EMPLOYMENT TRIBUNALS

Claimant: **Nick Mackenzie**

Respondent: **Joyners Plants Limited**

Heard at: **Exeter Employment Tribunal by Video Hearing System** **On: Monday, 13th and Tuesday 14th March 2023**

Before: **Employment Judge M. Salter**

Representation:
Claimant: In person
Respondent: Mr. T. Joyner, Director.

JUDGMENT

It is the judgment of the tribunal that:

1. The Claimant's claim of:

   (a) constructive unfair dismissal;
   (b) an unlawful deduction from wages so far as it related to a deduction of 13.5 hours pay for time the claimant said he worked; and
   (c) an unlawful deduction from wages so far as it related to a deduction of £357.00 for training fees incurred by the Respondent.

   are not well founded and are dismissed.

2. Contrary to Section 13 of the Employment Rights Act 1996 the respondent has made unlawful deductions from the wages of the claimant in the sum of £140.00 reflecting accrued but unpaid holiday. The respondent is ordered to pay to the claimant this amount.

3. For the avoidance of doubt, that figure is to be paid without deduction and is taxable in the hands of the Claimant.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: https://www.gov.uk/employment-tribunal-decisions. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to permanently remove judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

2. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 6; the findings of fact made in relation to those issues are at paragraphs 22-53; a concise identification of relevant law is at paragraphs 54-65; and how that law has been applied to those findings in order to decide the issues is at paragraphs 68-96.

BACKGROUND

<u>The Claimant's case as formulated in his ET1.</u>

3. The Claimant's complaint, as formulated in his Form ET1, presented to the tribunal on 22nd My 2022, is in short, he was constructively unfairly dismissed and was owed various payments.

The Respondent's Response

4. In its Form ET3, received by the tribunal 15th July 2023, the Respondent accepted the Claimant was an employee but denied he was dismissed, they also challenged his entitlements to various payment claimed.

Relevant Procedural History

5. The matter was made subject of automatic directions, and was supposed to have a hearing in November 2022. However owing to various reasons that hearing did not take place and Employment Judge Lang conducted a case management hearing in which they helpfully identified the issues in the claim and made case management orders.

List Of Issues

6. So far as is relevant, in light of my findings and judgment, Employment Judge Lang identified the issues as:

Constructive unfair dismissal

(a) The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breach(es) alleged are as follows;
   (i) Failing to hold his position open for the 3 months agreed in December 2021 should he decide to return from his position in Yeovil. That position starting in January 2022.
   (ii) On his return from Yeovil the Claimant asserts he was demoted from a Senior Manager to Retail Assistant.
   (iii) That because of his demotion he was being asked to complete tasks which he alleges breached health and safety (it is recorded that no claim is brought for detriment having made a protected disclosure).
   (iv) The manner in which the meeting on 19th April 2022 was undertaken and handled, and the unsatisfactory conclusion (or absence of a conclusion) of that meeting which considered the allegations from 16th April 2022.

   (The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

(b) The Respondent denies any breach of contract, it denies that the Claimant was instructed to act in a manner which would breach health and safety and denies that the Claimant was demoted. It asserts that the Claimant returned to the role which he was doing before he moved to Yeovil. The Respondent accepts that the meeting on 19th April 2022 was an investigatory meeting but was not a disciplinary meeting.

(c) The Tribunal will need to decide:

(i) Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent as alleged by the Claimant; and
(ii) If so, whether it had reasonable and proper cause for doing so.

(d) Did the Claimant resign because of any breach? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

(e) Did the Claimant delay before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

(f) In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

Holiday Pay (Working Time Regulations 1998)

(g) Did the Respondent fail to pay the Claimant the full amount for annual leave the Claimant had accrued but not taken when their employment ended?
(i) The Claimant accepts at the end of his employment he has been paid for the correct number of days, however, states that the calculation is incorrect as it does not take account the regular overtime he worked. He avers that he should have therefore been paid of 8 hours a day (having rounded down from 8.333) for holiday pay, not 7 hours per day. Giving rise to a claim for £140.00.
(ii) The Respondent asserts that holiday pay has been paid in accordance with the contract of employment which provides for payment of 7 hours per day.

Unauthorised deductions (Part II of the Employment Rights Act 1996)

(h) Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted?

Failure to pay 13.5 hours owed.
(i) The Claimant asserts that he was underpaid for a total of 13.5 hours in May and June 9 (8.75 hours in May and 4.75 hours in June) giving a total of £189.00 which was underpaid. He has calculated this on the basis of his work diary.

(ii) The Respondent is unclear at how the Claimant has calculated these sums however, states that the sums paid were correct and in full. They have calculated the sums owed using their clocking in system.

Deduction of £357.00

(iii) The Respondent has deducted the sum of £357.00 from the Claimant's wages for the cost of a course, asserting an agreement was signed authorising such a deduction.

(iv) The Claimant challenges that the Respondent was authorised to deduct such sums from his wages. He denies signing a document to authorise the sum of £357 from his wages.

THE FINAL HEARING

<u>General</u>

Final Hearing

7. The matter came before me for Final hearing. The Claimant represented himself, and the Respondent was represented by Mr Joyner, its owner.

8. This was a remote hearing which was not objected to by the parties, being conducted entirely by the Video Hearing System ("VHS") video platform. A face-to-face hearing was not held because it was not practicable, and no-one requested the same it was conducted using the VHS under rule 46.

9. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no significant difficulties.

10. The participants were told that it was an offence to record the proceedings.

Preparation for the Hearing and the Late Start

11. Unfortunately it was not a well-prepared matter. The bundle I had did not appear to contain some the relevant documents that both parties had seen as they referred to it in their statements. Some pages were unpaginated and was spread over some 50 or so attachments to an email.

12. Until 1130, the Respondent as adamant it had sent the tribunal the correct documents but at 1141 accepted it had was not a correct bundle and so arranged for this to be provided.

13. The claimant objected to the bundle on the basis that, although he had seen pages 94-125, indeed he had authored many of them, they had only been provided to him in an electronic format late in the week preceding the hearing, and he had not had the opportunity to print these out, and so did not have them in hard copy and it was his "right to have them in a file" as that is what the Order provided for. I was unimpressed by this submission,

but the Claimant therefore proposed he drive to the Respondent's to collect the missing 30 -odd pages. As a result the hearing did not commence until 14:30 on Monday, 13th March 2023.

Litigants in person

14. As both parties were representing themselves, I took time to explain to them:

    (a) the purpose and approach to cross examination;
    (b) that whilst I would do my best to ensure they was on an equal footing with the other side, and whilst I am able to ask questions of the witnesses in the case, I am not able to conduct cross examination of those witnesses on behalf of them; I also explained that part of cross examination was to "put the case" to the witness, and what this entailed.
    (c) the requirement to put their case to every witness, or I will consider they accept the point left unchallenged;
    (d) that they would get an opportunity at the end of the hearing to make submissions, if they wanted to, to tell me why they should win.

DOCUMENTS AND EVIDENCE

General

15. In advance of the hearing I had taken some time to privately read into the witness statements exchanged between the parties and relevant documents, as far as I was able to

Witness Evidence

16. All witnesses gave evidence by way of written witness statements that were read by the me in advance of them giving oral evidence.

17. I heard evidence from the Claimant and from the following witnesses on behalf of the Respondent:

    (a) Jamie Windsor
    (b) Nathan Bulley
    (c) Marie Rouse
    (d) Tony Joyner

18. Evidence was heard from all witnesses via video link. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence. When each witness came to give their evidence, they did so by confirming the contents of their statements and then, following any brief supplementary questions, be open to be cross-examined on them. All witnesses were cross-examined.

Bundle

19. To assist me in determining the matter I have before me today an agreed bundle consisting of some 124 numbered pages spread over 56 separate files attached to an email. My attention was taken to a number of these documents as part of me hearing submissions and as discussed with the parties at the outset of the hearing, before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

SUBMISSIONS

Claimant

20. The Claimant made oral submissions which I have considered with care but do not rehearse here in full. In essence, in the course of the hearing, it was submitted that: the Claimant had been demoted upon his return to the Newton Abbott from the Yeovil centre and that he now had to take instruction from someone who had been more junior than him. He then was called into a disciplinary hearing which was unsatisfactory, and he resigned after that hearing. Upon his resignation his final salary was short a sum of money that he had not approved the education of.

Respondent

21. The Respondent made submissions that were, in summary:

    (a) They denied any conduct was calculated to damage or destroy the relationship between the parties.
    (b) They accepted the claimant resigned in response to the alleged breaches of contract (albeit they say that there was no breach)
    (c) They pay holiday pay on the flat rate of seven hours, as set out in their contract of employment, and this is what the Claimant had received.

MATERIAL FACTS

General Points

22. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by The Claimant, Mr Windsor, MR Bulley, Ms Rouse and Mr Joyner in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the

rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.

23. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principal findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

The Respondent

24. Is a chain of garden centres across the southwest. For my purposes the only two relevant venues are Yeovil and Newton Abbot.

25. The Claimant was employed from 2nd April 2019 until 20th April 2022 in different roles.

Hours of Work

26. When they attend work employees of the Respondent are required to log their attendance on a computerised system that records their attendance and the time. Employees are required to log out when they leave work. The Respondent therefore has a record of their attendance at work and a record of how long they remained there. In his cross examination of the Respondents witnesses the Claimant contended that the record of his hours had been tampered with, and that his hours had been altered, thus reducing the Respondent's obligation to pay his wages. Beyond this allegation I have no evidence of any alteration, and the Respondents witnesses denied this had been carried out. Based on the material I have before me the Claimant has not satisfied me that there have been any adjustments carried out to the Claimant's hours by the Respondent.

Training Fees

27. In 2021 the Claimant undertook a training course on NPTC PA1 and PA6 Training and Assessment for Chemical Spraying Certificate [54]. This course was paid for by the Respondent and, the Claimant signed an agreement for the repayment that contained the following terms:

> "*the total cost of this course (including associated admin fees & Wage costs) is £617.00.*
> *…*
> *If you decide to resign or your contract is terminated within 24 months of the completion of the course, the full amount of the course and associated fees (as stated above) will be deducted from your final pay slip".*

28. Both parties agree that the cost of the course was £357.00.

The Claimant's Role

29. So far as is relevant until December 2021, the Claimant was employed in Newton Abbot as trainee manager and was an assistant so the Respondent's Operations Manager Mark Williams. However he transferred to Yeovil to take up a role of a Dispatch Supervisor in December 2021. When he transferred it was agreed between the Claimant and Respondent that if the role in Yeovil did not work out the claimant could transfer back into his old role in Newton Abbot.

30. The claimant's role as Mr William's assistant was never filled when the Claimant was in Yeovil.

31. Whilst both parties agreed that the Claimant did transfer back into Newton Abbot, in March 2021, the Respondent says he transferred back into his old role of trainee manager, the Claimant said it did not and that he was a sales assistant.

32. All relevant witnesses told me that the Claimant's role remained the same.

33. It is an agreed that:

    (a) The Claimant was included in WhatsApp Groups with other managers,
    (b) his pay was the same as before his move.

34. The organigram I was shown has the claimant's direct reporting line being to Mr Bulley, Mr Williams and Matt Pollard the Retail and Nursey Operations Managers [117].

35. There is no evidence of any complaint by the Claimant from his return until after the incident on the 16th April that he was in a subordinate position to the one he left in December 2021.

36. On the basis of this evidence I conclude the Claimant retuned to the same role as he left when he went to Yeovil.

The 16th April 2022

37. On the 16th April 2022 an incident occurred. On that day the Newton Abbot store was opened at 7am by Mr Windsor. The Claimant was due to attend at 7am to spray the plants before customers attended.

38. However on this day he had arranged at short notice to arrive at 0800. IN fact he actually arrived at 0830. At various points the claimant accepts it was 0820, and his work log shows it was in fact 0830; whilst the Respondent says it was around 0830. I find the claimant arrived at 0830, 30mintues later than his agreed start time. This late arrival caused problems as the claimant was required to undertake spraying of the plants, and indeed was the only person qualified to do so at this store. Spraying cannot be undertaken when customers are present, and by 0830 customers were present. Spraying could not therefore be undertaken.

39. I heard a dispute of evidence that the Claimant claims he was instructed to spray despite members of the public being present; whereas the Respondent contends the Claimant wished to spray at 0830 but was told he could not as members of the public were present. On balance I prefer the evidence of Mr Windsor on this exchange: he struck me as a clear and credible witness and, whilst he is still employed by the Respondent, I did not consider that on the basis of what I heard I could conclude he was in anyway giving untrue or incorrect evidence. Against this I have the claimant whom I found generally unconvincing as a witness, who was in a belligerent mood on the 16th April 2022 (see below), and whom in this regard is inconsistent as to the time he himself says attended his workplace. Doing as best I can in this situation, I consider Mr Windsor is the more credible witness and so the claimant has not satisfied me he was instructed to act in breach of health and safety.

40. Being as he was late; the Claimant was told that he would be marked as late for work. This seems to have upset the Claimant as it then appears to be an undisputed fact, indeed it was not challenged before me or in any contemporaneous document, that the claimant then spent a considerable part of the day on the telephone to other members of staff or his friends, despite Mr Windsor asking him not to do so. Calls to his work colleagues often involved no-work matters, and Mr Bulley tells me he received a call from the Claimant which was confrontational in its tone. I have heard the claimant's behaviour on site was also disruptive and unacceptable.

41. Despite requests to stop making calls unrelated to work the Claimant continued and so Mr Bulley had to attend the Newton Abbot store.

42. When he attended the store Mr Bulley received numerous complaints about the claimant's behaviour and when he tried to speak to the claimant found the claimant to be wound up and confrontational and he felt that it was, as he put it, "difficult for him to get a word in."

43. Mr Bulley therefore called Mr Joyner, the Respondent's owner, and in a call between Mr. Joyner and the Claimant, Mr Joyner told the claimant to go home for the day as a result of his behaviour. The Claimant remained on site for a further 30-45 minutes insisting he have a break before he leaves, and continuing with his behaviour.

44. On the 17th April the Claimant was written to by Mr Joyner and the email states that the Respondent had been alerted to several instances of disruptive behaviour and that this led to him being asked to leave the premises. The claimant was written to and reminded that his next working day was the 19th April when there would be a meeting about the incident on the 16th April. [84].

45. The Claimant did not seek clarification as to what the allegations of disruptive behaviour were at any point. I consider this telling that he was well aware of his conduct and behaviour on that day.

<u>The 19th April Meeting</u>

46. On the 19th April the Claimant attended work and the meeting into the incident of the 16th April 2022 was held. Unfortunately there are no proper

minutes of this meeting, the notes (such as they are) are said to have been incorporated into the email on [87].

47. On all accounts this was a less than ideal meeting. The Claimant contends Mr Joyner admitted to being “out of control” and at one point left the meeting and invited the claimant to finish the meeting “in the car park”. There was no contemporaneous record of this comment by either party and that the claimant’s account in his email of 19th April is that Mr Joyner said for the Claimant to “come with me” and not the invitation with the threat the claimant presented to me . Both Mr Joyner and Mr Bulley, who was present in the room, deny it was made.

48. Mr Joyner accepts he had to call an end to the meeting, but this was, he says, because of the claimant’s behaviour in the meeting. In this meeting I am told that the Claimant denied that anything important had occurred on the 16th and the claimant did not discuss it, despite the efforts of Mr. Joyner. I have heard that in the past when the Claimant was in dispute with other employers he would simply try and patch up the issue informally and move on with the relationship. I conclude this was the claimant’s desired outcome to the meeting of the 19th April, and accounts for the Claimants failure at any juncture to dispute the allegations about his behaviour.

49. After the meeting there was some further correspondence between, the parties concerning the claimant’s upcoming work shifts and the use of his personal mobile phone whilst at work.

50. At 1315 on 19th April 2022 the Respondent also indicated it would respond to the Claimants email of 1040 on 19th April 2022.

51. However, it never got a chance however as at 1320 on the 20th April, after taking legal advice, the Claimant resigned, so far as is relevant the Claimants resignation letter states:

> I exercised the right the company said I had to return to my old retail position. That being a retail ops manager.
> …
> Upon my arrival at Newton Abbot on Monday March 21st I found this wasn't the case. I had to report directly to Jamie Windsor and Max Hornabrook, store manager and supervisor. This was a demotion to sales assistant.

On Saturday April 16th I came into Newton Abbot store around 820am. Paul informed me that Jamie Windsor had activated the sprinklers and he could not spray the climbers. Paul had informed Jamie this was the date he would need to spray. Jamie himself reported the honeysuckles have aphids and mildew. I had to point out to Jamie that the honeysuckles are dying and some are dead. Jamie became extremely agitated by this. It's unfair on both of us to be put in this position where the actions of the company has caused chaos.

On Saturday April 16th I was asked to leave the premises at 1245pm by Tony Joyner. This despite it being busy and me having a good day on customer service.

A disciplinary investigation meeting was convened for Tuesday April 19th. At this meeting the chair Tony Joyner was extremely irate and conducted the meeting with a raised voice. The meeting was terminated early after he admitted being 'out of control. Despite this being an investigatory meeting only a decision to ban me using a mobile phone on the shop was taken. This is a vital piece of equipment taken away and inhibits my ability to do my job further.

52. There is no challenge or question regarding the allegations made by the Respondent about the Claimant's behaviour on the 16th April 2022 that led to him being asked to leave the workplace on that day. Again I consider this telling, especially after receiving legal advice.

53. Upon receiving his last payslip the claimant noted he had not been paid for 9 hours holiday reflecting the overtime he had worked, that a deduction of £357.00 had been made to reflect the course fees, and on his account his working hours had been miscalculated.

THE LAW

<u>Constructive Dismissal</u>

54. So far as is relevant the Employment Rights Act 1996 states:

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if)

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

55. The classic test for such a constructive dismissal is that proposed in Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27 where it was stated:

> "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 employer 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".

56. Here no breach of an express term is relied upon. The claimant asserts there to have been a breach of the implied duty of trust and confidence. In terms of the duty of implied trust and confidence the case of Mahmud v Bank of Credit and Commerce International 1997 IRLR 462 provides guidance clarifying that there is imposed on an employer a duty that he

> "will not without reasonable and proper cause conduct himself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee".

57. The effect of the employer's conduct must be looked at objectively. It is recognised that there are situations where a balance has to be struck between an employer's interest in managing its business as it sees fit and the employee's interest in not being unfairly and improperly exploited. In Amnesty International v Ahmed [2009] ICR 1450 it was said that "it is plainly right that conduct on the part of the employer may be for 'proper and reasonable cause' even if there were other options available to him."

58. The handling of an investigation or disciplinary process may constitute a fundamental breach. In Working Men's Club and Institute Union Ltd v Balls UKEAT/0119/11 where it was said:

> "Of course tribunals should be slow to treat the initiation of an investigation as itself a repudiatory breach: very often an employer may act reasonably in investigating allegations of misconduct which turn out in the end to be groundless."

59. The Court of Appeal in the case of London Borough of Waltham Forest v Omilaju 2004 EWCA Civ 1493 considered the situation where an employee resigns after a series of acts by his employer. The claimant brings his case,

in the alternative, on such basis saying in evidence that the imposition of a performance improvement plan was the final straw.

60. Essentially, it was held by the Court of Appeal that in an unfair constructive dismissal case, an employee is entitled to rely on a series of acts by the employer as evidence of a repudiatory breach of contract. For an employee to rely on a final act as repudiation of the contract by the employer, it should be an act in a series of acts whose cumulative effect is to amount to a breach of the implied term of trust and confidence. The last straw does not have to be of the same character as the earlier acts, but it has to be capable of contributing something to the series of earlier acts. There is, however, no requirement for the last straw to be unreasonable or blameworthy conduct of the employer, but it will be an unusual case where perfectly reasonable and justifiable conduct gives rise to a constructive dismissal.

61. If it is shown that the employee resigned in response to a fundamental breach of contract in circumstances amounting to dismissal (and did not delay too long so as to be regarded as having affirmed the contract of employment), it is then for the employer to show that such dismissal was for a potentially fair reason. If it does so, then it is for the Tribunal to be satisfied whether the dismissal for that reason was fair or unfair pursuant to Section 98(4) of the Employment Rights Act 1996.

Unlawful Deduction from Wages

62. So far as is relevant the Employment Rights Act 1996 states:

PART II PROTECTION OF WAGES

13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

The Working Time Regulations 1998

63. Under these regulations where a worker's employment is terminated and he has accrued but untaken leave to which he is entitled under the Working Time Regulations, the employer must pay him in lieu of that untaken leave (regulation 14).

64. This is enforceable under Part II of eth Employment Rights Act 1996.

65. This issue is how that entitlement is to be calculate those sums. IN Bear Scotland Ltd v Fulton [2015] ICR 221 the Employment Appeal tribunal determined that non-guaranteed overtime should be included in the calculation of holiday pay. Voluntary overtime should be in included in any calculation of holiday pay where the pattern of work is sufficiently regular and settled for payments to be made in respect of it to amount to regular remuneration: East of England Ambulance Service NHS Trust v Flowers and others [2019] EWCA Civ 946=7.

CONCLUSIONS ON THE ISSUES

<u>General</u>

66. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

67. I first make some preliminary observations:

(a) neither the Claimant nor Mr. Joyner struck me as particularly impressive witnesses, with both being influenced to some degree by personal animosity towards the other;

(b) the Respondent's approach to its employment obligations appears somewhat slapdash and not up to the standards one would expect of an employer (for instance historically unilaterally handing out disciplinary warnings without any sort of process). I have considered these.

I have considered these conclusions, where relevant, to my assessment of the issues I am asked to determine below.

Findings on the Issues

Issue 1: The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breach(es) alleged are as follows;

(i) Failing to hold his position open for the 3 months agreed in December 2021 should he decide to return from his position in Yeovil. That position starting in January 2022.

68. I have found that the role was kept open for the Claimant. When he returned to Newton Abbot, he returned to the same role he had left, was paid the same salary and was retained within the same WhatsApp Groups as he was.

(ii) On his return from Yeovil the Claimant asserts he was demoted from a Senior Manager to Retail Assistant.

69. Accordingly, on the evidence I have, the Claimant was not demoted to Retail Assistant as alleged or at all. He returned to the same role he departed.

(iii) That because of his demotion he was being asked to complete tasks which he alleges breached health and safety (it is recorded that no claim is brought for detriment having made a protected disclosure).

70. I have found the Claimant was not asked to undertake any task that breached health and safety. The claimant was prevented from carrying out spraying as he was late attending work and when he was present there were customers present, and it was not safe to spray in those circumstances.

(iv) The manner in which the meeting on 19th April 2022 was undertaken and handled, and the unsatisfactory conclusion (or absence of a conclusion) of that meeting which considered the allegations from 16th April 2022.

71. The meeting of 19th April 2022 was an unsatisfactory meeting on all party's accounts. With each blaming the other for the lack of any progress at that meeting. In particular:

    (a) I have no doubt in concluding the Respondent had cause to call the meeting after the claimant's behaviour on the 16th April 2022.
    (b) I do not consider that this is some targeted failing by the Respondent towards the claimant but rather is indictive of the Respondent's seemingly lax approach to best practice.
    (c) The Claimant was notified however that the outcome of this meeting (which was investigatory) would be notified to him.
    (d) I conclude that the Claimant was not asked to finish this meeting in the car park as he alleged. I am aware the Respondent had not had an opportunity to respond to the comment before the Claimant's resignation, but that Mr Joyce and Mr Bulley both deny it was made and it is not referred to in the Claimant's resignation letter.

Issue 2: The Respondent denies any breach of contract, it denies that the Claimant was instructed to act in a manner which would breach health and safety and denies that the Claimant was demoted. It asserts that the Claimant returned to the role which he was doing before he moved to Yeovil. The Respondent accepts that the meeting on 19th April 2022 was an investigatory meeting but was not a disciplinary meeting.

72. I have set out my findings in respect of each of the alleged breaches above.

Issue 3: The Tribunal will need to decide:

(a) Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent as alleged by the Claimant; and
(b) If so, whether it had reasonable and proper cause for doing so.

73. On the facts as I have found I consider that the Respondent, although party to a meeting that neither it nor the Claimant considered acceptable, did not act in a way that was *calculated* to damage or destroy the relationship of trust and confident between it and the claimant.

74. I then considered whether the Respondent's meeting could be said to have been *likely to* damage or destroy that relationship. I found that it did not. On the basis of what I have seen this was an unfortunate meeting but nothing more than that. Objectively it was not likely to damage or story the relationship,

75. I also considered the other outcomes to that meeting:

    (a) The limitation on the Claimant's use of his personal mobile phone on site also seems entirely normal and I have no evidence that the

claimant was being singled out by it, or that this was a disciplinary outcome.

(b) I do not consider that any threat (implicit or otherwise) was made to the claimant.

76. I do also reject eh suggestion the Claimant was not aware of the next steps as he received an email setting out what was to happen next after the meeting.

77. Accordingly, having made the findings I have above the claimants claim of constructive dismissal fails.

78. If called upon to decide the other matters in the claim I would have found that the claimant did reign in response to the alleged breaches, did not delay in that resignation and that the Respondent would not have established a fair dismissal on these facts.

Financial Claims

79. These claims are presented under the Part II of Employment Rights Act 1996 and not as breaches of contract.

80. There are three separate claims here:

(a) accrued but unpaid holiday pay;
(b) deduction from wages relating to unpaid wages; and
(c) deduction made for training course.

81. I will address each in turn.

Holiday Pay

82. The Respondent did not seek to challenge the mathematics underlying the claimant's claim [21], rather they challenged the entitlement to the figure based on the grounds his contract of employment. The Respondent accepts the claimant is entitled to accrued holiday pay, but that it paid it in accordance with his contract of employment that provided for holiday being calculated on 7 hours work each day.

83. The problem for the Respondent however is that the Claimant has presented this claim under the provisions of the Employment Rights Act 1996 and not a claim for breach of contract, and the Order of Employment Judge Lang makes this clear.

84. The Employment Rights Act 1996 requires the wage to be properly payable, that is the claimant must have a lawful entitlement to the sum. The Claimant's lawful entitlement would arise under the Working Time Regulations and the case law generated by holiday pay claims.

85. The Claimant is entitled to receive payment for accrued but untaken holiday pay, and the contractual provision in his contract of employment is not relevant for the purposes of this claim under the Employment Rights Act /Working Time Regulations.

86. If called on to determine the issue of whether the overtime payment was payable in the calculation of holiday pay, I would have found it was there is no dispute the claimant worked the extra hours he says he did, and it is also not in dispute that the claimant habitually carried out overtime. It was usually worked and usually paid to the claimant by the Respondent, indeed the Respondents evidence was that they received notification from the claimant that he did intend to reduce his hours and work no more than 35 hours a week, which was his contracted hours.

87. I therefore conclude that the claimant had a lawful entitlement for his holiday pay to be calculated on the basis of the hours he actually worked and so the total of 9 hours he claims is due and owing to him. For the purposes of the ERA it is a wage, and it has been deducted.

88. The Respondent has not shown any reason for the deduction being authorised.

89. Accordingly and having looked at the papers on this part of the claim I consider the claimant has satisfied me he is entitled to 9 hours as set out in the claimant's Schedule of Loss making a total of £140.00.

Unpaid Wages

90. The Respondent operates a system whereby employees log in and log out. Their time is recorded on a computer and a spreadsheet of times produced. I have seen this spreadsheet, and determined the claimant has not convinced me they are inaccurate. I have seen the various payslips in the bundle that contain the hours the Respondent has paid, and doing as best as I can to reconcile them against the hours the Respondent says the

claimant earned, the Respondent has, I find, paid the claimant in accordance with its timings for the claimant's attendance. Accordingly there has been no deduction from his wages. His claim here fails.

Deduction of Training Fees

91. Both parties agree:
    - (a) the Claimant had a deduction to his wages of £357.00;
    - (b) this was made for training fees incurred by the Respondent for the spraying course the claimant undertook in 2021;
    - (c) £357 was the cost of the course;
    - (d) The Respondent was contractual permitted to deduct a sum from the claimant's pay for this course;

92. I do not accept the Claimant's argument that the Respondent was only permitted to deduct £617.00 from his wages. The figure of £617.00 set out in the Training Agreement relate to the total cost of the course and is expressly stated to include wage costs. The Power to make a deduction is more limited and only relates to course and associated "fees", it does not include the associated wage costs of the course.

93. The parties agree that the course fees were £357.00. This is the amount that was deducted from the Claimant's pay: it is a deduction from wages.

94. This deduction had been set out in writing prior to the Respondent making the deduction. It is, therefore, a lawful deduction. The claimant's claim fails here.

Conclusion

95. The Claimant's claim of constructive unfair dismissal is dismissed, as is his claim for an unlawful deduction from wages concerning the training fees and wages.

96. The Claimant's claim for an unlawful deduction from wages concerning his holiday pay is successful.

Employment Judge Salter
Date: Thursday, 6 April 2023

Judgment & reasons sent to the Parties on 12 April 2023

For the Tribunal Office

<u>Notes</u>
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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