EMPLOYMENT TRIBUNALS
(England and Wales)
London Central Region

Claimant: MS M TRACEY
Respondent: ACAS

Heard by CVP on 15,16 and 17 March 2023

Before: Employment Judge J Burns

Representation
Claimant: Ms E Grace (Counsel)
Respondent: Mr J McHugh (Counsel)

JUDGMENT

1. The claims of unfair dismissal and for holiday pay succeed
2. By 31/3/23 the Respondent must pay the Claimant by her solicitors the sum of £24,847.58.

REASONS

Introduction

1. This was a claim for constructive unfair dismissal and holiday pay. The Claimant claims that the Respondent's persistent failure to allow her the correct amount of paid holiday and to deal with her grievances over this was a repudiatory breach causing her resignation on 10/2/22 with an effective date of termination on 16/3/22.

2. In opening Ms Grace confirmed that to the extent that the unfair dismissal claim depended on the last straw doctrine, the claimed last straw was a telephone conversation between the Claimant and her manager Ms L Claxton on 9/2/22 as described in paragraph 58 of the Claimant's witness statement.

3. The holiday pay claim was in the amount of £522.24 as shown in the Claimants schedule of loss.

4. I was referred to documents in a 491 page bundle and in addition the Claimant gave late disclosure of a few pages which were admitted with the Respondents consent. I heard evidence from the Claimant and then from the Respondents witnesses Lisa Claxton, and then from Paul Byford, (HR advisor). I received written and oral final submissions.

Findings of fact

5. The Claimant commenced work for the Respondent on 1 May 2013 as a Grade 10 Helpline Advisor. She was initially employed on a fixed-term contract which she signed by way of acceptance. That contract itself stated that it would end after a year. The terms of that contract as regards holidays were as follows *"You are entitled to 125 hours per annual leave year….In addition…you will be entitled to paid absence on public holidays and on 2.5 other days known as privilege days".*

6. Following the expiry of the fixed term contract the Claimant continued in her employment. On 11/9/2014 a manager sent the Claimant a draft new contract which stated the following as regards holidays "*You are entitled to 111 hours paid leave each year rising to 132 hours after 5 years continuous service….In addition you will be entitled to paid absence on public holidays and on the Queens at that Birthday (known as a privilege day*".

7. The letter that ended with the following : "*If you are willing to accept employment on the basis of the terms and conditions which this letter contains or to which it refers, please sign the acceptance declaration at the end of both copies of the letter and return one of them to me".* The Claimant did not sign and return this contract because she had various queries - for example she wanted to have her hours specifically specified.

8. On 16/2/2015 the Respondent sent the Claimant an amended draft new contract for the permanent role which the Claimant had started on 2/5/2014. The Claimant refused to sign that also in a message to her manager which reads as follows "*I believe it is a reduction of 1.5 days annual leave which I don't agree to".*

9. The Respondent did not press the point and no new written contract was ever concluded. Hence the Claimant had no written contract after the end of April 2014.

10. Her employment continued after that date and in due course she accepted promotion and higher pay which were arranged informally. In or around 2017, the Claimant was redeployed to a Grade 10 Conciliator role following closure of the helpline operations in London. On 24 September 2018, the Claimant was temporarily promoted to a Grade 9 Conciliator role and this temporary promotion was made permanent on 1 June 2019.

11. The initial fixed term contract signed in 2013 expired in 2014 under its own express self-limiting term. In any event the terms were not apt to continue beyond the end of the first year and by 2022 the Claimant's salary, job title and grade, place and hours and days of work had all changed from those described at the beginning.

12. Mr Bayford explained that in circumstances in which an employee such as the Claimant fails to sign a written contract and states in terms that she refuses accept its terms, but remains in employment, the Respondents practice is to act subsequently on the assumption that the contractual terms nevertheless take effect by implication or performance.

13. It is unnecessary for me to decide the exact legal status of the Claimant's employment contract after 1/5/14 because the parties are agreed that the Claimant accepted the terms of the 2015 draft contract (page 83 of the bundle) by performance and in any event that after the expiry of 5 years continuous employment - ie after April 2018 - the Claimant entitlement to annual paid holiday/absence was the part-time equivalent of a full timer's 40.5 days per year, of which 1 days paid absence on the Queen's Birthday ("QB").

14. The QB is a civil service benefit which arose initially from Royal decree.

15. The 2015 contract contains the following: *'In addition to the leave entitlement given above, you will be entitled to paid absence on public holidays and on the Queen's Birthday (known as a privilege day)'*

16. The Respondent's written policy about holidays contains the following; "*18.1 Payment should be given for days/hours in lieu of Public and privilege holidays due but not taken at the time of termination."*

17. .I accept this as the best evidence about the matter and I reject Mr Bayfords evidence (which otherwise I found very helpful) that the QB is "*a use it or lose it*" entitlement, at least insofar as pay-in-lieu-on-termination is concerned.

18. The Respondent a few years ago started using a software system called "iTrent" to administer holidays and absences. At that stage absence and holiday records for the Respondent's employees started to be kept centrally electronically rather than on paper by the employees themselves rather.

19. The persons in control of the ITrenet system did not know how to use it to record properly the holiday entitlement of an employee such as the Claimant who worked part time for school terms only. As a consequence, no proper records of the Claimant's leave were kept.

20. Nothing was done to address the ITrent problem until January 2022 when Marwa Taher left the Respondent's payroll department and was replaced by Tam Hogue.

21. The Claimant worked part-time and during school terms only, which would have required complicated calculations of her exact entitlement even if records had been kept.

22. In early January 2018 the Claimant and her then manager became aware of the fact that no Claimant's leave records could be found, so the Claimant started trying to reconstruct these manually going back to 2013.

23. After the Claimant was promoted in September 2018, she had a conversation with Barbara Hawkes, who had become her line manager, about her leave entitlement, asking for clarification for the period up to 30 April 2018, from 1 May to 23 September 2018 and from 24 September onwards in a single figure. On 14 November 2018 Barbara Hawkes sent an email to Pay Enquiries about this. In response, payroll initially suggested that the Claimant may have been overpaid. When the Claimant challenged this, Pay Enquiries subsequently confirmed that they would not seek to recover an overpayment. The Claimant's view was that there had been no overpayment. The Claimant did not receive a response to her leave entitlement query.

24. On at least one other separate occasion the Respondents payroll department wrongly suggested that the Claimant had been overpaid

25. In the light of these references to overpayment, the Claimant became concerned to exclude the possibility that, in ignorance of her entitlement, she might unwittingly take excess paid holiday, causing the Respondent on discovering this to make a claim against her for repayment.

26. The Claimant continued to pursue the subject in emails and oral conversations with her managers from then on until the end of her employment. The Claimant wanted to be told what her annual leave entitlement was as a single figure and also given an assurance that Bank holidays would not be deducted from (or counted towards) that entitlement.

27. The managers referred the queries to the Respondent's Pay Department. The Claimant eventually had a meeting with in June 2021 with a pay officer called Marwa Taher who told the Claimant that she would have to give credit against her annual entitlement for any Bank holidays. The Claimant did not accept this. Marwa Taher provided the Claimant with incorrect information in a response to an email sent by the Claimant on 20/7/21

28. None of the managers were able to provide a clear answer which the Claimant was satisfied with.

29. On 23 August 2021, the Claimant emailed the Respondent claiming that she felt the ongoing issues with her holiday pay had left her with no option but to resign.

30. On 13 September 2021, the Claimant formally resigned, however, her line manager (Ms Claxton) asked the Claimant to re-consider her position and assured her that the pay issue would be resolved. The Claimant subsequently retracted her resignation on 14 September 2021oncondition that it would be resolved by early January 2022.

31. On 19/10/21 the Claimant had a meeting with managers Lisa Claxton, Kirsty Burrows and Rebecca Harding. Ms Burrows told the Claimant that all the Claimant's payroll records would be checked and that a final figure for the Claimants current leave entitlement would be provided. It would probably be 133.47 hours per year. This would be confirmed by Christmas 2021 or early in 2022. The Claimant asked that HR would issue a letter confirming that the final figures would stand and that ACAS would not be able to change its stance later and claim repayment if an error was discovered. This was agreed to by the managers.

32. On 25/11/21 the Claimant received an email from Ms Claxton enclosing a draft letter stating that she was owed 124.32 hours leave which was roughly a year's worth of annual leave for her. It also stated that her ongoing leave entitlement was 133.64 hours per year.

33. On about 20 December 2021 the Claimant responded, and asked again for the draft letter to be finalised.

34. The Claimant did not receive a final letter so she chased the matter again in January 22. Ms Claxton said it would be provided by the end of January 22. The discussion about how the accrued leave would be taken was still under discussion.

35. On 1/1/22 22, Tam Hogue, another payroll administrator, who had just taken over from Marwa Taher in the Payroll department, started corresponding with Ms Claxton about the Claimant's entitlement and stated again that various bank holidays would have to be deducted from the Claimant's entitlement. The Claimant when she was copied in to this correspondence took the view that, as all but one of these bank holidays fell during the time when she was not at work, they should not have been deducted. She felt that she had already explained all this to Rebecca Harding.

36. On 31/1/22 Ms Claxton sent the Claimant an email attaching a draft letter (misdated 25/5/22 in the bundle) with the request "*please let me know if the letter is agreed*…" The email also asked the Claimant to "*provide the leave you have taken this year as requested below*". The draft letter stated that the Claimant was owed 122.43 hours holiday from previous leave years and that her current and future leave entitlements would be 133.64 hours (per year). It set out a proposal as to how the Claimant should use up her accrued holiday entitlement.

37. The Claimant replied the same day asking "*are they going to put something in writing like it was discussed - that ACAS will draw a line and even if they have made a mistake will not come after me 9 years later. It is just that I have been through so many HR individuals and each has something different to say. I don't wish to take leave and ACAS to say please pay us back (like happened with my pay and wages)".*

38. On 2/2/22 Ms Claxton sent the Claimant a text asking *"are you happy with the letter so I can send it to the pay team re annual leave …Did you want as paragraph in it re you wont be asked to pay back at a later date or do you want a separate letter?".* The Claimant replied by text "*truthfully not really would want something in writing about Acas drawing a line. Also want to be able to take my leave*…"

39. In early February 2022 the Claimant started suffering an increase in her migraine headaches which she attributed to the stress which the ongoing issue was causing her.

40. On 4 February 2022 Tam Hogue sent an email to Ms Claxton asking that the Claimant confirm her contracted hours and annual weeks worked from 1 May 2018. His email stated that the information was not on the system. When the Claimant was copied in on this email she was upset by it because she had previously provided this information to Payroll on several occasions. She had already provided the information to Barbara Hawkes in 2018, Quentin Turay in 2018, in 2019, and Marwa Taher in 2021.

41. Ms Claxton suggested in her evidence that these queries from Tam Hogue were simply for the purpose of obtaining information to ensure that in future the Itrent system would be able to correctly record and control the Claimant's holidays, and that the provision of this information would not have disturbed the proposed figures of accrued and ongoing holidays in the draft letter of 31/1/22.

42. However this suggestion is not supported by the terms of Mr Hogue's email of 4/2/22 which reads in part "*Please could you confirm Mandy's contracted hours and annual weeks worked from the 01/05/2018. This is so we can calculate and investigate this correctly. We believe this is the reason why annual leave has been causing issues on the system."*

43. Even if this Mr Hogue's motivation was not to disturb the figures in Ms Claxton's draft settlement letter of 31/1/22, it was not understood as such by the Claimant, who drew the natural inference that the figures in the last draft letter were once again subject to the possibility of further variation when Mr Hogue had obtained and processed the information which he was requesting.

44. Ms Claxton then told the Claimant that Mr Hogue had queried the school term dates which the Claimant had previously provided to payroll. Ms Claxton asked the Claimant if she had done something she shouldn't have. She asked the Claimant to provide proof of the school term dates. A short time later that request was withdrawn. However the Claimant felt that her integrity was being questioned.

45. On 7/2/22 the Claimant sent an email to Ms Claxton again requesting clarification of her leave entitlement for the next year, the amount of leave that she accrued per week and that her leave had been calculated in line with the case of Harper Trust v Brazel. She confirmed that she did not want to be paid in lieu in respect of untaken leave, which amounted to almost a year's leave and that instead she wanted to take the leave. She also confirmed again her working hours.

46. On 9 February 2022 the Claimant sent Ms Claxton an email in which she summarised and reviewed the long-standing problem she had had over her annual leave. She pointed out that she had been persuaded to withdraw her previous resignation, on the basis that the Respondent would resolve the issues, but 5 months later she was still being asked the same questions that she had previously answered.

47. Also that day the Claimant had a conversation with Ms Claxton. Ms Claxton did not refer to this conversation in her witness statement and said she could not recall its detail. I accept

the Claimant's version which she described as follows in her witness statement: "*Lisa said that the concerns had been resolved and referred to the fact that I had been provided with a figure in respect of my outstanding leave. I said that I had been relying on the representations that had been made that everything would be checked and that at that point a leave figure would be provided to me. I said that if they had not properly checked everything then potentially the leave figure would be wrong. Lisa was unable to confirm that all my concerns had been properly looked into and when I asked why I kept being asked for my work patterns and bank holidays Lisa just said that she did not know what to say to me."*

48. In substance this amounted to an indication by Ms Claxton that the Respondent had still not resolved her holiday entitlement. In fact, the Respondent had not resolved it so Ms Claxton was simply indicating the true situation.

49. On 10 February 2022 the Claimant sent her resignation email in the following terms "*Please accept this email as notice to terminate my employment and to give you contractual notice. I can't work in an organisation that does not treat me fairly and reasonably. As you aware from our conversation yesterday, it was last straw – as I said I feel like I have been treated like 'a fool' and I don't think anyone should be made to feel that way. The reasons I am leaving are as follows: I have been treated less favourably as a part time worker,I have been denied my right to take my full holiday entitlement since 2013. Acas has breached my contract Sex discrimination Discrimination by Association (disability) I honestly believe my whole experience at Acas would have been different if I was a full time worker. I was always honest about needing to work term time and the reasons why. I am devastated it has come to this."*

50. In her oral evidence the Claimant agreed with the following (which I put to her as a summary of the oral evidence she had given up until then) "*you resigned not because you were owed money or disagreed with the number of hours, - the problem was these were not final leaving you vulnerable to money being clawed back, and the doubt was compounded by them asking all sorts of fundamental questions about bank holidays and children's holidays, leaving you feeling the whole matter was up in the air*". I accept this as an accurate summary.

51. The Claimant's last day of employment was on 16/3/22.

52. During her notice period on 2/3/22 the Claimant raised a formal grievance and requested that it be dealt with by managers other than those who had already been involved in the issue. Ms Claxton decided to deal with the matter informally at least at first instance as she was permitted to do under the Respondent's grievance procedure. She regarded the issue

of the Claimant's leave as very nearly resolved and that handing it to others to start afresh would waste the work which had been already done and cause significant delay.

53. In response to the Claimant's final resignation and grievance the Respondent's payroll department started working on the matter in earnest and Mr Byford got involved from 1/3/22 onwards. He saw that the Claimant's holiday pay had been miscalculated from the beginning of her employment, because her holidays had not been added to her working days in calculating the holiday entitlement. This was a new point which had not been the subject of the prolonged discussions about the Claimant's pay which had been going on until then.

54. As a consequence, on 4 April 22 a person acting under Mr Byford's direction produced a calculation going back to the beginning of the Claimant's employment suggesting that she had been underpaid for holidays or allowed too little holiday throughout, as a consequence of which the Respondent owed her £9625.67. This calculation excluded the QB, which in Mr Byford's view (on my finding his view was wrong) was not a contractual entitlement. Hence he thought it would be correct to exclude it when calculating the shortfall in the Claimant's holiday payment.

55. The £9625.67 which was paid to the Claimant on 31/5/22, included sums which were not legally enforceable because of limitation. Mr Bayford nevertheless thought it should be paid in full because "this was the right thing to do".

56. If the Claimant had been compensated for the QB during her employment with the Respondent then the settlement calculation in respect of the period from 1/5/2020 would have been £522.25 more than the sum of £9625.67 which she was paid on 31 May 2022.

57. On 1/6/22 Ms Claxton sent a detailed grievance outcome confirming that the Respondent had made errors and that the Claimant had been paid the £9625 in settlement. This outcome was not sent to the Claimant but to her TU advisor in accordance with the Claimant's previous request. The advisor received the email but did not read the outcome letter until August at which point he wrote to Ms Claxton asking for an extension of time for lodging an appeal. The time limit for an appeal in the Respondent's grievance procedure is ten days after the outcome is received and hence by August the appeal request was very late. Ms Claxton having consulted with HR did not consent to a late formal appeal but on 10/8/22 sent a message to the TU advisor that if the Claimant wished to submit submissions through her solicitor (who was already advising the Claimant in relation to the dispute and shoes details were on the ET1) relating to her grievance or its outcome, these would be reviewed. The Claimant who had by this time received the Respondents ET3 in the instant proceedings, decided not to take up this offer.

The law

58. In order for an applicant to establish constructive dismissal she must establish a breach of contract by the employer.

59. The breach must be fundamental and repudiatory and going to the heart of the contract – ie sufficiently serious to have justified the employee resigning immediately. The test is whether the employers conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after she has discovered it and can walk out of her job without prior notice.

60. It is necessary that the employee left her employment with the employer in response to the breach and not for some other unconnected reason. It is sufficient for this purpose if the breach is one of the reasons amongst others for the resignation.

61. The employee must also not wait too long and so affirm the contract before resigning, but there is no fixed time limit in which the employee must make up her mind. Acts which positively affirm the continuation of the contract can amount to affirmation. It is possible to avoid affirmation by continuing to work under express protest. Mere delay does not constitute affirmation but it is possible for Employment Tribunal to infer implied affirmation from prolonged delay. Affirmation is fact sensitive, and the question is one of mixed law and fact.

62. The breach of contract can be of an express or an implied term.

63. There is a term implied by law in all employment contracts that an employer shall not without reasonable and proper cause conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

64. The implied term will be breached only where there is no reasonable or proper cause for the employers conduct.

65. The test as to whether there has been a breach of the implied term is an objective one. The motives of the employer are not determinative or relevant. If conduct, objectively considered, is calculated or likely to cause serious damage to the relationship between employer and employee, a breach of the implied term may arise.

66. The range of reasonable responses test does not apply in establishing whether a breach has taken place.

67. Even where an employer inadvertently fails to pay an employee or delays in paying them, that may still be a fundamental breach, particularly where it is repeated and persistent.

68. The breach can be by means of a single act or by a series of acts which cumulatively amount to a repudiatory breach, though each individual incident may not do so. In such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract – the question is – “does the cumulative series of acts taken together amount to a breach of the implied term?” This is the last straw situation.

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

70. Once an employer is guilty of repudiatory breach he cannot make amends so as to preclude legal acceptance. All the cards are then in the employee's hands and the employer can only make amends so as to try to secure affirmation

Conclusions

The unfair dismissal claim

71. The Respondent failed to enter into a written contract with the Claimant for any period after 30/4/2014. It should either have negotiated a mutually acceptable contract with the Claimant in 2014 or dismissed her and offered her re-employment on the new terms. Instead it left the contractual situation in limbo.

72. The Respondent also failed to issue her with an accurate updated statement of employment particulars pertaining to her holiday entitlements as required by section 4 ERA 1996.

73. It also failed to keep any proper leave records for the Claimant for years despite the fact that it knew that its ITrent system was not working in relation to the Claimant's leave. This situation persisted until the end of the Claimant's employment.

74. The Respondent also made unjustified claims against the Claimant that she had been overpaid on at least two separate occasions.

75. For these reasons the Claimant did not know what her leave entitlement was. Her concerns were not that she should get more holiday pay or paid leave but that she should have certainty. She did not want to exceed her proper entitlements and run the risk of a claw back.

76. From early 2018 onwards, the Claimant made the Respondent aware of the uncertainty and she asked for clarification. She also asked several times for a final letter or document from the Respondent to confirm the position.

77. Nothing effective was done for a period of several years despite the Claimant's persistent complaints.

78. Ms Claxton who became the new line manager in February 2019 became active in 2021 From then on, she appears to have tried to try to facilitate a resolution. Ms Claxton was herself unable to investigate the details of the holiday entitlement as she did not have the expertise, and acting reasonably was only able to try to encourage the Payroll department to properly investigate. Ms Claxton came close to achieving this in time. No criticism attaches to her.

79. However the draft settlement letter she issued to the Claimant on 31 January 22 was accompanied once again with a request to the Claimant from Payroll for further information, and quickly followed by further queries for the Claimant about bank holidays and school terms which made the Claimant realise that the Respondent's payroll department had still not looked into the matter properly and had not reached a final decision as to her entitlements.

80. Despite Ms Claxton's efforts, and the Claimant's repeated requests, prior to the Claimant's final resignation, the matter had simply not been investigated by the Respondent adequately. It was only after the final resignation, when Mr Bayford got involved, that the issue was properly addressed, but that was too late.

81. The Respondent should have told the Claimant what her entitlements were, and issued her with a proper statement of employment particulars. Instead the Respondent's pay department which had not kept proper records of its own, repeatedly asked her to provide basic information which the Respondent should have known already and properly recorded.

82. The Respondent was in fundamental breach of the implied term of trust and confidence by creating and then allowing this situation to continue up to the date of the final resignation. The particular breaches were persistent failures to allow her the correct amount of paid holiday and to fully and completely investigate her complaints about this within a reasonable period.

83. While the Respondents managers and the payroll department were working on the matter they did not do bring the matter to a conclusion before the Claimant's first resignation and they did not do so prior to her final resignation either.

84. The investigation up to the final resignation was carried out over an unduly prolonged period and notwithstanding what Ms Claxton said, it was still inconclusive by 10/2/22.

85. Contrary to the Claimant's previous request which had been made from October 2021 onwards, the Respondent did not provide a final statement of entitlement coupled with a written assurance that the Respondent would not re-open the matter. Offering to provide the letter when it was clear to the Claimant that in fact the payroll department was still investigating, so the matter was still not resolved, was not what the Claimant reasonably required.

86. The ongoing situation exposed the Claimant to uncertainty and stress and had a negative impact on her health, and an inability to take holidays without worrying about the consequences.

87. Pay is a matter which goes to the heart of the contract. Holidays for employees are a fundamental entitlement. The Respondent's failure to provide correct information and confirmation substantially interfered with her ability to identify and enjoy her entitlement.

88. I reject the Respondent's submission that by the time the Claimant resigned everything had been solved and all that was required was for the Claimant to agree to the letter of 31/1/22 and confirm how and by whom she wanted the letter of assurance to be issued. The issue of how the Claimant was to take accrued leave had not been decided. The Claimant had stated repeatedly from October 2021 onwards that she wanted HR to issue the letter so further questions about this were superfluous.

89. In any event and more fundamentally, at the same time that the 31/1/22 draft letter was produced, yet further queries and issues were raised by Mr Hoque and passed on to the Claimant to deal with. This made it obvious to the Claimant that even then the matter had not been properly investigated and a correct solution had not been provided.

90. I reject the Respondent's submission that the Claimant waived the breach or affirmed the contract after the breach so as to preclude her subsequent reliance on it. She withdrew her September 2021 resignation on the clear understanding that the Respondent would resolve the problem by January 22 at the latest. Hence, she was not accepting the breach but continuing to work subject to a proviso which specifically required the breach to be remedied within a defined period, which the Respondent failed to do.

91. In any event after the withdrawal of the September 21 resignation, the Respondent remained in continuing breach until the end of January 22 and beyond up to the day of the final resignation on 10/2/22.

92. Working a notice period thereafter until the last day of employment was also not affirmation as it was after the resignation which was not thereby withdrawn.

93. No question of affirmation or waiver arises. If I am wrong about this then I accept that the Claimant's conversation with Ms Claxton on 9/2/22 was a last straw which revived the breaches.

94. The Claimant resigned in response to the breaches/last straw and hence was constructively dismissed. The dismissal was unfair because it was not for any potentially fair reason and the Respondent acted unreasonably in all the circumstances.

<u>The holiday pay claim</u>

95. Although Mr Byford explained in his oral evidence that the QB paid absence benefit arose from Royal decree, the benefit was clearly incorporated as a right in the contract which the Claimant accepted by performance and hence it is and was a contractual right.

96. The written policy says that if not taken it should be paid in lieu on termination.

97. The definition of wages from which an employer is not allowed to make unauthorised deductions appears in section 27 of the ERA 1996. It includes *"any sum 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"*. The Claimant's QB entitlement falls within that definition.

98. The Claimant should have paid QBs but was not and the compensation paid to her in May 2022 did not include that pay.

99. I find that the Claimant has suffered a breach of contract and an unauthorised deduction in the amount of £522.24 which relates to the missing QBs in the period from 1/5/2020.

100. Hence the holiday pay claim succeeds as a contract claim alternatively as a claim under the statute.

Other matters

101. I make an award under Section 38 of the Employment Act 2002 of 4 weeks' pay = ie 4 x £392.34 = £1569.36. As confirmed by Mr Byford, the Claimant did not have an updated statement of main terms and conditions of employment. It is just and equitable in all the circumstances of the case to make the award at the higher amount, because the absence of the statement contributed to the dispute and secondly the Respondent is a body whose main purpose is to support and enable employment rights.

102. I do not make any uplift in damages under section 207A TULCR 1992. The Claimant submits that the Respondent failed to follow its own grievance guidelines. I reject this submission. The Respondent did provide an effective grievance procedure for the Claimant, which procedure produced a substantial award to her in excess of her legally enforceable rights. The Respondent also provided the opportunity for an appeal subject to a reasonable and justifiable ten-day time-limit, but the Claimant through her representative failed to avail herself of that opportunity at the proper time. Despite that, the Respondent offered to review any submissions which were presented in August but the Claimant failed to take up the offer. There is no basis for an uplift.

103. I do not made an award under Section 12A of the Employment Tribunals Act 1996. The Respondent's managers made an effort to resolve the matter, but unfortunately were unsuccessful before the final resignation. After the Claimant left she received a generous pay-out in excess of her enforceable legal rights. I find the matter falls short of the "aggravating features" necessary for such an award. Furthermore, if a penalty was paid to the Secretary of State it would have to be funded by the government which funds the Respondent.

Remedy

104. Both sides had produced a Schedule with similar figures. After giving judgment on liability I adjourned to allow the parties to try to agree the appropriate compensation. They agreed and the result was as follows:

Claimant's gross weekly pay: £392.34

Total for unfair dismissal £22,755.97, comprising:

Basic award: **£4,708.08**

Total compensatory award following application of statutory cap of 52 weeks' gross pay: **£18,047.89**, comprising:

Compensatory award for loss of earnings: £27,456.00

Pension loss: £2,880.44 (past); £4,800.74 (future)

Loss of statutory rights: £500.00

Total compensatory award before cap: £35,137.18

Total for unlawful deduction of wages/contractual claim: **£522.25**

d. Total for failure to provide written particulars of employment: **£1,569.36**

Therefore, the total compensation for successful claims is agreed at **£24,847.58.**

J S Burns Employment Judge
London Central
17/3/2023
For Secretary of the Tribunals
Date sent : 17/03/2023