on time given that the date for payment had not at that stage in fact passed.

125. As set out above, the Claimant resigned with immediate effect by way of an email to Stephen Horbury timed at 7.57a.m on 30th September 2016. The Claimant's brief resignation email said this.

> *"I am writing to inform you that I am resigning from my position within your company with immediate effect. Please accept this as my formal notice of resignation and the termination of our contract. I strongly feel that I am left with no other choice but to resign, all in light of my recent and ongoing unfair unreasonable experiences culminating in a fundamental breach of contract, and a breach of trust and confidence on your part."*

126. Mr. Horbury responded to the Claimant's e mail just over three hours after it was sent. The Claimant is critical that Mr. Horbury did not respond more promptly and that he did not telephone her to try and change her mind about resigning and to assure her that her wages were on their way.

127. I do not share that criticism. I accept that Mr. Horbury doubtless had other matters to attend to at work that day and, further, it appears from his reply to the Claimant that he did not receive her email until 11.03 a.m (see page 181 of the hearing bundle). In my view, there can be no reasonable criticism of the time which it took him to acknowledge the Claimant's resignation. Moreover, this was of course the fourth time that the Claimant had resigned from employment and there was no reason for Mr. Horbury not to accept her decision. It might also be said that Mr. Horbury had done enough previously to try and persuade the Claimant to stay. I therefore do not see that any reasonable criticism can be levelled at Mr. Horbury for not telephoning the Claimant to try and persuade her to change her mind. In all events, any failure to do so cannot possibly be a matter upon which the Claimant relies on in the context of the constructive dismissal claim given that her resignation had already predated any response from Mr. Horbury.

128. Mr. Horbury's response to the Claimant did in fact make it clear that the Respondent was not happy about the Claimant's decision to resign and he invited her to a grievance meeting to discuss the same. That was a matter which was again to be dealt with by Stallard Kane on the Respondent's behalf. In later correspondence, he also asked for confirmation if the Claimant was actually resigning (see page 121 of the hearing bundle) and so if it had been the case that the Claimant again wanted to change her mind, she was given that potential opportunity to do so by Mr. Horbury.

129. The Claimant attended the grievance meeting on 12th October 2016 and received a detailed outcome from Stallard Kane rejecting her grievances by way of a letter dated 26th October 2016 (see pages 128 to 131 of the hearing bundle). I do not need not set out the content of that letter here given that it is not relevant to the matters relied upon or the reasons for the Claimant's resignation.

130. It is common ground, however, that following the termination of the Claimant's employment, the Respondent did not pay to her the final instalment of salary to which she was entitled. This is the salary payment that should have been paid on 1st October 2016 and which was received by all other members of staff on either 2nd or 3rd October 2016. The Claimant contends that that supports her contention that the Respondent never intended to pay her that September 2016 salary at all.

131. The position of the Respondent is to the contrary and that in fact the wages were withheld because the Claimant did not give any notice of her intention to terminate her employment. Mr. Horbury took advice and considered her to have breached her contract in this regard. His evidence therefore was that he had withheld the Claimant's wages on account of her having not given the Respondent her required notice and that he had relied upon the relevant termination provisions in the Contract of Employment as justification to withhold the same. As set out above, the relevant termination provisions in this regard said this:

> ***Termination without giving notice****: If you terminate your employment without giving notice as stated above, the Company reserves the right to recover that amount from any accrued wages and/or holiday pay or by other means it sees fit."*

132. I accept the evidence of Mr. Horbury that this was the clause that he was relying on in withholding the September 2016 salary payment and that there is nothing to support the Claimant's contention that the intention of the Respondent all along was to withhold those wages under the Wastage provisions of her Contract of Employment on account of the "loss" of the £3,000.00. I have accepted Mr. Horbury's evidence in that regard and have also taken into account the following when making that finding:

> (i) The disciplinary outcome letter made no mention of using the Wastage provisions to make a deduction from the Claimant's wages. That is in contrast to the disciplinary hearing invitation letter where that issue was considered. If Mr. Horbury had determined as part of the disciplinary case against the Claimant to make a deduction from her wages then I find it more likely than not that he would have notified her of that position in the otherwise lengthy outcome letter;
>
> (ii) As Mr. Horbury points out in his evidence, if it was the case that he had been invoking the Wastage provision of the Contract of Employment then he was aware that that would have only permitted a deduction of up to £1,000.00. The Claimant's wages for September 2016 were £1,243.00 net. Therefore, if it was that clause of the Contract of Employment that he was relying on then the Claimant would have received the balance of £243.00 in respect of her September 2016 salary;

(iii) As set out above, the salary payment had not been withheld and was not late at the point of the Claimant's resignation and it cannot therefore be said that the decision not to pay her had already been made before she resigned without notice;

(iv) The contemporaneous documentation contained within the hearing bundle (see page 126 and 130 of the same) supports the Respondent's position that it was the "Termination without giving notice" clause of the Contract of Employment and not the "Wastage" provisions upon which the Respondent was relying in withholding the Claimant's final salary payment.

133. I have considered whether the fact that the Respondent has now conceded that there was an unauthorised deduction from the Claimant's wages alters my view on matters but ultimately I am satisfied that it does not. There was a clause which, on the face of it, entitled the Respondent to make the deduction on account of notice not having been given and I am satisfied that it was that clause upon which Mr. Horbury was relying at the time. The fact that he has now been given contrary advice by different advisers to Stallard Kane as to the legitimacy of the deduction does not alter that position.

134. I am therefore satisfied that had the Claimant not resigned she would have been paid her wages along with everyone else in the payroll run on 2nd/3rd October 2016.

CONCLUSIONS

135. Insofar as I have not already done so, I set out my conclusions in respect of the remaining complaints before me.

136. I begin with the complaint of constructive unfair dismissal and remind myself that the onus is upon the Claimant to establish the necessary elements of this complaint. As set out above, the Claimant relies upon the following incidents in support of her constructive dismissal complaint.

(a) That the Respondent had accused her of causing a loss of £3,000.00 which had been paid into an incorrect bank account and which led to an unfair final written warning being imposed;
(b) That the Respondent had made unfair accusations against her that she had been two hours short on her contractual working time;
(c) That the disciplinary process which had led to her final written warning had been unfair in that:
    (i) The investigation stages and disciplinary hearing had been dealt with by the same person (namely Stephen Horbury); and
    (ii) That the disciplinary hearing had been conducted in a rushed and hurried fashion by Stephen Horbury.
(d) That she had not been paid her wages in September 2016.

137. I shall deal with each of those matters in turn. I am entirely satisfied from the evidence before me that the Claimant did not deal properly and in a timely fashion with the instruction given to her in April 2016 by Mr. Horbury to advise all clients that there had been a change of banking institution. That delay in carrying out the instruction from Mr. Horbury had the direct result that a client paid £3,000.00 into the wrong account and those monies were thereafter unable to be

accessed by the Respondent as they were withheld by the HSBC bank as part of an ongoing dispute. Given that that situation had resulted from the Claimant's failure to carry out the instruction given to her by Mr. Horbury, it cannot be said that it was unfair or unreasonable for him to have commenced disciplinary action. That is particularly the case given the fact that the Claimant had also walked out on 2nd September 2016 and had neglected her duties for the remainder of that day and also at the event scheduled for 3rd September. During those periods, she was absent without authorisation.

138. In view of the events of 2nd and 3rd September 2016, I am also satisfied that it cannot be said that the imposition of a final written warning was inappropriate in the circumstances given the facts as I have found them to be and as they were in the mind of Mr. Horbury. In this regard, the Claimant had been given an instruction by Mr. Horbury on behalf of the Respondent and she had failed to carry it out. The net result of that had been the loss (at least in immediate terms) of a not insignificant sum of money. To compound that position, the Claimant had then absented herself from work (in circumstances where she claimed that she had not resigned) on 2nd and 3rd September 2016. She had missed a client meeting on the afternoon of 2nd September without reasonable excuse and she had similarly not attended an important event on 3rd September which she was to oversee and manage. As Mr. Horbury had pointed out in his letter of 19th September, if there had been any doubt about whether she was to work those events if she had genuinely not resigned, then a simple telephone call to the Respondent would have rectified that. She did not take that action and effectively simply absented herself from work and from her duties without authorisation. It cannot in my view be said that the imposition of a final written warning in those circumstances was inappropriate or unfair.

139. I turn then to the issue with regard to the "two hours short" on working time. It is accepted by Mr. Horbury that he was wrong about this issue. I accept, however, that he genuinely believed that he was correct about the position at the time that he wrote his letter of 19th September 2016 and, indeed, the Claimant had also accepted the position and apologised at the disciplinary hearing when the matter was discussed. It is perhaps fair to say that he should have been more thorough about the matter but in all events the issue was nothing more than an addendum to the disciplinary outcome. It did not form part of the reasons for issuing the final written warning and nor was any other action take in respect of that misunderstanding. The matter was not spoken about again after 19th September. The Claimant was not asked to make up the time and nothing was deducted from her salary in respect of the matter. Therefore, whilst Mr. Horbury should have been more thorough, I am satisfied that this was not a matter which caused any prejudice or angst to the Claimant. It certainly was not sufficient to breach trust and confidence.

140. The next matter relied upon by the Claimant is the disciplinary process that led to the imposition of the final written warning. The Claimant contends that that process was unfair in that firstly the investigatory and disciplinary stages had both been dealt with by Mr. Horbury. In fact, that is factually inaccurate on the basis that there was no investigation undertaken. The allegations against the Claimant were simply put to her and she was invited to a disciplinary hearing to consider them. The Claimant had the opportunity to respond to those allegations, both in writing and at the disciplinary hearing, and I am satisfied that Mr. Horbury took her representations into account. The Claimant has not been

able to suggest any element of investigation which she contends would have been necessary before progressing matters to a disciplinary stage.

141. The being said, as I have already observed, it was not a sensible decision for Mr. Horbury to have dealt with the disciplinary hearing. There were other people available to deal with that, including potentially external advisers who were instructed to deal with the Claimant's appeal and grievance. Given that Mr. Horbury was essentially a witness to some events – for example the instruction of April 2016 – and therefore that his position had the capacity to conflict with the Claimant's, it was not a sensible idea at all for him to have dealt with the matter.

142. Whilst this specific issue was not a matter relied upon by the Claimant as part of her constructive dismissal claim, I have considered the question as to whether that resulted in a breach of the Claimant's contract of employment if it had formed a part of the complaint. It has not been suggested that this issue would have been a breach of an express term but rather it must go to the question of whether there was a breach of the implied term of mutual trust and confidence. I am satisfied ultimately, however, that there was no breach of that implied term and in reaching that conclusion I take the following matters into account:

(i) The Claimant at no stage requested that anyone else deal with the disciplinary hearing. Mr. Horbury was not therefore on notice that there was any issue with him chairing the hearing or making a decision as far as the Claimant was concerned. The Claimant had of course vocalised other areas of the process with which she was dissatisfied and it is reasonable to assume that she would also have voiced any concerns in this regard;
(ii) There is nothing to show that anyone else dealing with the disciplinary hearing would have reached a conclusion more favourable to the Claimant on the evidence that was to hand;
(iii) Having regard to the circumstances of the matter, it was not unreasonable to impose a final written warning in all events;
(iv) The Claimant was offered the opportunity to appeal against the final written warning to someone other than Mr. Horbury and so could have that decision looked at afresh. That appeal did not proceed only on account of the Claimant's resignation.

143. The second part of the disciplinary proceedings which the Claimant relies upon in the context of the constructive unfair dismissal complaint is the fact that it is contended that Mr. Horbury conducted the same in a rushed and hurried fashion. As I have already observed above, this is certainly true with regard to the timescale that Mr. Horbury initially set for the disciplinary hearing to take place when the Claimant was given insufficient notice of the same. However, I am satisfied that ultimately this caused no unfairness given that upon the Claimant raising her concerns as to the timing of meetings and the need for further time to prepare, Mr. Horbury postponed the disciplinary hearings that had been scheduled. In the final analysis, the disciplinary hearing did not take place until 14th September 2016.

144. By that stage, the Claimant had been aware of the allegations which were to be discussed for nine calendar days and her evidence at the hearing before me was that she had had sufficient time to therefore prepare. Although the early stages of the process were therefore not a model of best practice and there was

an element of the Respondent having somewhat rushed the process, those matters were all rectified when the Claimant raised her objections and by the time that the disciplinary hearing came round she had had more than sufficient time to prepare. I am therefore satisfied that the early scheduling of the disciplinary hearing was not a matter that caused unfairness to the Claimant nor can it reasonably be said to have breached the implied term of mutual trust and confidence.

145. This finally leaves then the question of non-payment of wages on 30th September 2016. As I have already found above, I am not satisfied that there was ever any intention to withhold the Claimant's September 2016 salary prior to her resignation on account of the "Wastage" provisions of her Contract of Employment. Moreover, at the date and time that the Claimant resigned, her wages were not in fact due for payment. The date for payment would have been 1st October 2016 as a result of the previous agreement to amend the pay date.

146. Whilst salary payments for all staff did in fact not meet the 1st October date, that was on account of that date falling on a weekend when payroll could not be run. However, the Claimant did not resign in response to an "anticipatory" breach that her wages would be received late but rather on her incorrect assumption that they were either late as at 30th September 2016 or were not going to be paid at all. Neither of those assumptions was in fact correct and at the point of the Claimant's resignation, the Respondent was not in breach with regard to any late payment of wages or non-payment at all.

147. I am therefore satisfied for the reasons that I have given above that neither singularly nor cumulatively did the matters relied upon by the Claimant breach either any express contractual term or the implied term of mutual trust and confidence. Moreover, to the extent that the Claimant relies upon the late payment of wages on 30th September as being the "last straw" which prompted her resignation, as I have found above the wages had not fallen due for payment before the point that the Claimant resigned and there was therefore no wrongdoing by the Respondent as at that date.

148. It therefore follows that the Claimant's claim of constructive unfair dismissal must fail and be dismissed. Given that the complaint of a breach of contract with regard to notice pay stands and falls with the constructive unfair dismissal claim, it follows that the complaint also fails and is dismissed.

149. The only remaining complaint is one of unpaid holiday pay. The Respondent contends that no additional holiday pay that has not already been paid is due. The burden in establishing that such further sums are due falls upon the Claimant. Her evidence at the hearing, however, was that she did not know how she had formed the view as set out in her Schedule of Loss (see page 34 of the hearing bundle) that she was entitled to payment of a further seven days outstanding annual leave. There was nothing at all about that in her otherwise detailed witness statement and she was not able to explain to me at the hearing how it was that she had calculated that unpaid holiday pay was due to her. All that she was able to say in this regard was that she could well be mistaken that she was entitled to either that additional seven days or indeed anything at all.

150. Therefore, she could not in her evidence give me any indication as to how she had arrived at a conclusion that she was entitled to any other sum other than that which she had already been paid to her by the Respondent. Accordingly, on

that basis and bearing in mind that the burden of proof rests with her, I have not been able to make any finding of fact that the Claimant was entitled to any further payment from the Respondent in respect of unpaid holiday pay and that aspect of her claim is also dismissed.

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Employment Judge Heap

Date: 12th July 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 15/7/17

.....

S.Cresswell

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FOR EMPLOYMENT TRIBUNALS