RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Wright**

Respondent: **Securitas Security Services (UK) LTD**

Heard at: **East London Hearing Centre**

On: **13 and 14 January 2022**

Before: **Employment Judge Hallen**
Representation

Claimant: In person

Respondent: Mr. H. Zovidavi- Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **The Claimant's claim for unfair constructive dismissal fails and is dismissed.**

2. **The Claimant's claims for unlawful deduction from wages pursuant to section 13 Employment Rights Act 1996 (ERA) in respect of unpaid wages from June 2020 to 8 March 2021, 17 days accrued holiday pay for 2020 and one months notice also fails and is dismissed.**

REASONS

Background and Issues

1. The Claimant was employed as a Relief Security Officer by the Respondent from 1 August 2017 until 8 March 2021.

2. In his Claim Form received by the Tribunal on 22 March 2021, he brought complaints of constructive unfair dismissal and unlawful deduction of wages in respect of unpaid wages from 8 June 2020 to 8 March 2021, 17 days holiday pay and one months notice pay.

3. The Respondent in its Response Form dated 9 June 2021 disputed that the Claimant was unfairly constructively dismissed stating that he had resigned. It also disputed that he was entitled to 17 days holiday pay or any unpaid wages.

4. At the hearing before me, the parties agreed the issues as follows. With regard to the claim for constructive dismissal, the Tribunal had to decide if the reason for the Claimant's resignation on 8 March 2021 was a constructive (unfair) dismissal within the meaning of section 95(1)(c) ERA, specifically applying the following common law tests: Were the following actions or inactions of the Respondent actual or anticipatory, repudiatory breach(s) of a contractual term, express or implied (including the implied term of trust and confidence), by the Respondent: Failing to give the Claimant sufficient notice to return to work after a period of furlough to accommodate his childcare responsibilities as a single parent; thereafter telling the Claimant that he was AWOL and threatening him with disciplinary action; Failing to engage with ACAS in early conciliation. Did the Claimant resign in response to those breach(es)? Did the Claimant do anything to waive those breach(s) or affirm the contract, for example: expressly, in writing or otherwise informing the Respondent; or impliedly, either by calling on the Respondent for the performance of the contract; or acting in a way that showed they were treating the contract as ongoing? If the Employment Tribunal find that the Claimant was constructively dismissed, did the Respondent act reasonably in treating that reason as sufficient reason for dismissing the Claimant, applying section 98(4) ERA?

5. With regard to his claim for unlawful deduction from wages pursuant to section 13 ERA the questions for the Tribunal were has the Claimant suffered an unlawful deduction from wages pursuant to section 13 ERA? The Claimant claimed the following deductions: 40 weeks of unpaid wages from the end of his furlough leave in June 2020 to the date of resignation on 8 March 2021; 17 days annual leave accrued during 2020; one month’s notice pay. If there has been a deduction, was the Respondent authorised to make such a deduction, pursuant to section 13(1) ERA?

6. The Claimant at the outset of the proceedings confirmed that he did not wish to amend his claim to add a claim for less favourable treatment due to his sex. Although at the outset of the hearing he did raise issue of less favourable treatment due to his sex he agreed that these matters were not raised in his Claim Form or his witness statement. He was aware that if an application to amend his claim was granted that would involve a postponement of the hearing for the Respondent to deal with the new claim. As he had travelled from abroad having recently relocated to the United Arab Emirates in October 2021 to work as a Security Guard, he was anxious to have at least the liability aspect of his existing claims (as outlined above) dealt with by the Tribunal. Accordingly, now application was made by him to amend his claim to add sex discrimination.

7. The Tribunal had an agreed bundle of documents in front of it. In addition, I accepted 4 pages of additional documents from the Claimant marked C1 and one document from the Respondent marked R1. The Claimant gave evidence under oath and was cross examined. He had prepared a written witness statement. The Respondent was represented at the hearing by counsel and called one witness, Mr. Andrew Ellis who was the Deputy Security Operations Manager for the Respondent at the time. Mr. Ellis was subject to cross examination by the Claimant. The parties were also asked questions by me.

Facts

8. The Respondent is a security guarding business and is arranged in branches. The Claimant worked as a relief security officer for the branch named RC527. This meant that the Claimant could be asked to work anywhere at any time in the branch area. However, the Claimant was allocated to provide cover on the Westfield Stratford site. The Claimant's job description stated that he was required *"to provide security services at various sites across a defined geographical area as required".* It also stated in the person specification that he had "*To be available as and when called upon to cover shifts, occasionally at short notice."* He had to *"be willing and able to work shifts covering days, nights and week-ends".* The Claimant as a relief security officer had to make himself available as and when required by the Respondent.

9. The Claimants contract of employment also confirmed that a hight degree of flexibility was expected in the role of relief security officer. For example, it was stated that he would be offered work and if he unreasonably refused the work offered to him, any claim for payments or other benefits would reflect his refusal to accept the work offered to him. It was also confirmed that he would only be paid for the hours that he worked and that he was required to demonstrate considerable flexibility. In his role his hours would vary from time to time in accordance with business or customer needs. Shift patterns were subject to variation and any such changes would be notified to him in advance where reasonably practicable. He was also required to contact the company if he had not been contacted with work for a period of two weeks to ensure that he was ready and able to do work. The contract stated that it was his responsibility to make contact with his manager and to obtain shifts/work. If shifts were allocated to him but were refused, he agreed that they would be deemed as deductible from his contract wages as appropriate. With regard to holiday entitlement, it was put to the Claimant and agreed by him that he would not accrue annual leave entitlement where he had been absent, and the absence was unauthorised. He also agreed that there was no rollover of holiday entitlement for a holiday year which ran from 1 January to 31 December each year. The Claimant also agreed that if he did not undertake work, he would not be entitled to pay nor would he accrue holiday pay.

10. The Claimant sought to persuade me that the contract disclosed by the Respondent in the bundle of documents was not his actual contract. However, I did not accept this to be the case. The Claimant asserted that he was guaranteed a minimum of 10 shifts per month, and this was set out in his contract of employment. However, the Claimant did not state this in any correspondence with the Respondent proceeding his claim, in his Claim Form or his witness statement. As this was an important matter as it would guarantee a payment for at least 10 shifts per month amounting to £1,363.00, I would have expected him to have raised this issue before. The fact that he did not do so persuaded me that the version of the contract of employment in the bundle of documents was the correct version which applied to him. This contract did not make mention of a guaranteed minimum of 10 shifts per month or a minimum guaranteed payment.

11. He also sought to persuade the Tribunal that instead of accruing holiday entitlement for the holiday year in question, he accrued it for that holiday year and this was to be claimed and taken in the following holiday year. I did not accept this to be the case. I looked at the wage slips for the holiday year 1 January 2020 to 31 December 2020 and noted that the Claimant had accrued and was paid holiday pay for the months from July until December 2020 which he had accrued during that holiday year. Indeed, this

corresponded with his evidence to me that when he did not return to work in June 2020, he asked and was granted permission to take his holiday entitlement for that holiday year. In addition, the Respondent disputed the Claimants interpretation which it stated was not how the process works normally and I agreed with this interpretation. This was also consistent with the wage slips in the bundle of documents that confirmed payment to the Claimant of holiday pay for the holiday year 2020 that he accrued whilst he was on furlough leave from April to June 2020.

12. In April 2020, the Respondent put some of its staff in the Claimant's branch on furlough leave. On 20 April 2020 the Claimant agreed to be put on furlough leave from 18 April for 1 month. On 29 May 2020 the Claimant agreed for the period to be extended to 31 July 2020. On or around 3 June 2020 the Claimant agreed to be taken off furlough leave from 8 June 2020.

13. On or around 11 June 2020, Eilish Hughes, who worked as a Service Delivery Manager in the Claimant's branch spoke to the Claimant who stated that he agreed to be taken off Furlough from the 8 June 2020. However, the Claimant also stated that he was not able to work until 22 June. It was agreed that the Claimant would use annual leave that he had accrued during the current holiday year until he could return to work.

14. Around the same time Mr Taylor, a manager within the Claimant's branch contacted the Claimant to attend a training day to be appraised of the new regulations regarding COVID in order to return to the workplace. Mr Taylor discussed training day shifts with the Claimant to enable him to return to work. The Claimant did not attend the training the first training shift on 8 June because he was only given limited notice of it. Indeed, the Claimant did not attend the required training and it was later agreed with him 23 November 2020 that he could be provided with on the job training with regard to the new regulations when he was able to attend work. This was agreed with the Claimant so that he would not be unduly hindered in a return to work.

15. The Claimant was paid for 23.58 hours of holiday in August 2020, 58.95 hours in September 2020, 23.52 hours in October 2020 and November 2020 respectively and 44.38 hours in December 2020. These payments extinguished the Claimant’s holiday pay entitlement for the holiday year 2020.

16. By an email dated 19 November 2020, the Claimant contacted the HR section and not his managers to state that he had not been offered any shifts or a return from furlough. The Claimant explained that his holiday pay had been topped up with benefits which covered his shortfall; and that his son was due to start a college course in September, but the pandemic meant that there were issues with this. The Claimant did not state his dates of availability to work or that he was ready to return to work as was required in his contract of employment. Indeed, the Claimant stated that his preference was to use his annual leave and that moving forwards he wished to review the situation in January 2021.

17. On or around 20 November 2020, the Respondent contacted the Claimant to find out about his position. The Claimant stated that he had not had the training so could not attend work. By email from Andy Ellis, Deputy Security Operations Manager dated 23 November 2020, the Claimant was asked again for his availability to attend work. Mr Ellis had previously attempted to contact the Claimant by telephone but could not get through to him. As a consequence, he sent his email to the Claimant to clarify some information that he needed as well as asking the Claimant to provide his availability for December

2020 and January 2021 so that the Respondent and could schedule shifts for him. Mr Ellis also made it clear in this email that the Claimant was not required to attend training and that he would receive on the job training with regard to the new regulations when he returned to work. The Claimant responded on 23 November 2020, that currently he was on annual leave, but that he would provide a clearer explanation regarding his availability on or before 27 November 2020.

18. On 26 November 2020, the Claimant emailed the Respondent to state that he did not request any shifts between June to November 2020 as he had made a decision to claim benefits. The Claimant claimed that pre Covid, he could book shifts with 72 hours notice, but now he needed 3 weeks notice. The Claimant stated that even if he could not do the work, he expected to be offered 36 hours per week, however he did not expect pay for no work. The Claimant stated that it would be better to look at things again in the new year. The Claimant also requested annual leave for December 2020 of 18 and 19 December. As a consequence of receiving this email, Mr Ellis instructed another manager, Mr Islam 2 book shifts for the claimant with a minimum of three weeks notice and to inform the Claimant that this was happening.

19. On 11 January 2021, Mr Ellis received an email from the Claimant. The Claimant at this stage asked to be re furloughed. By this stage the Claimant had not made any substantive effort to return to work since the end of his furlough leave on 8 June 2020. The Respondent was not re-furloughing any security officers because it had work for all of them to undertake at the Westfield Stratford site. In his email of 11 January, the Claimant asked for the matter to be resolved within 14 days failing which he would contact ACAS in respect of the early conciliation process with a view to a potential claim for breach of contract and constructive dismissal.

20. Mr Ellis responded to the Claimants email on the same date explaining that the Claimant was required to provide the Respondent with his availability pursuant to his contract of employment for the Respondent to fulfil its obligation to provide the Claimant with work and it was stated to him that he had failed to do this either in person or through the Respondents portal or by a simple phone call. Mr Ellis asked him to rectify the situation and offer his availability for the next three months so that be Respondent could meet its obligation to allocate shifts to him. He also indicated in his email that he had held off with any formal action with respect to the Claimants unauthorised absence to give the Claimant an opportunity to pick up the phone to discuss the matter and offer the Respondent shifts that he could undertake and which the Respondent could accommodate in accordance with the Claimants personal needs. The Claimant was warned that if he did not offer his availability a formal process regarding his absence without authority could be started against him. He indicated that this process could be avoided by the Claimant simply informing the Respondent of his availability and the Claimant was urged to pick up the phone and give the Respondent a reasonable chance of meeting the Claimants expectations which could accommodate his childcare responsibilities.

21. As the Claimant did not offer any shifts, the Respondent through Mr Ellis emailed the Claimant on 28 January 2021. Mr Ellis told the Claimant that they had not received any dates of availability from the Claimant as requested and that he needed him to contact the Respondent so that the company could understand the Claimant’s position and work out a solution. The email also attached a letter dated 28 January 2021, warning the Claimant that it was a condition of his employment that he attend work when rostered to

work. That he should contact Mr Ellis to explain why he has not attended work by 3 February 2021. The Claimant responded on 28 January that he could not forward availability due to childcare issues. He also confirmed that he had started the ACAS pre claims conciliation process in respect of the action he had previously mentioned.

22. By email from Mr. Islam dated 29 January 2020, the Claimant was informed that he had been sent shifts for February 2020 some of which towards the end of February the Claimant informed the Tribunal he could do as he was given sufficient notice of them. However, he chose not to confirm that he could do them because he expected the Respondent to make a response to the ACAS process and '*he was not aware who Mr. Islam was*' and '*he was not his manager'*. This was despite the fact that the Claimant was told that a new manager, Mr. Islam was dealing with shift allocation and that the Claimant was to contact this new manager. Instead, the Claimant did not offer any more shifts saying that he was awaiting guidance from ACAS as to how to move forward. When I asked him if ACAS had advised him to take legal advice from an independent solicitor the Claimant confirmed that it had but that he did not see the need to take such advice at his time. He also said that ACAS had not advised him to not engage with his employer during this time as it sought to resolve the issues directly with the Claimant.

23. The Claimant did not contact the Respondent by 3 February 2020 and so by email dated 10 February 2020 from Mr Ellis asking the Claimant to get in touch to resolve the situation, the Claimant was sent a letter asking the Claimant to attend an absence from work meeting on 12 February between 1500-1800 by Teams so that the Respondent could understand the Claimant's situation and resolve it to his satisfaction. The Claimant was warned that disciplinary action may be taken should he fail to make contact. He was reminded of his contractual obligation that he was required to attend work when rostered to do so.

24. It was not until 10 February 2020 that the Claimant explained that it was because he had to pay for childcare in advance and that if he did not cancel the child care within 48 hours he would lose his payment, which was why he could not attend work. It was in this email that the Claimant stated that he again wished to be re furloughed. He said again in the email that he had contacted ACAS and that the conciliation period ended on 7 March 2021.

25. By email dated 8 March 2021 to Mr Ellis, the Claimant resigned his employment stating that it was the Respondent's failure to engage with ACAS from 25 January to 8 March 2021 that was the reason for his resignation. He stated that he would be making a claim for breach of contract and constructive dismissal. The resignation was with immediate effect and without the one months notice as required in the Claimants contract of employment. By letter dated 16 March 2021, Mr. Ellis accepted the Claimant's immediate resignation as the Claimant had made it clear that that he was not prepared to accept any shifts event with 3 weeks notice that he needed to accommodate his childcare arrangements. The Respondent subsequently confirmed that it had paid the Claimant for holiday pay for the holiday year 2020 and as the Claimant had not worked for the holiday year 2021, he had not accrued any holiday entitlement under his contract for that year pursuant to his contract of employment. In addition, as he was taken off furlough leave on 8 June 2020 with his agreement and had not undertaken any shifts since that date he was not entitled to any pay.

Law

Constructive Dismissal

26. Section 95 ERA states (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

27. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment (Western Excavation Limited v Sharp). "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

28. Whether or not the employer intended to break the contract is irrelevant (Bliss v South East 713 [1987] ICR 700 (CA)).

29. It is an implied term of any contract of employment that the 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: (Malik v Bank of Credit and Commerce International [1998] AC20 34h -35d and 45c-46e).

30. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Limited [1981] ICR 666 at 672, Morrow v Safeway Stores [2002] IRLR 9.

31. The test of whether there has been a breach of the implied term of trust and confidence is objective (Lord Nicolls, Malik page 35c) The conduct relied on as constituting the breach must impinge on the relationship that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence that the employee is reasonably entitled to have in its employer. A breach occurs when the proscribed conduct takes place: See Malik.

32. Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach, but it is not a legal requirement: See Bournemouth University v Buckland [2010] ICR 908 at para 28.

33. The Claimant must not affirm the breach: Lord Denning said in Western Excavating v Sharp (referring to an employee who had been the subject of a repudiatory breach): "the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged."

34. The Court of Appeal's decision in Marriott v Oxford Co-operative Society [1970] 1 QB 186 is an authority for the proposition that, provided the employee makes clear their objection to what is being done, they are not to be taken to have affirmed the contract by

continuing to work and draw pay for a limited period of time after the breach, even if their purpose is to enable them to find alternative work.

35. The Claimant must show that it resigned in response to this breach, not for some other reason. However, the breach does not need to be the sole or primary cause of the resignation; only an effective cause (Nottinghamshire County Council v Meikle [2004] IRLR 703).

36. In Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR, the Court of Appeal approved the guidance given in Waltham Forest LBC v Omilaju (at paragraph 15-16). Those authorities give the following guidance on the "last straw" doctrine:-The repudiatory conduct may consist of a series of acts or incidents some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: Lewis v Motorword Garages Ltd [1986] IRLR 157, per Neil LJ (p167C). In particular, 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? Although the final straw may be relatively insignificant it must not be utterly trivial: the principle that the law is not concerned with very small things is of general application. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. The act does not have to have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant. The "final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. The last straw must contribute, however, slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality referred to. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. If an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign, soldiers on and affirms the contract s/he cannot subsequently rely on these acts to justify a constructive dismissal unless s/he can point to a later act which enables her to do so. If the later act on which s/he seeks to rely is entirely innocuous, it is not necessary to examine earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle. The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer's conduct will have cross the Malik threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the Malik term. Even when correctly used in the context of a cumulative breach, there are two distinct legal effects to which the "last straw" label can be applied. The first is the legal significance of the final act in the series that the employer's conduct had not previously crossed the Malik threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that

threshold at an earlier stage, but the employee has soldiered no until the later act which triggers her/his resignation: in this case by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so. The affirmation point discussed in Omilaju will not arise in every cumulative breach case: "There will be such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed, in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)." (per Underhill LJ).

Unlawful Deduction from Wages

37. Under Section 13 of the Employment Rights Act 1996, "(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."

Conclusion and Findings

38. In this case I had to ask myself if the employer was guilty of conduct which was a significant breach going to the root of the contract of employment, or which showed that the employer no longer intended to be bound by one or more of the essential terms of the contract. The Claimant said that the following actions or inactions of the Respondent were repudiatory breaches of his contract of employment whether express or implied (including the implied term of trust and confidence), by the Respondent: Failing to give the Claimant sufficient notice to return to work after a period of furlough leave to accommodate his childcare responsibilities as a single parent; thereafter telling the Claimant that he was AWOL and threatening him with disciplinary action; Failing to engage with ACAS in early conciliation.

39. I did not find that the Respondent was in breach of the Claimant's contract of employment at all and that none of the above examples cited by the Claimant amounted to a breach of contract by the Respondent. I shall deal with each of the examples cited by the Claimant in turn.

40. With regard to the allegation that the Respondent failed to give the Claimant sufficient notice to return to work after a period of furlough leave to accommodate his childcare arrangements as he was a single parent looking after a 13-year-old son, I find that the Claimant was given sufficient notice to return from furlough leave on 3 June 2020 with a return on 8 June 2020 which was a period of five days. He was initially required to undertake refresher training before he could return to work, but he offered the Respondent no alternative dates for this when he could not attend the first date offered to him for the training on 8 June. Eventually, on 23 November 2020, the Respondent via Mr. Ellis confirmed that the Claimant could return to work without undertaking this refresher training and could receive briefings whilst back at work to bring him up to speed. In addition, I find that the Claimant as a relief security officer had a contract of employment that required him to be extremely flexible which he accepted in evidence. It was a duty upon him to offer the Respondent dates for shifts that he could undertake. I find that the Claimant between June and December 2020 did not comply with his contractual obligation to offer shifts to

the Respondent. He used the remainder of his holiday entitlement for the holiday year 2020 and also as he said in his emails of 19 November 2020 and 26 November 2020, he claimed state benefits. I find that he was not complying with his contractual obligations to offer the Respondent any shifts and to fulfil his role off a relief security officer during this period of time. It seemed to me that what the Claimant really wanted to be reinstated to furlough leave/pay again as he made clear in his emails of 11 January and 10 February 2020. As the Respondent had made clear to the Claimant in June 2020 it had plenty of work for security officers at the Westfield centre in Stratford and would not be offering these security officers furlough leave again. It seemed to me that the real reason why the Claimant did not wish to return to work as was self-evident in his emails was that he wished to be re-furloughed and receive furlough pay.

41. With regard to the Claimant's assertion that he was threatened with disciplinary action because he was absent without leave, this did not amount to a breach of contract in my view. I find that Mr Ellis in his emails from 23 November 2020 onwards was attempting to understand the Claimants failure to offer shifts to the Respondent as he was contractually obliged to do and attempting to facilitate the Claimant's personal requirements so that he could return to work. It was also clear to me from the Claimant did not offer the Respondent shifts for the period June 2020 until the end November 2020. From the Claimant's own email of 26 November, it appeared that he was not ready to return to work until at least January 2021 as he was receiving is accrued holiday pay for the holiday year 2020 and also state benefits. It was also clear that the Claimant really wanted to remain on furlough leave. Once the Respondent had not got a satisfactory response from the Claimant in regard to his continued absence and failure to offer any substantive availability, it was only natural for the Respondent to ascertain why this was in an attempt to accommodate the Claimants needs. When the Claimant continued to fail to engage in this process, it was again only normal for the Respondent to warn the Claimant that it would consider taking disciplinary action against him if he did not engage with an informal process to facilitate his return to work. The Respondent was only complying with its legal duties in warning the Claimant that if he failed to engage with the Respondent, it would move on to a formal disciplinary process. The Respondent never did move on to such process because it still wished to attempt to resolve the issues informally by understanding the Claimant's position and offer him shifts that he would be happy to undertake giving him the notice of them that he wanted. The Claimant did not engage with this process but chose instead to resign from his employment with immediate effect on 8 March 2021.

42. The Claimant stated reason for his resignation in his email of 8 March 2021 was that the Respondent had failed to engage with the ACAS pre claims conciliation process. This in itself could not be a breach of contract as there was no contractual provision either express or implied in the Claimants contract of employment that the Respondent was required to engage in such process. Indeed, it was open to the Claimant to ask ACAS to issue him with a conciliation certificate straight away without engaging with the Respondent at all. I could not see how this could amount to a breach of contract let alone a fundamental breach of contract. However, regardless of this, it was clear to me that the Respondent was making every effort to engage with the Claimant directly to ascertain his position, his personal circumstances and the reasons why he was not able to offer the Respondent any shifts. The Respondent reiterated on more than one occasion that it wished to meet the Claimant to discuss these matters, but the Claimant did not engage in this process. There appeared to be no good reason for the Claimant failing to do this as he admitted to me that ACAS did not advise him not to engage with his employer whilst

the conciliation process was continuing. Furthermore, the Claimant indicated to me that ACAS advised him to consult with an independent solicitor about his personal circumstances and take independent advice, but the Claimant never did so. It seemed to me that as the Claimant was still an employee of the Respondent at this stage the sensible course of action would have been for him to engage with Mr. Ellis to facilitate a return to work. There appeared to be no sensible reason for failing to do so. Nor was there a sensible reason given to me as to why he did not take independent legal advice on his circumstances and how he should move the matter forward. Nevertheless, he resigned from his employment by email dated 8 March 2021 without engaging with the Respondent directly in terms of discussing his personal circumstances with the Respondent and how it could facilitate his return to work. The Respondents actions in attempting to get the Claimant back to work and make adjustments to accord with the Claimants personal circumstances appeared to be the actions of a reasonable employer and they did not amount to a breach of contract let alone a fundamental breach of contract.

43. With regard to the Claimant's claim for 17 days accrued holiday pay, I find that the Claimant accrued holiday entitlement for the holiday year 2020 which commenced on 1 January 2020 and ended on 31 December 2020. I find that on the basis of the pay slips in the bundle of documents that the Claimant was paid holiday entitlement for this year in its entirety. I also find that the Claimant had accrued no holiday entitlement as he agreed that for the holiday year 2021 which started on 1 January 2021, as he was not at work and therefore contractually not entitled to accrue holiday entitlement. His contract of employment confirmed that he would not be entitled to accrue contractual benefits including holiday entitlement whilst he was on unauthorised absence. This absence was unauthorised. Therefore, for this year, the Claimant was not owed any holiday and his claim for 17 days holiday pay was dismissed. As the Claimant had undertaken no shifts for the Respondent between 8 June 2020 and 8 March 2021, he was also not entitled to any pay as he rightly admitted in evidence as his contract did not entitle him to pay if he did not work. Therefore, his claim for pay for this period was dismissed.

44. Finally, with regard to the Claimant claim for one months pay in lieu of notice, as the Claimant resigned from his employment and this was not due to a constructive dismissal, he was not entitled to one months pay in lieu of notice.

Employment Judge Hallen

20 January 2022