Case Number: **2201917/2022**

EMPLOYMENT TRIBUNALS

Claimant: Charlotte Tindale

Respondent: Fushi Wellbeing Ltd

HELD AT London Central Employment Tribunal **ON:** 26 and 27 January 2023

Employment Judge Miller-Varey

Representation:

For the Claimant: Represented herself
For the Respondents: Ms Angelisa Ralph

RESERVED JUDGMENT

1. The claim for damages for breach of contract is not well founded and is accordingly dismissed.

2. The claim for unpaid wages is not well founded and is accordingly dismissed

3. The claim for outstanding holiday pay on termination succeeds and the Claimant is entitled to the sum of £192.31 gross.

REASONS

Introduction

1. In its original form the claim pursued by the claimant is for unfair dismissal, breach of contract, unpaid wages and holiday pay.

2. On the first day of the hearing, I considered the opposed application of the claimant to amend her case to pursue a claim for discriminatory dismissal, by reference to the protected characteristic of disability or sex. This application was made by a letter of 31 July 2022 but had not been dealt with prior to the hearing. I also heard an application by the respondent (pursuant to its representatives' letter of 19 January 2023), to strike out the claim for unfair dismissal based on s.94 of Employment Rights Act 1996. The basis of that application was

that the claimant commenced her employment on 12 January 2021 and correspondingly did not have the requisite period of two years continuous service to bring such a claim (s.108 ERA 1996).

3. I decided the amendment application should not be granted. I decided the strike out application should be granted. I gave detailed oral reasons. A transcript of those reasons (with minor editorial corrections) is annexed at Annex A.

Claims and issues as narrowed

4. In consequence of those decisions the focus of the case became the claim for breach of contract, unpaid wages and holiday pay. Both the date and manner by which the claimant's employment ended are disputed. This gives rise to some legal complexity. In order to place the parties on an equal footing in the evening between the 2 days hearing I prepared a draft list of issues with a with an accompanying neutral statement of the applicable legal principles. These are attached at Annex B. The parties were given the opportunity to comment upon the issues and to each ask any further questions arising of the witnesses.

5. The effect of the two case management decisions was to confine the claim in financial terms, to unpaid salary of £8333.34, unpaid pension contributions of £250, holiday pay of £673.08 and a 10% monthly bonus. The claimant's statement of remedy also included compensation for her own time in preparing for the tribunal and completing necessary documentation at the rate of £41, the recovery of her solicitor's fees in the sum of £3799 and a month's salary for stress, anxiety and illness.

6. There were some difficulties experienced between the parties in preparing an agreed bundle of documents. It is not necessary for me to recount them. In the event, I received a bundle from the respondent of 143 pages and a separate bundle from the claimant of just over 40 pages, to which her witness statement referred. The latter had all been shared previously with the respondent. In addition to that bundle, the claimant identified some further documents in the course of the hearing (both on the day 1 and day 2) which were received by me into evidence without objection. The parties also agreed that following the hearing I could have regard to information about Covid Plan B, which the claimant provided by way of a link.

7. I heard evidence from the claimant. Mr Rannesh Jansari, director and company secretary of the respondent, gave evidence in support of its defence.

Findings of fact

8. From the evidence and submissions, I made the following findings 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 witnesses (both in their respective written statements and oral evidence). 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 the evidence, or set out all of the evidence, even where it is disputed. 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, reflects, in accordance with the overriding objective,

the extent to which I consider the particular matter assists me in determining the relevant issues. Instead, I have set up my principal findings of fact on the evidence before me that I consider are necessary to fairly determine the claim and issues.

9. The claimant was employed by the respondent as a supply chain manager on 12 January 2021. The respondent's business is manufacturing and selling organic handmade health and beauty products. The email by which the offer was made details particulars including the days to be worked. Of that it says: "5 days per week 9-6...Office/home-based (3 days office post Covid)" (claimant's p. 4).

10. The employment contract contains the following clauses which are material:

> *4. Place of Work The employee shall work at the employee's home or the employer's offices at Unit 9, Roslin Square, Roslin Rd, Acton, London, W3 8DH and at such other places as the satisfactory discharge of her duties shall require, as stipulated in terms of offer of employment, and shall if required, temporarily assist at any other office held by the employer now or in the future.*
> *...*
> *9. Deductions The employer reserves the right to make deductions from the employee's salary as follows:*
> *9.1 Where the employer has overpaid the employee for any reason.*
> *9.2 Where the employer suffers loss by failure of the employee to follow instructions or exercise diligence.*
> *9.3 If the employee causes damage to the employer's property the value of replacement or repair shall be deducted.*
> *9.4 If* ***the employee leaves the employer's employment without giving the required notice the value of the employee's pay for the notice period will be deducted.***
> *9.5 If the employee enters the employer into any contract without authority the value of any loss will be deducted.*
> *9.6 When the employee leaves the employer, they will deduct any overpayments, advances and holiday pay taken in excess of the employee's allowance.*
>
> *14. Notice*
> *14.1 Up to 6 months of service the employer will give 5 working days' notice to the employee.*
> *14.2 Thereafter the employer will give two months' notice except in the event of dismissal for gross misconduct whereby the employer has the right to dismiss immediately. Gross misconduct shall be taken to include (but not restricted to) the following:*
>
> *14.3 The employee shall at all time give two months prior notice to the employer if leaving the employment of her own volition*

11. The claimant and the respondent also signed an employee equipment agreement which included an acknowledgement of receipt of equipment of a latitude laptop. The agreement contains the following provision material to this case:

> *I understand that upon termination of my employment, I shall surrender and turn over the equipment back to the company. The company has the right to withhold my final pay until return of the equipment.*

12. It is relevant to note for the purposes of contextualising a dispute which later arose about the claimant's place of work, what happened in this regard between the

commencement of her employment and January 2022. At the start of her employment, she worked one day in the office which she then increased to two. At the beginning of July 2021, the claimant suffered a broken ankle and worked at home during the period of her recovery which took until around the end of October. The respondent at that time was very keen that the claimant return to work in the office 4 days per week and therefore work only one day from home. This was a source of considerable tension. The claimant has alleged that she was inappropriately threatened with possible redundancy if she did not accede. This complaint is not part of the breach of contract claim so I do not need to adjudicate upon it. I am satisfied that subject of redundancy was raised. Also, that the claimant regarded the proposal about attending the office more frequently was wrong by reference to the degree of her injury but also by reference to her childcare needs. The respondent (as corroborated in emails between the parties on 27 August and on 31 August 2021) was keen to know whether after the expiry of her most recent sick note of one month, she would be able to work at the company premises. Mr Jansari commented that *"I really need your role more hands on with the team"*. Whilst the claimant has maintained consistently that there were really no impediments to her working at home in terms of executing her role, I find the respondent was in the position to assess what was optimal for the business. Further, although the claimant had three direct reports only, these were all themselves managers and the claimant's job was at a senior level. The team comprised around 14 to 16 other people in all.

13. The claimant, I find, felt pressured. She offered her resignation on 1 August 2022. The respondent asked her to withdraw this, which she did. But issues around her place of work continued until on 3 September 2021 a meeting was held and the claimant, she accepts, agreed to start a full return on 4 days a week in the office from the end of October.

14. Once the claimant returned from sick leave, around the end of October 2021, I am satisfied that, discounting periods of holiday and other necessary absences, the claimant substantially fulfilled the respondent's requirement to attend the premises 4 days per week. In her evidence during the hearing the claimant expressed that this position was agreed "under duress" and that she was *hoping* to get back to 3 days in the office and 2 days at home. That says to me that after the tumult of the summer and the September agreement which resolved it, she appreciated the onus lay on her to persuade the respondent of a variation back to the way things were. Otherwise, she knew what her obligations were.

15. I am not satisfied that after the discussion in 2021 of possible redundancy on the heels of the claimant's extended sick leave, that there were further discussions about redundancy. Mr Jansari has asserted that in various verbal interactions, the respondent made it clear towards the end of 2021 the business was experiencing a downturn and may have to enter an overhead reduction process which could result in redundancies or reduced hours. I am not satisfied that the claimant was told this information.

16. On 5 January 2022 the claimant attended what she expected to be her usual one-to-one meeting with Mr Jansari. He told her that the company was making cuts and that she was being made redundant. The claimant was deeply shocked.

17. On 6 January the respondent emailed the claimant a letter confirming the redundancy. The letter explained that the role of Supply Chain Manager was not currently viable, that her final date of employment would be 6 March 2022, that she had 3.5 days remaining holiday to take and that arrangements would be made to ensure that she received her final salary

payment and P45 on termination of her employment or soon thereafter. The expected date for next payment of the Claimant's usual wages was 4th February.

18. I have been provided with teams' conversations which took place between the claimant and the respondent (Page 8 of the claimant's bundle) which are an insight into both dealings between the parties and work activity undertaken by the claimant. Taking those conversations alongside the other evidence (including the live evidence and three emails I have been provided with) I am satisfied of the following material points

- The claimant wished to work from home on Thursday and Friday 6th and 7th
- Mr Jansari asked that she keep her original pattern, expressing that he was focused on "all hands-on deck" and in addition the need to organise handover.
- On 6 January in response to a request to attend the office on that day, the Claimant said she would be unable to as she had to take and collect her daughter and also to process the discussion of the day before.
- This was agreed but Mr Jansari requested that she maintain her 4 days per week in the office from the week following i.e., the week beginning Monday 10th January.
- On Monday 10 January the claimant messaged Mr Jansari indicating that she had a terrible weekend with a bad cold and would message her colleague to let him know. She said separately the following:

  I also checked the current plan B and the guidance is that if you can work from home you should so will be following this guidance until the measures change.

- In a reply very shortly after, Mr Jansari asked for the claimant to share plan B information and said that as far as he was aware claimant needed to be at the office to conduct her job. The claimant sent a link to government guidance. She had at that stage done a lateral flow test but was awaiting the result. She did not reply on the wider assertion of her earlier message - i.e., that until measures change (not simply her symptoms ended) she would be working from home.
- The claimant did some work from home on 10 January, included emailing a colleague about costs for certification of a product.
- On the 11th the claimant was feeling unwell with a bad sore throat and awaited results from a PCR test. She was working still and communicated with the respondent about relevant work-related matters.
- On 12 January the claimant messaged to say she had an interview so would not be available first thing she also asked to have a brief chat and discussion, requesting that Mr Jansari was not in the open office for this.
- The respondent agreed. I am satisfied the claimant again did some work from home work. She has provided evidence of an email to a colleague.
- On the 13 January the claimant again did some work from home (she has provided emails with a colleague about a payment remittance advice). A one-to-one meeting was arranged.

13 January 2022 meeting

19. The claimant asked a number of very detailed questions relating to her redundancy. These related to consultation, considerations of different roles, redundancy criteria, and options which were alternative to redundancy.

20. There is a dispute between the parties about the respective conduct of the claimant and Mr Jansari. The claimant maintains in that Mr Jansari became angry as a result of her numerous enquiries. I am satisfied that he did tell the claimant that the matter wasn't personal, that people frequently did lose their jobs and that he did not need to follow process. I don't think those comments per se can be criticised other than in lacking an appropriate dose of human compassion. The fact was, the claimant had passed her probation period but did not have the statutory protection from which the requirement of a procedurally fair redundancy arises.

21. The claimant requested that for the remainder of her notice she should attend the office once a week only and work at home otherwise. She articulated her request on a number of grounds. In summary she relied on the government guidelines which were to work at home if you could, that the claimant still had childcare responsibilities which had been the basis for her original working arrangement in the offer of employment, that this would facilitate better participation in interviews and associated travel, any training she needed to deliver would be safer teams and working from home would mitigate expenses. She also offered as an alternative to agreement about her place off work that the respondent could pay her in lieu.

22. I find this request precipitated an adverse reaction from Mr Jansari. I accept the claimant's account that he became angry. I prefer her evidence on this point for a number of reasons. First, I admitted into evidence a draft document which I accept she prepared directly following the call, partly so that she made an accurate contemporaneous record of what happened [p.] I find it is accurate. It is clear that the claimant had planned quite exhaustively for the meeting. I find the claimant to be somebody with an extremely high attention to detail, who given her circumstances was highly focused on the issues that she needed to resolve and who clearly then believed that, in law, some remedy might arise or some negotiation would be possible as a consequence of a poor redundancy process. Second, I had a good opportunity to assess Mr Jansari when he gave his evidence. Whilst he remained civil, he showed clear instances of being irritated when questioned by the claimant about matters he considered either self-evident or already sufficiently established. In moments, his tone was rebuking and dismissive. I am quite satisfied that he would have found the claimant's highly organised approach and her persistence and attitude down to this point, particularly over the repeated homeworking impasse, to be very irritating. This tipped him into vocal irritation and exacerbation with the claimant. The conversation deteriorated. He was sarcastic about alternative employment she was seeking and about the likelihood of her being able to get legal assistance. He said the claimant did not deserve to receive notice pay. The claimant was upset and abruptly closed her laptop, ending the meeting.

23. It was put to the claimant in cross examination that she was threatening to Mr Jansari. She was not. I am satisfied she conducted herself in an assertive way but that against the background, Mr Jansari regarded her as wasting time over a decision he felt was not going to change, and which he was under no obligation to reconsider.

24. Immediately following that meeting on that day and the morning after the claimant was unable to access to its email, folders and IT system, remotely. The respondent accepts that it did this deliberately and says that had the claimant attended the premises it would have been possible for her to access all of the necessary systems. There is no evidence to

contradict that and given the timing and then clear wish of Mr Jansari to get the claimant into the premises, I find that was right.

25. There was privileged communication by the claimant, written under the express banner of without prejudice. Pausing here, I have not had regard to this. The respondent has previously opposed that. Moreover, the Claimant in response to my question told me she accepts it was written for the purpose of trying to settle matters.

26. On 20 January the respondent emailed the claimant with a letter. The letter referenced the discussion on 5 January and gave some more details as to the reason for the redundancy. It also said that the claimant's position was no longer financially viable and that no suitable alternative vacancy could be offered. She was told that she was required to work out her full notice period and in order to be conducted effectively, this needed to be done from the office for 4 days a week as was agreed in September 2021. The letter also asserted that this was within the current government guidance. The letter went on to say that the claimant had not attended her place of work since 10 January without prior authorisation. She was offered the right to appeal. She was also requested to attend the office on Monday the 24th for a face-to-face meeting with Mr Jansari and Nabella Khan, head of finance. The purpose of the meeting was to address any questions the claimant had, with privacy assured. The letter also made clear that the claimant must return to fulfil her obligations on Monday the 24th. If she was not able to do so she was required to state the reasons in writing with supporting documentation, failing which she would be regarded in breach of contract.

27. The claimant had by that stage instructed a solicitor who on 21 January sent a response by email. The letter written is an open letter but makes passing reference to other correspondence which is privileged from production in these proceedings. The letter does say, in its admissible part, that the writer could not see how the claimant could be in breach of contract and welcomed sensible dialogue concerning the termination of the claimant's employment.

28. The claimant did not attend the office on Monday 24. She did not attend the meeting. Beyond her solicitors' letter of 21, she did not communicate with the respondent. I accept she was distressed and very troubled by how the meeting had gone on 13th.

29. There was then some confusing correspondence in that the respondent sent a letter addressed to the claimant, both to the claimant and her solicitor, via email on 24th. This was immediately recalled. A further email attaching the self-same document was then sent but only to the claimant. Putting that to one side, the letter referenced the "appeal hearing" scheduled for the 24th which she did not attend. The letter indicated Mr Jansari would like to meet with her on 27 January at 9.30 at the head office. She was offered the opportunity to attend the meeting with a trade union official.

30. The claimant's solicitor replied in the early afternoon of the 26th. This email again makes reference to the privileged communication. In a freestanding sentence which is admissible, he urges the respondent to deal with the matters relating to the working out of the claimant's notice period.

31. Mr Jansari replied in an email on 26 January and said that he would come back to the claimant's solicitor later that day to explain why the claimant must continue her 2-month notice period under the same arrangement as before she was made redundant.

32. At 9.19 that evening Mr Jansari sent a letter to the claimant to explain why she was needed and also sought confirmation of her attendance at the meeting the following day. The letter was 3 pages. It gave a different account of the meeting. On the subject of working from home Mr Jansari explained that he had a lot of hands-on work, training and handover that required the claimant to be at the workplace and that he required everyone's hands on support. He also made the point that this was a return to the pre-redundancy working pattern. The letter says that during the meeting (I don't find this was discussed then) that Mr Jansari had indicated to her that attending work without reasonable prior notice would be considered gross misconduct.

33. The claimant did not attend the meeting scheduled for 27 January. She acknowledged the email for the first time on 28 January 2022 at 9.49. She highlighted that her solicitor had not been included and forwarded the letter to him. The claimant's email made no reference to her own health. She has described in her witness statement that she had been unwell again with suspected covid symptoms, a high temperature, cough and headache. She has produced [p.101] a copy of the site pass received by her electronically at lunchtime on the 28th to obtain a PCR test. I accept she was unwell.

34. It was then a week until the claimant's solicitor emailed the respondent on 4 February. In an open letter of that date, they asserted that the relationship had broken down, the trust and confidence had been irretrievably damaged by the respondent. They said, using very clearly the past tense, "[the claimant] **has been** wrongfully dismissed" (my emphasis) and was entitled to her contractual notice in any event. The letter went on to assert that the claimant had been made redundant as a result of the ankle injury and discriminated against on grounds of sex. Urgent settlement proposals were sought.

35. On the same day the respondent via Ms Khan made a formal request for the return of the company's laptop in accordance with the signed employee equipment agreement which required that it be surrendered.

36. The claimant did not receive salary on 4 February 2022 despite it being the usual payday.

37. The following Monday the respondent emailed the claimant acknowledging receipt of her letter of 4th of February and requesting that she please invoke the formal appeals process. The letter alluded to the 2 previous missed meetings. They then offered her a remote appeal meeting by zoom/teams or alternatively an appeal in writing. They also offered a separate independent person to handle the appeal. The letter also said " we also remind you that we have not had a response from our letter dated 2 February 2022 for you to return the company laptop if you do not intend to return to work".

38. In a letter of 8 February 2022, the claimant resigned. She alluded to the 2 actions of seeking the return of her laptop and not paying her as having ended her contract. She described this as a significant breach obliging her to formally resign her position with immediate effect.

39. By a letter sent by email on 10 February, the respondent confirmed receipt of the claimant's letter of resignation. The letter said that the respondent welcomed the opportunity to discuss the points of concern that she had raised and therefore arranged a grievance

meeting on 14 February. Associated instructions were given.

40. The claimant's solicitor replied on 14 February [p.106]. They complained that they were not being addressed on behalf of the claimant nor copied. They said that as the claimant was no longer an employee there was no requirement for her to attend any further meeting. They indicated proceedings would follow and again urged settlement proposals as a matter of urgency.

41. On 16 February the respondent wrote to the claimant informing her of remaining salary due up to and including her last working day of 13 January 2022. The letter stated that although the claimant's resignation was on 8 February no money was due a she had not been at work and had not provided a valid reason for not being at work. The letter said this:

*The monies owed equates to 9/21 working days including bank holidays and has accrued 0.8 days of holiday. Therefore, payment due. Gross salary = £4,166.67 * 9/21 = £1,785.71 0.8 Holiday @ Daily Rate = 0.8 * £192.31 = £ 153.84 Total gross salary = £1,939.55 Note this is gross and therefore does not include any PAYE/NI/Pension payment*

42. The letter also referred to the company laptop and gave 23 February as a deadline for its safe receipt. The respondent said that if the claimant chose not to return the laptop, that the cost of in excess of £1700 would be deducted from her final salary payment which itself would be paid on 25 February 2022.

43. There followed some correspondence about arranging a courier. The laptop was ultimately safely received back on 25 February. The respondent confirmed the claimant would receive both her pay and P45 therefore on the 28th. In the event the claimant did not receive her P45 until Friday, 18 March 2022 on which day she also received the sum of £1756.26, and payslips for February and March in the net sums of £209.80 and £1546.46 respectively.

The Law

Wages

44. There is the maxim of "no work, no pay", although **North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387** says this:
In my view, developments in both employment and regulatory law mean that, in the present day, the co-dependency argument needs to be treated with considerable caution. Taken to its logical conclusion, it would permit an employer to deduct pay when an employee was ill, which would be a surprising result. That is why I consider that the contractual analysis is fundamental: if the employer cannot show that, pursuant to the express or implied terms of the contract, or by reference to custom and practice, he is entitled to deduct pay in these circumstances, then it seems to me that a general co-dependency argument cannot give him the remedy that the contractual terms themselves do not.

(per Lord justice Coulson at para 64):

45. There is the common law doctrine of “ready, willing and able to work” i.e. that an employee’s right to remuneration depends on his doing or being able to do the work that he was employed to do and that if he declined to do that work, the employer need not pay him.

46. There are some conflicts in the authorities but these principles are uncontroversial:

a) If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction to their pay (Petrie).

b) If he or she was ready and willing to work, and the inability to work was the result of a third-party decision or external constraint, any deduction of pay may be unlawful. It will depend on the circumstances.

c) An inability to work due to a lawful suspension imposed by way of sanction will permit the lawful deduction of pay (Wallwork v Fielding). Judgment Approved by the court for handing down. North West Anglia NHS Foundation Trust v Gregg d) By contrast, an inability to work due to an “unavoidable impediment” (Lord Brightman in Miles v Wakefield) or which was “involuntary” (Lord Oliver in Miles v Wakefield) may render the deduction of pay unlawful.

Unlawful deductions under the ERA 1996

47. Section 13 enshrines the right not to suffer an unauthorised deduction from wages other than in prescribed circumstances. So far as relevant, it provides as follows:

> *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.

48. Section 14, under the title "Excepted Deductions", sets out that the bar to employer deductions under s.13 (and the concomitant right of the employee not to suffer those deductions) does not apply to a deduction which has one of two defined purposes. So far as relevant in the circumstances of this case where expenses do not arise, it provides that:

"the reimbursement of the employer in respect of—

(a) an overpayment of wages,

….

made (for any reason) by the employer to the worker..."

is an excepted deduction.

27.— Meaning of "wages" etc.

(1) In this Part "wages" , in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

Breach of contract

49. A useful statement about the law relating to breach of contract is set out in IDS, chapter 12 paragraph 2.41 as follows:

Under general contract law, a breach by a party that goes to the root of a contract entitles the other party either to accept the repudiation (in which case the contract is terminated and the innocent party has the right to sue for damages) or to refuse to accept the repudiation (in which case the contract is not terminated and the innocent party may stand and sue for specific performance of the original contract). An unaccepted repudiation is 'a thing writ in water' — Howard v Pickford Tool Co Ltd 1951 1 KB 417, CA. In other words, a repudiatory breach in and of itself does not have the effect of automatically terminating the

contract — the innocent party can choose whether or not to bring it to an end. This is known as the 'elective' theory of termination.

Discussion and Conclusions

Wages prior to termination

50. In my judgement wages were not payable to the claimant after 13 January.

51. The claimant has asserted that she was ready and willing to work. I have set out the applicable law already which supports that being ready and willing to work will generally entitle payment of the remuneration due under the contract.

52. It is necessary to consider the context of the claimant's then working pattern when assessing whether she was ready and willing to work. I am satisfied that following the events in summer 2022 a mutual variation of the original term as to the balance between home and office working had occurred. I accept that the claimant entertained the hope that there might be a return to that original formula but as a matter of fact that had not taken place.

53. At its highest, I find the claimant can be described as ready and willing to work on conditions. They were, in essence that there should be acknowledgement of Mr Jansari's hostility on the meeting of 13 January and concessions about home working. I have some sympathy with the claimant on a human level but that was not a sound basis on which to temporarily or otherwise, withhold her attendance in the required location and still expect to be paid. I make no finding that she was entitled to resign then, but the fact is, she did not do so and her own contractual obligations were unaffected. This was not a situation in which she was ready and willing but, in essence, frustrated by something beyond her control, meaning her right to payment of wages was ongoing.

54. I have considered the question of her health and also the status of Covid restrictions, as they related to work at that time.

55. The claimant is unable to rely on ill-health to justify her absence as authorised and therefore payable (at least in respect of sick pay) from 13 January. I accept what she has said and written about her health is honest. Quite simply though, she did not ever comply after 13 January with the requirements of the sickness policy set out in her employment contract.

56. So far as the Covid restrictions were concerned, I have considered Plan B as announced on 8 December 2021. The information which the claimant provided to me via a link confirms that from Monday 13 December 2022 the advice was "those who can will be advised to work from home".

57. It follows that for the claimant to go to the office to work would not have offended any law. Correspondingly, the instruction to attend the workplace given repeatedly over teams down to 13 January and since, was an entirely lawful instruction. It was also reasonable having regard to the varied contract terms. Although I do accept that the claimant did have some ongoing concerns about Covid towards the end of 2021, and especially the Christmas party, I accept the respondent's evidence that she was the main lead in the company for

covid policy. Mr Jansari also gave credible evidence about the testing regime at the earlier peak and the importance attached to the subject given the business was akin to a food business. I found this reassuring. I also find, as he told me, that where mask wearing did not take place people observed social distancing as far as possible. Also looking at the claimant's personal position, she did not then identify to Mr Jansari any particular vulnerability barring her age, (50), which would cause her to have heightened genuine and reasonable concerns that, despite the measures taken, she would still be placed at an unacceptably high risk. The circumstances of Covid and the Plan B guidance when applied to the claimant's situation cannot in my view be said to constitute any kind of external constraint or unavoidable impediment to her working at the office. I also reflect that wanting the claimant to work in the office was not new. I refer to paragraph 23 above and Mr Jansari's comments in his email from August 2021. It was not being alighted upon to try and abridge the claimant's notice and avoid paying her. It was even more reasonable too, given the necessity to handover tasks before her departure.

Termination of employment/ breach of contract

58. The respondent submitted that the claimant's employment ended on 13 January on grounds of redundancy but also that the claimant took unauthorised absence which is considered as gross misconduct. In respect of the redundancy point, it's quite clear that on any assessment the claimant's employment ended sooner than 6 March which was the intended date upon which dismissal by reference to redundancy would have taken effect. Her redundancy was not therefore the terminating event. Events superseded.

59. In terms of gross misconduct, the claimant's failure to attend the office to work at any point after 13 January would give rise to the right on the part of the respondent to summarily dismiss her for gross misconduct. However, what is clear is that at 26 January the contract was treated as ongoing still. Hence the request contained in the letter of that date for the claimant to return. The nature of the claimant's breach was continuing however. There was no express acceptance of the breach. I note the entitlement to seek the return of the laptop on 4 February (11.34am) only arose in circumstances where termination had taken place. However, the respondent in the accompanying request made no direct reference to summary dismissal or any disciplinary process. That being said, this action definitely preserved its rights because it excluded any possibility of the respondent having affirmed or waived any breach. The reverse is true.

60. I find the claimant's employment ended with or just before her solicitor's email sent at 11.50 am on 4 February. This was sent in ignorance of the request for the laptop and before she tendered her express resignation on Monday, 8 February. However, crucially, her solicitor's letter of that day indicated that her wrongful dismissal had already taken place, referencing this to a breach of the implied term of trust and confidence. He sought, in open correspondence, a settlement by reference to this. That cannot be reconciled in any sense with the employment relationship between the claimant and the respondent continuing still. The claimant was asserting that the respondent's actions towards her had entitled her to end the contact and treat herself as dismissed, and moreover, that she had ***already*** done this. I don't find any ambiguity about this.

61. I find that contrary to the letter, there were no breaches of contract by that stage that would entitle the claimant to treat herself as discharged and sue for damages for loss. There are a number of reasons for this.

62. The main reason is the claimant herself was in fundamental breach that had not been waived. I refer to her not obeying the instructions to attend her place of work. This was happening to some degree in the week of 6 January, where there is evidence of unliteral decision making on this issue by the claimant. But as a minimum that was repeated every day after the 13th. Whilst falling short of expressly and directly of dismissing her, the respondent by seeking the return of the equipment on 4 February was demonstrably not overlooking or disregarding the claimant's conduct. In those circumstances the respondent was entitled to accept her resignation without notice, bringing to an end any obligation in respect of notice pay itself.

63. It is also right to observe that the breaches which the claimant was asserting had resulted in her wrongful dismissal, and therefore had taken place prior to 4 February, could not have included the failure to pay monies due in respect of January wages (not due until 4th February) or indeed the request for the return of the laptop which came only later. These were later referenced in the claimant's express resignation of 8 February.

64. The respondent's potential breaches could therefore only relate to the action on 13 January 2022 and what had happened in between times. The claimant did not resign in response to the conduct of 13. In respect of events since, she had received the benefit of a further explanation for and invitation requiring her presence and had still not attended the premises or meeting. The removal, and consistent refusal of, remote access to the system was not a breach in my view but entirely within the rights of the respondent. I accept it injured the claimant's feelings but it was reasonable in all of the circumstances. The alternative would be to say, in effect, that the respondent must make itself liable to pay the claimant's salary even when she was not working as it wanted her to. It was not a last straw upon which the claimant can rely. The respondent had not done anything to revive any right to resign that she may have enjoyed previously.

65. Bringing these points together therefore the claimant's employment had ended prior to her entitlement to wages on 4 February. The respondent was entitled to withhold that payment pending receipt back of the laptop, under the terms of the employee equipment agreement. Those wages were paid net for the period of the claimant's actual work up to 13 January, in full. She had no right to damages as a consequence of her resignation nor contractual notice.

Holiday Pay

66. I am satisfied the respondent was obliged to pay the claimant for holiday leave and its accrual was not affected by her unauthorised absence. There is nothing in the contract that acts to prevent that and by extrapolation of the well-accepted principle that holiday pay continues to accrue during sick leave (*Schultz-Hoff v Deutsche Rentenversicherung Bund 2009 ICR 932, ECJ*) whilst the claimant remained a worker, I consider that must be right.

67. The respondent has not satisfied me that it ended her employment for reason of misconduct at any point prior to 2nd February and accordingly, I find she accrued leave down to the point. She is accordingly entitled to holiday pay of 1.8 days (33/365 x 20 days). She had been paid 0.8 days and so is entitled to a further 1 day's holiday pay at the rate of £192.31 gross.

Tribunal Judge A Miller-Varey
(acting as an Employment Judge)

6 March 2023

Sent to the parties on:

.06/03/2023

For the Tribunals Office

Notes

1. 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.

Annex A

Case Management Decision on Amendment and Strike out

1. The original ET1 which made a claim for unfair dismissal in this case did not make reference to discrimination on either ground of sex or disability or indeed any other protected characteristic. The relevant boxes were not ticked.

2. The matter I am now concerned with is one which has hung over somewhat unfortunately since the middle of summer last year. It is the application of Mrs Tindale to amend her ET1 by the addition of two allegations being that of sex discrimination in relation to her redundancy and alternatively disability discrimination on the grounds of and she references an injury that she sustained to her ankle in the summer of the year before, that is to say July 2021.

3. The parties have made submissions to me about this. It is right to reflect that in the case of the Claimant she wanted to understand, as much as to raise, issues about the implications that an application to amend would cause, and what those implications would be.

4. The law directs me to essentially weigh up when I am looking at the question of an amendment a number of different factors. These are set out in a series of well-known cases of which the most well-known one is Selkent Bus Company v Moore. I have taken this into account alongside more recent cases including Vaughan v Modality Partnership [2021] ICR 535 and Chaudhry v Cerberus Security and Monitoring Services Limited [2022] EAT 172. I have regard to all of those factors in those cases.

5. The most important thing really is that I identify what the amendments are, and I balance the injustice and hardship of allowing or refusing them taking account of all the relevant factors. Now, those relevant factors seem to me on the part of Mrs Tindale the fact that as she puts (in a commendably a measured way) there will be the feeling for her that the case has not been put in the way that it should be and that all the issues have not been looked at. I can identify that there may be a prejudice to her because by adding these claims there is a potential for the remedy to have a greater financial value then they would were she confined to the original claim. On the part of the Respondent however, there are aspects of prejudice and hardship that I can see. They are these. The first is that this amendment application were I to allow it is an amendment that is made significantly out of time. That is unassailable. It was not brought until July 2022. The ACAS process concluded in very early April and the claim was issued on 18 April. The act of discrimination that is alleged is 5 January. The time limits are strict and although there is the facility to extend by reference to what is just and equitable it is right for me to consider in this case what would be the position in July had Mrs Tindale instead of trying to amend this claim brought a new claim and the answer is that she would have been significantly out of time and would have had the burden of demonstrating that it was just and equitable for that extension of time to be granted.

6.I read the bundle of documents carefully and there is one thing that I may say would tend to support her which is that at a much earlier stage solicitors acting on her behalf did include reference to discrimination on the grounds of sex or on the grounds of disability within correspondence. That was perhaps to put a shot across the Respondent's bows. However, what I cannot ignore is that it was not repeated in the ET1. Now that may be in consequence of an oversight, but that would not have been manifest to the Respondent and it was not then remedied for some months.

7.It is not the case that Mrs Tindale has caused there to be a delay in dealing with her application, but the fact is we are here today and the Respondent (as it only can) has addressed the pleaded case. Its witness evidence is accordingly limited. It follows that for the amended claims to proceed there would have to be an adjournment of this final hearing, there would have to be further particulars of the allegation of discrimination of grounds of sex and disability to be given and there would be expense and protraction of the proceedings which are ultimately undesirable in general. More to the point, these are matters of real hardship. There is the fact that memories fade too and although the period since the end of July is not at the door of Mrs Tindale, it seems to me I cannot ignore that further passage of time.

8.These factors favour not allowing these two other claims to go forward at this stage. I think in all it would not be fair to the Respondent and I would therefore decline those amendments. I would confirm that the original, what we call the ordinary unfair dismissal claim, cannot proceed and the reason for that is because the Tribunal has no jurisdiction. That is a straight forward facet of the period of Mrs Tindale's employment with the Respondent. She did not have two years in and it follows that no Tribunal has the power to examine the fairness of the redundancy process in general.

9.The implication for these proceedings is this that I will be concerned to deal with all of the issues relating to the breach of contract, the entitlement of the Claimant to receive monies after the date on which its alleged that she no longer presented for work and any other losses and costs which we made connected to that claim.

Annex B

Draft list of issues and neutral statement of law provided to the parties at the beginning of final hearing day 2 on 27/1/23

Wages prior to termination

1. It is common ground that wages were paid until the 13 January 2022. Were any wages payable to the Claimant after 13 January 2022?

The Tribunal will need to consider: what the Claimant's contract provided relevant to the events which happened, the codependency principle (no work means no pay) and the doctrine of being "ready and willing to work". An annex (Annex A) sets out a neutral statement of principle to put the parties on an equal footing.

2. If wages were not payable to the Claimant after 13 January 2022, why not and for what period?

3. If <u>later than</u> 13 January 2022, on what date did wages cease to be payable? For what reason?

4. For any period after 13 January 2022 were there deductions from wages that were payable, such that the Claimant's right not to suffer unauthorised deductions from wages was infringed? I.e., they were not "excepted deductions" under s.14 and none of the circumstances in s.13(1)(a) to (b) apply?

5. What sums were within those wages for the purposes of s.27 of the ERA 1996? Did "wages" include bonus?

<u>Termination of employment</u>

6. When and how did the Claimant's employment end?

The Respondent will say that the Claimant's employment ended on [ ] by reason of []. The Claimant says that she was entitled to accept the Respondent's repudiatory breaches and to treat herself as dismissed on 8 February 2022.*

7. If the Tribunal considers that the Claimant resigned from her employment, was/were there repudiatory breach(es) of contract which entitled her to treat herself as discharged?

8. Was/were the breaches fundamental one(s)? 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.

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

10. Did the Claimant affirm the contract before resigning?

12. If the Claimant did resign in those circumstances, what loss has been caused by the Respondent's breach and what remedy should be granted?
The Tribunal will need to consider the effect of notice of her redundancy given on 5 or 6 January 2022 in terms of the period of any loss

<u>Holiday Pay</u>

13. Did the Respondent fail to pay the Claimant for annual leave the claimant had accrued but not taken when their employment ended?
14. What was the Claimant's leave year?
15. How much of the leave year had passed when the Claimant's employment ended?

16. **How much leave had accrued for the year by that date?**
17. **How much paid leave had the claimant taken in the year?**
18. **Were any days carried over from previous holiday years?**

*the P45 shows the Claimant's leaving date as 28/2/22

NEUTRAL STATEMENT OF LAW

Wages

There is the maxim of "no work, no pay", although **North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387** says this:

In my view, developments in both employment and regulatory law mean that, in the present day, the co-dependency argument needs to be treated with considerable caution. Taken to its logical conclusion, it would permit an employer to deduct pay when an employee was ill, which would be a surprising result. That is why I consider that the contractual analysis is fundamental: if the employer cannot show that, pursuant to the express or implied terms of the contract, or by reference to custom and practice, he is entitled to deduct pay in these circumstances, then it seems to me that a general co-dependency argument cannot give him the remedy that the contractual terms themselves do not.

(per Lord justice Coulson at para 64):

There is the common law doctrine of "ready, willing and able to work" I.e. that an employee's right to remuneration depends on his doing or being able to do the work that he was employed to do and that if he declined to do that work, the employer need not pay him.

There are some conflicts in the authorities but these principles are uncontroversial:

a) If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction to their pay (Petrie).

b) If he or she was ready and willing to work, and the inability to work was the result of a third-party decision or external constraint, any deduction of pay may be unlawful. It will depend on the circumstances.

c) An inability to work due to a lawful suspension imposed by way of sanction will permit the lawful deduction of pay (Wallwork v Fielding). Judgment Approved by the court for handing down. North West Anglia NHS Foundation Trust v Gregg d) By contrast, an inability to work due to an "unavoidable impediment" (Lord Brightman in Miles v Wakefield)

or which was "involuntary" (Lord Oliver in Miles v Wakefield) may render the deduction of pay unlawful.

Unlawful deductions under the ERA 1996

Section 13 enshrines the right not to suffer an unauthorised deduction from wages other than in prescribed circumstances. So far as relevant, it provides as follows:

> *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.*

Section 14, under the title "Excepted Deductions", sets out that the bar to employer deductions under s.13 (and the concomitant right of the employee not to suffer those deductions) does not apply to a deduction which has one of two defined purposes. So far as relevant in the circumstances of this case where expenses do not arise, it provides that:

> *"the reimbursement of the employer in respect of—*
>
> *(a) an overpayment of wages,*

….

made (for any reason) by the employer to the worker...”

is an excepted deduction.

27.— Meaning of “wages” etc.

(1) In this Part “wages” , in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,