**Case Number: 1304258/2024**

# EMPLOYMENT TRIBUNALS

**BETWEEN**

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| **Claimant:** | **Mrs Kelly Rodgers** |
| **Respondent:** | **DAVP Limited T/A Boulevard** |
| **SITTING AT:** | **Birmingham Employment Tribunal** |
| **ON:** | **18 and 19 September 2024** |
| **BEFORE:** | **Employment Judge G Smart (Sitting alone by CVP in public)** |

# RESERVED JUDGMENT

On hearing Mr. James Rodgers (Claimant's Husband) and Mr. Dominic Portman (Managing Director) for the Respondent:

1. The Claimant was constructively dismissed.

2. The Claimant's claim for unfair dismissal is well founded and succeeds.

3. The Claimant's claim for Breach of Contract for the Respondent failing to pay pension payments into the pension scheme is well founded and succeeds.

4. The Claimant's claim for notice pay succeeds.

5. The Claimant's claim for unlawful deduction of wages is well founded and succeeds for non-payment of wages for the months of January, February and March 2024.

6. The Respondent's counter claim is not well founded and is dismissed.

# REASONS

**The issues to be decided**

1. The issues were discussed and agreed on the first day of the hearing. They are annexed to this judgement at Annex one.

**Preliminary issues at the hearing**

2. The hearing had three preliminary issues as follows:

2.1. The Respondent's application to strike out the case on numerous grounds.

2.2. There was no list of issues.

2.3. It seemed that the Claimant had failed to put in a defence to the respondent's counter claim/employer's contract claim.

3. The strike out application was heard and as part of hearing the submissions about that, both sides' cases were clarified.

4. I refused the application for a strike out because it was not appropriate to strike out the case. I say this because there were many facts still in dispute, a fair trial could still take place, the Claimant had not deliberately breached any Tribunal orders it was simply that the Claimant hadn't been sent them properly, I could find no abuse of process, the costs situation for proceedings in another court was irrelevant to these proceedings and it would not further the overriding objective by dealing with cases justly to have struck out the case.

5. Detailed oral reasons were given at the hearing which will not be repeated here.

6. The issues were clarified as part of that application and I organised for the list to be sent to the parties on day 1 whilst I was reading into the case to allow them time to check and comment on the list before we started the evidence on day 2.

7. The Claimant had not been sent the ET3 form correctly by the tribunal or indeed any other correspondence about the case. This was because the tribunal had been sending the correspondence to an incorrect email address. The Claimant therefore did not receive any Tribunal orders or the detail of the employer's contract claim until on or around 8 August 2024.

8. Once received the Claimant had submitted the response to the counter claim in the form of a witness statement which specifically referred to the counterclaim and specifically responded to it. This was well within the 28 days required from the date the contract claim was sent to the Claimant. It was therefore inappropriate to issue any default judgment about the counter claim. That claim would be heard and considered with the other issues.

9. That dealt with all the preliminary issues.

## Evidence

10. There was a joint agreed bundle of documents of 368 pages in length according to the pdf viewing window or 363 pages if looking at the pagination.

11. I heard evidence from the Claimant herself and from Mr. Dominic Portman the Company's Managing Director.

12. There were numerous witness statements in the bundle that appeared to

have been used for separate High Court Injunctive Relief Proceedings about the Claimant's application for the Respondent to be wound up.

13. I enquired if any of the witnesses other than the Claimant herself and the Respondent's Mr. Portman would be giving evidence and both said no other witnesses were able to be present. The other statements in the bundle would therefore be given appropriate weight given they were unsworn and had not been tested in cross examination.

14. The untested statements were from the following people:

    14.1. Andy McEvilly
    14.2. Aurelia Cox
    14.3. Dave Sheldon-Hadley
    14.4. Phil Carroll
    14.5. Lucy Chambers-Bligh
    14.6. Lindsay Probert.

15. The hearing was concluded with submissions and I reserved judgment because there was insufficient time to deliberate and come to a decision.

## Findings of fact

### Agreed facts and common ground

16. The Claimant was employed as a Distribution Manager.

17. Her key duties and responsibilities were to oversee the warehouse at the respondent's Shrub Hill site and deal with returns promptly amongst other duties.

18. The Claimant's normal pay date for wages was between 26 and 28 of each month inclusive.

19. It was not in dispute that the effective date of termination of employment was 1 April 2024 when the Claiamnt resigned without notice. The documents support this.

20. It was not in dispute that the Claimant had more than two years' continuous service to bring her unfair dismissal complaint. The documents support this agreed fact too.

21. It was an agreed fact that the Claimant was entitled to one calendar month's notice if she were to succeed in her notice pay claim.

22. It was an agreed fact that the Respondent had failed to pay the Claimant her wages for January, February and March 2024.

23. It was common ground that the Company had failed to pass on pension payments deducted from the Claimant's wages into the NEST pension scheme for the months of November and December 2023. The respondent stated that these payments had not been brought up to date with NEST because they had been set off against the loss the respondent said it had

suffered because of the Claimant's alleged gross misconduct.

24. It was also an agreed fact that the Claimant had done work during those months.

25. When the Company began to have financial difficulties as a result of a policy change by Amazon, the Claimant had stayed in post working her usual hours and had encouraged others to do so as well.

26. The backdrop to this case dates from when the Respondent's selling platform, Amazon, froze the income of companies for product sales proceeds whilst auditing was carried out to ensure compliance with its rules and usage procedures.

27. This caused an overnight cash flow crisis for the Company, meaning it was very difficult for the Company to pay wages to its employees.

**Amazon and its behaviours**

28. The Respondent is a retailer of consumer products through online markets such as eBay and Amazon. It has been trading for about 8 years.

29. The Respondent alleged the stock is processed on a sell or return basis. Unsold stock is returned to the supplier.

30. A natural consequence of receiving or selling any stock is that sometimes, consumers are not happy with their purchases and/or the stock occasionally is damaged in transit from the supplier or at the warehouse itself.

31. It was not challenged that there are strict time limits for when unsold stock, or stock delivered from the supplier already damaged has to be returned to avoid the Respondent accepting financial responsibility for it.

32. Amazon is the main market for the Respondent's consumer business and it has a set of policies that govern how people that use its platform must behave when processing transactions, dealing with customer queries and returns. Those policies are focussed on ensuring that consumers who use Amazon have their consumer and other rights protected.

33. It was not challenged that if purchases are not received by the consumer within the applicable timeframes, then a full refund becomes due to the consumer.

34. Amazon also has a set of data that it keeps about all its retailers using its platform. Mr. Portman described these as scoring metrics and they are essentially performance criteria about transaction and delivery times and adherence to policies.

35. Therefore, late returns, slow processing or dispatch of orders or a failure generally to manage sales within Amazon's rules will automatically lead to losses for the Respondent of varying degrees dependent upon the failure identified.

36. Amazon conduct seller audits on a biannual basis. This includes assessing the product listings to check they are accurate and compliant and also analysing the seller's sale and trading history.

37. In summary terms, money for goods sold using Amazon is paid into the seller's account within the Amazon platform subject to terms and conditions of use. Amazon will then periodically pay the sales proceeds remaining, after any fees or penalties have been debited, to the seller.

38. In August 2023, Amazon announced a policy change. That change was to freeze the accounts of the sellers when audits were taking place. There was very little warning of the freeze and it meant that overnight, thousands of sellers both small and large in their business size who were expecting turnover cash to arrive in their business accounts were not sent their money.

39. This caused major cash flow implications for the Respondent and many other retailers. Some went out of business after this policy change. The policy change was catastrophic for some organisations either because they had money in Amazon's account they couldn't access to pay their bills, tax or other liabilities such as rent for example or because Amazon took months to finish their audits, meaning that ordinarily cash rich organisations began to struggle with cash flow as their reserves became depleted over time.

40. There are of course many ways for a company to respond to such a cash crisis. The Respondent chose to focus on seeking new sales platforms, keeping stock turning over, sourcing external funding and trying to decrease its dependence on Amazon as a marketplace, whilst simultaneously engaging with Amazon to try to solve the problem.

41. Unfortunately, this strategy was at the expense of all its employees because Mr. Portman decided not to pay their wages.

42. Consequently, the Respondent relied on the good will of its employees and expected them to work whilst not being paid.

43. All the Claimant's complaints stem from this backdrop and how the situation was subsequently managed by Mr. Portman.

44. On 19 October 2023, Amazon commenced an audit of the respondent and froze all of its trading funds.

45. The audit was completed relatively quickly and on 31 October 2023 the respondent was notified by Amazon that it had passed the audit.

46. However, for reasons unknown there had been ongoing delays by Amazon in unfreezing the trading accounts of some sellers. The respondent was one of those sellers.

47. Sporadic releases of funds were occurring thereafter. However, in January 2024, Amazon re audited the respondent and it passed the audit for a second time.

48. Again however, rather than receive a full release of funds, there were similar

sporadic releases of money to the respondent from amazon.

49. It was not challenged that the knock on effect of not receiving full trading funds for the best part of six months meaning that the respondent was having difficulty in meeting the costs of suppliers such as couriers, which in turn had a knock on effect with fulfilling amazon's metrics in delivering goods to consumers within set timeframes, this led to server financial and operational difficulties and the imposition of trading penalties imposed on the respondent by Amazon.

**The Shrub Hill Site**

50. The Shrub Hill warehouse is where the Claimant was stationed.

51. Photos of the warehouse both inside and out were in the bundle as either separate photos or a WhatsApp photo message from Mr. McEvilly the Respondent's former Assistant Operations Manager. These photos were said to have been taken in early 2023.

52. Having read the statements of the staff who worked there and looked at the photos of the site it is fair to say that the Shrub Hill warehouse was an old dilapidated building with a leaking roof in several places, meaning that if the weather was poor rain water would easily enter the warehouse and drip onto the products and floor.

53. Photos of the ceiling in the warehouse show areas of what appear to be damaged and discoloured wooden ceiling slats with what appears to be thick black mould growing on them and on the walls they touch.

54. There is evidence in the photos that the stock kept inside the warehouse needed to be covered by plastic sheets, black polyethene or other similar materials in several places around the warehouse to protect it from water, despite it being stored indoors.

55. In at least two photos, there is a plastic tray or a large bin placed under leaking areas to collect water. One bin, about the size of a wheelie bin, is almost completely full of water although I have no idea how long it took for the bin to become that full.

56. There are areas of the walls and floor where the paint or floor coating is coming off, in my view, likely to be because of the water damage and damp environment clearly depicted in the photos.

57. Consequently, I find the warehouse was untidy and neglected.

58. The warehouse shelves seem to be very full and consequently stock storage of larger boxes appears to be taken place by the boxes being placed on the dry areas of the floor.

**The Claimant's contract of employment**

59. The following clauses are relevant to this claim and its disposal:

*"**4. PAY***

*The Company shall pay you at the rate and intervals stated at paragraph 8 of the Summary. The Company reserves the right to alter the time, method and frequency of payment by issuing you with reasonable notice of any such change. The Company shall review your pay annually at its discretion. Receipt of a pay increase one year creates neither the right to nor expectation of a pay increase in any subsequent year.*

***18. DEDUCTION OF REMUNERATION***

*18.1 The Company reserves the right at any time during or in any event on termination to deduct from your remuneration any monies owed to the Company by you including but not limited to any missing property including petty cash that was in your control or was your responsibility, excess holiday, outstanding loans, advances and the cost of repairing any damage or loss to the Company's property caused by you. In the event of shortages arising of cash or of stock the Company reserves the right to recover an equitable amount from any payments due to any employee concerned.*

*18.2 Should you fail to give proper notice to terminate your employment as stated at paragraph 17 of the Summary or take unauthorised absence and have already received your current month's salary, the Company reserves the right to deduct the amount of pay which has been overpaid (taking the last day at work as the last day for which pay becomes due) from the following month's salary or from any other sums due to you on termination of your employment.*

***24. CHANGES IN YOUR TERMS OF EMPLOYMENT***
*The Company reserves the right to make reasonable changes to any of your terms and conditions of employment. You will be informed of any such changes in writing, the changes taking effect from the date of the notice. Significant changes to your contract of employment will be notified to you not less than one month in advance."*

**The Claimant and the unpaid wages**

60. In October 2020 the claimant commenced her employment with the respondent initially as a warehouse operative and she was then promoted on 8th March 2021 to the distribution centre manager of the shrub hill warehouse.

61. In November and December 2023, the Respondent failed to pay pension contributions deducted from the Claiamnt's and other employee's wages into he NEST pension scheme. Mr. Portman explained whilst being questioned that those payments had not been made because of *"administrative error".* I believe him on this point, there was no reason not to and it essentially wasn't challenged by the Claimant.

62. It is also important to note that the money for those pension payments at that time was available because it had been deducted from the wages of the affected employees.

63. As a result of the financial crisis that company was facing, Mr Portman had a meeting with the claimant on 24 January 2024.

64. During said meeting, Mr Portman explained the situation to the claimant which she believed, and he advised the claimant that the company was unable to pay her salary on time and also the salary of other employees on time. However, he reassured her the claimant that the release of funds by Amazon was expected imminently and that the company was also expecting a payment due from HMRC.

65. At this point the claimant said that she was under the impression that her salary would be around a week or so late and was therefore content to continue working because this would not affect her financial situation too badly.

66. By 8 February 2024, claimant's wages had not been paid. She decided to carry on working.

67. There were various announcements made by Mr Portman to the Company's employees through its communication facility called Slack.

68. The first communication of note is on sent to employees on 8 February 2024. It reported successes with finding a new funder as a go between with Amazon freeing up cash flow. Mr. Portman also informed the employees that he had signed up with a new cleaning products supplier. The combination of these successes would mean an increased cash floor and increased turnover for the Company according to Mr. Portman. He also reported that the Company had no concerns about its business model or longevity. Mr. Portman said he *"appreciated everyone's loyalty and hard work as the business has navigated a challenging period."*

69. On 9 February 2024, an employee Phil Carroll responded to Mr. Portman asking for a timeline for when the pay situation might be resolved, because a timeline was missing from the announcement the day before. Mr. Portman gave a timeline of *"…We are aiming for a resolution in the next few weeks".* Mr. Portman also said that he could not give a definite date because to do so could mislead the employees and he was reliant on third parties to release funds and couldn't be sure when that would happen because dates had ben provided by Amazon previously and then the funds had not materialised.

70. By 12 February 2024, the Claimant emailed Mr. Portman requesting a meeting to discuss the situation because she had still not received her wages.

71. It is important to note that the email starts *"Further to informal conversations and messages regarding the current financial situation and non payment of salaries I feel it is important that I formalise the situation."* Consequently, this email was a formal grievance. The Claimant raises the issue of her salary not being paid and wants a discussion to come to a resolution.

72. The meeting took place on 15 February 2024. The Claimant attended with her husband. Mr. Portman attended alone. The outcome was that although the situation was not good, she was reassured by Mr. Portman stating that

there were to be funds coming in from various sources despite no timescale being given. The Claimant believed Mr. Portman when he said this was a temporary cash flow issue and given the positive light she says he gave to the information provided.

73. In my view, this meeting was effectively a grievance meeting to try to resolve the issues the Claimant had with her lack of wage payments.

74. On 16 February 2024, there is a further announcement from Mr. Portman via Slack. This explains that funds have still not become available and he was escalating matters with Amazon and its Managing Director.

75. On 22 February 2024, there was a further update from Mr. Portman. Some funds had been released. However, he had chosen to use that money to fulfil orders from customers rather than pay any wages to his employees or contractors. He reported that the Company at its worst point had been running at 92% below projections and was now running at 50% below projections so things were starting to improve. He also shared links to hardship and mental health helplines to support employees.

76. February's wage payment was not then paid.

77. On 15 March 2024, there was another announcement. The features of it were the same as previous announcements. Money was said to be due to the Company imminently and that would enable the Company to *"pay out a substantial amount of what is owed to everyone. Final amount TBC on the basis that they pay out as their escalations team has promised."*

78. It was not challenged by the Respondent that on 21 March 2024, Mr. Portman visited the Claimant at work. There are few important things to note from this visit:

    78.1. First, the visit took place at the Shrub Hill site and Mr. Portman would have been able to identify any issues out of the ordinary with it whilst he was there. No issues were raised. Mr Portman would have been able to see the warehouse in a general sense because the meeting room was a few metres away from the entrance to the warehouse and you would therefore need to walk through part of the warehouse to get to the meeting room.

    78.2. Mr. Portman again said money was due to be paid to the Company and the amount from HMRC was now £160,000 and everything was again described in a positive way.

    78.3. What had changed was the Claimant's take on the situation. By now, she was starting to disbelieve what she was being told.

79. On 22 March 2024, there was a meeting at the Shrub Hill site. The meeting's purpose was to discuss a change in job roles of Lucy Chambers-Bligh. Ms Chambers-Bligh would be taking on the role of Head of Operations. This was another opportunity for both Ms Chambers-Bligh and Mr. Portman to have spotted any concerns out of the ordinary about the warehouse in general. However, no issues were raised.

80. The Claimant then went on annual leave for a week and was due to return to work on 1 April 2024.

81. On 25 March 2024, the Claimant received a letter from the finance manager Lucy Reed. The letter stated that January and February pay slips had been produced showing that a full wage had been paid rather than zero earnings being paid. The Company had therefore decided to revise the payslips and resubmit them to HMRC showing to the true situation. The Claimant was suspicious about this letter and what it meant.

82. By 28 March 2024, the Claiamnt had not received any wages and it was now a period of three months' work without pay. She therefore sent Mr. Portman an email enquiring about when she might receive substantial payment.

83. In response, Mr Portman stated there was no concrete date that he could give to her. He mentioned the payment from HMRC again and once received he planned to pay January's and most of February's wages. He ended the email with *"I understand your position, am sorry for the stress caused and will respect any decision you make."*

84. On 29 March 2024, the Claimant responded offering possible solutions on a without prejudice basis. Privilege has been waived about this email because both sides consented to it being included in the bundle. The Claimant's suggestions were an advance of wages or a loan. She also stated that for her to continue working she would require payment of her wages by 2 April 2024 to the value of January's net salary of £1856.33. She ended the email with *"Whilst this clearly won't settle the complete arrears owed to me, it will give me a period of confidence which will allow me to continue working whilst the business endeavours to recover."*

85. Clearly then, the Claimant is expressing a clear intention that, subject to her receiving part payment of the wages, she intended to continue working and for the contract of employment to continue.

86. Mr Portman responded by rejecting those proposals and stated that the Company was focussing on inventory and paying couriers at present. He ended by saying *"it would be a real shame to lose you as you are a great asset and a valued team member, but I respect the situation will mean you have to make difficult decisions."*

87. It is significant to note at this point that the evidence from numerous statements in the bundle including Mr. McEvilly (Assistant Operations Manager), Ms Cox (the Claimant's former line manager and Operations Manager), Mr. Sheldon – Hadley (the outlet store manager) and Mr. Carroll the warehouse supervisor who the Claimant managed, was that the Claimant was a hard worker, went above and beyond what was expected of her, was kind, supportive and got stuck in. This attitude was said to have continued even during the period of financial instability.

88. Mr. Portman too seems to at this point have held her in high esteem. Ms Cox reported that the Claimant actually won a Kudos award for her work and it is clear that Mr. Portman wanted to keep the Claimant in post. Indeed, at this

point there couldn't have been any issues between the Claimant and respondent because the Claimant had actively encouraged her team to stay despite not being paid, which was common ground.

89. By 1 April 2024, the Claimant had thought about the situation whilst she was on leave and had considered the recent email exchanges between Mr. Portman and her. She decided to resign.

90. The resignation letter had the following key information in it:

    90.1. The resignation was with immediate effect;

    90.2. the claimant said that she was resigning because of a fundamental breach of contract by the company and that she therefore considered herself to be constructively dismissed;

    90.3. the claimant stated that she considered her position to be untenable leaving her with no option to resign in response to the company's breach of contract;

    90.4. the claimant stated that the fundamental breach of contract had been caused by the company failing to pay her salary in January, February and March 2024 and in addition pension payments had not been made since the 17 November 2023;

    90.5. the claimant stated that she did not in any way believe that she had affirmed or waived the fundamental breach.

91. Having heard from the claimant and weighing all of the evidence about the non-payment of wages and pension payments into the NEST pension scheme, it is clear the reasons why the claimant resigned were as stated in her resignation letter and for no other reasons.

92. Astonishingly, Mr Portman responds to the claimant's resignation letter stating *"I acknowledge your letter but I'm very surprised. Not only am I surprised, but given the communications we have had, I do not appreciate the tone. You did not raise a formal grievance in the time period since we have faced this issue and you have repeatedly communicated in past three months that 'you are fine' and 'I mustn't worry about you'.*

93. However, I do not believe that Mr Portman was surprised. He must have appreciated the claimant was considering resignation by the recent e-mail communications between them, especially when he himself has identified that the claimant might need to make a difficult decision. It is also astonishing that Mr Portman took exception to the tone of the resignation letter when, in my view, it is a polite and professional letter in the circumstances. Indeed, an employee may have been forgiven for being impolite when they had effectively worked for free for three months with no sign of being paid for that work or any definitive timeframe for even a part payment being provided.

94. Effectively, Mr Portman seems to have taken exception to the allegations in the letter when from the claimant's perspective she has been working for free for three entire months without any wage payment or any definitive timeline

for when any of the wages would be paid to her for those three months or indeed at any point in the future.

95. It is a fundamental part of any contract of employment that employees get paid for the work that they legitimately perform.

**Alleged gross misconduct**

96. Following the claimant's resignation, she issued a statutory demand for the wages outstanding.

97. In response, the respondent argued that it had discovered significant failings in the claims management of the Shrub Hill warehouse and also a number of other failings which it argues amounted to intentional failures to do her job, which has caused the company considerable losses in excess of £30k.

98. Mr Portman says that he asked Ms Cambers-Bligh and Ms Lyndsey Probert (Warndon distribution Centre Manager) to conduct an investigation into the warehouse shortcomings and they produced statements about what they found.

99. Ms Chambers-Bligh stated as follows in her statement in summary:

    99.1. That she had visited the warehouse the day after the claimant had resigned and was shocked and appalled at what she found.

    99.2. She said it was incredibly disorganised.

    99.3. She found three large crates of packaged orders which upon inspection were identified as cancelled customer orders that should have been returned to the shelf.

    99.4. She then discovered three large crates of returns that had not been processed ‘hidden’ in the chiller.

    99.5. She stated further that she had questioned this but was told by persons unknown that the claimant had agreed to move the crates into the chiller because they were low on the priority list.

    99.6. Trevor Portman, Mr Portman’s father, had allegedly reported that there was no direction from the claimant about how to stop water damage to the stock and had allegedly taken it upon himself to cover items with plastic.

    99.7. There is a vague allegation where Ms Chambers-Bligh, alleged that she was told, again by persons unknown, that an incident had occurred where the claimant was allegedly very angry about being asked to do a task by the purchasing team and behaved unprofessionally. However the statement fails to say what the unprofessional behaviour was, fails to give a date about when this incident happened, fails to name the people that she allegedly spoke to and fails to describe the task or the names of the people in the purchasing team about which the initial conversation took place, which led to the alleged misconduct.

99.8. It was also alleged that many staff, although again no names are mentioned and the number of staff are not mentioned, that they spent a lot of time sitting around as they did not know what to do.

100. Ms Probert's statement said as follows:

100.1. Cancelled orders had been sat in the warehouse for at least two or three weeks.

100.2. She witnessed 3 large pallets of returns that she said the claimant stored away in the chiller instead of being processed so customers could not be advised the company had received their return.

100.3. Curiously, despite the statement being said to have been written by Lindsey Probert, the next point states *"it was disgusting when Lindsey arrived. Lindsey said there was tobacco all over the desk."* Again, there is another point which talks about Lindsey in the third person. Here it stated, *"Lindsey was shocked to see how unorganised this warehouse wars in comparison to Warndon."* and *"every time Lindsey came here people were sat around smoking not doing very much."*

101. In addition, Mr Portman makes a number of other allegations such as:

101.1. The claimant allegedly failing to complete HSE daily checks within the warehouse.

101.2. The claimant allegedly failed to ensure that random bag searches of temporary staff were carried out.

101.3. The claimant had caused lost revenue in relation to cancelled orders that were left several weeks without being unpacked and processed for resale or returned to the supplier.

101.4. That goods had allegedly being actively hidden in the shrub hill chiller units.

101.5. That there were approximately £10k arising from financial and trading penalties imposed upon the company by Amazon as a result of noncompliance with its fulfilment and returns policies.

102. Then there is the email of 15 April 2024, from Spencer West Solicitors alleging the Claimant's behaviour in allegedly deliberately hiding stock in chillers to be fraudulent, which is an incredibly serious allegation.

103. What is surprising in the company making these allegations is the lack of evidence to support them. For example:

103.1. Reference is made to staff members being spoken to and providing information. However, no such statements are documented or provided.

103.2. Allegations are made such as there being tobacco shavings left on the

desk. However, no evidence has been provided to prove that it was the claimant who rolled the cigarette and left the mess rather than another person with access to the office, when it is also documented that a number of staff smoke out the shrub hill site.

103.3. The visits made by Ms Probert and Ms Chambers-Bligh appears to have been made in the absence of the claimant whilst she was on annual leave in the last week of her employment or after the termination of her employment. She then appears to be blamed by staff members on these visits not having much to do and smoking whilst on shift. However, clearly those allegations cannot be applicable to the claimant when she wasn't on site to manage the staff in question.

103.4. There are serious allegations of deliberately hiding stock and alleged deliberate failing to process items that have been returned so that refunds can be processed or stock sent back to suppliers. However, it appears to me that no investigation was done, or certainly that there are no documents proving that an investigation was done, to provide evidence that on balance the claimant had deliberately downed tools or deliberately hidden stock.

103.5. In addition, whilst being questioned, Mr Portman suggested that these allegations well known to him before the claimant resigned, the claimant got wind of this and that is why she resigned on 1 April 2024. However, there is no evidence to support that argument. The respondent's own emails do not suggest there was any issue with the claimant until Mr Portman took exception to the claimants resignation and the only documentary evidence in the bundle that I was taken to, to confirm when the claimant was made aware of the gross misconduct allegations was dated 15 April 2024, two weeks after the claimant's resignation. This was done by solicitor’s letter in response to the Claimant’s statutory demand.

103.6. In addition, the handwritten statement of Ms Probert does not appear to have been written by her.

103.7. There were also significant gaps in disclosure in this case from the respondent. If the respondent was alleging that returns had not been processed properly or that items had caused lost revenue in cancelled orders or penalties imposed by Amazon directly linked to the claimants conduct, I would have expected to see documents containing the electronic audit trail of at least some of the problem transactions from start to finish to evidence this. This is especially the case given that Mr Portman stated there were various electronic order and cancellation documents generated by the platform, including barcoded documents for returns to be scanned and sent back to supplies etc.

103.8. However, no such documents were disclosed and there are no documents showing what penalties were incurred from the various transaction accounts or platforms themselves. Mr. Portman provided his own drafted list of transactions, but this is not supported by any primary evidence proving the Claimant’s guilt.

103.9. There is no evidence coming remotely close to proving fraud that I have seen.

103.10. Finally, the timing of the discovery of alleged gross misconduct, is highly dubious given the financial backdrop and circumstances behind the resignation and Mr. Portman's unreasonable and surprising response to the claimant's resignation letter.

104. There is then the evidence of the statements the Claimant provided from her ex-colleagues who worked closely with her and were from various levels of the organisation as well as her own evidence about the allegations. The key points from these are:

104.1. Trevor Portman put the items in the chiller the week the Claimant left her employment and that the disused chillers were often used to store stock. Mr. Sheldon Hadley supports this state of affairs in clear terms.

104.2. Some staff had been made redundant and this meant the team were short staffed. The fact of redundancies was supported by Ms Cox in her statement.

104.3. The warehouse being in a state of disarray is explained by the fact the Respondent had moved a lot of stock from the Warndon site to the Shrub Hill site, which is again supported by Ms Cox.

104.4. The Claimant stated that there were backlogs of returns because the couriers weren't consistently arriving because they were not being paid. That explanation is supported by Mr. Portman's own evidence.

104.5. The financial penalties incurred were caused by the fact that Customer orders were not being fulfilled whilst the Company was going through the cash flow crisis therefore generating penalties.

105. Overall, I prefer the evidence of the untested statements submitted by the Claimant rather than the untested statements submitted by the Respondent. The Statements supporting the Claimant are clear, specific and on balance seem more plausible in all the circumstances.

## THE LAW

### Constructive Dismissal, Wrongful dismissal and breach of contract

#### Constructive dismissal contractual principles

106. For a resignation to amount to a dismissal under section 95 employment rights act 1996, the following must be answered following the case of **Kaur v Leeds Teaching Hospitals [2018] EWCA Civ 978:**

106.1. What was the most recent act on the part of the employer which the Claimant alleges caused her resignation?

106.2. Has the contract been affirmed since that date?

106.3. If not, was it a repudiatory breach of contract?

106.4. If not, was it part of a sequence of events that collectively breached the contract?

106.5. Did the employee resign in response to that breach within a reasonable time?

107. **Kaur** is also authority for the principle that even if past breaches of contract were affirmed by the employee who continued to perform the contract, a subsequent breach can then amount to the last straw and revive the previous breaches, so as to amount to a cumulative breach.

108. After **Humby v Barts Health NHS Trust [2024] EAT 17,** the Tribunal needs to consider both breaches of implied and express terms for determining whether a repudiatory breach has happened.

109. A series of events, which may amount to minor issues may amount to a cumulative breach of the implied term when looked at as a whole and the employee has resigned in response to the last act or "last straw" **Lewis v Motorworld Garages limited [1986] ICR 157.**

110. The last straw must be at least part of the reason for the resignation **Omilaju v Waltham Forest London Borough Council [2004] EWCA Civ 1493.**

111. Contracts of employment are a unique contract that is distinct from commercial contracts for goods or services, but usual contractual principles apply generally to them.

**Burden of proof**

112. In the case of constructive dismissal, it is for the Claimant to prove they were constructively dismissed.

113. In the case of the breach of contract claims, it is for the Claimant to prove there was a binding contract, that the contract was breached and that the damage from the breach was contractually foreseeable after **Hadley v Baxendale [1854] EWHC Exch J70**.

114. When considering the burden of proof more generally, the burden usually rests with the person who is asserting something to be a factual allegation and the standard of proof is on the balance of probabilities as summarised by HHJ Auerbach in **Hovis Limited v Louton [2021] UKEAT/1023/20/LA.**

**Breach of contract**

115. Breach of contract is a common law claim not based on statute. However, the power to consider a wrongful dismissal complaint in the Employment Tribunal is provided for by the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.**

116. If a contract is breached, then damages are payable to place the parties

where they would have been had the contract been fulfilled properly in the normal course of the relationship or damages are payable if they were in contemplation of the parties at the time the contract was entered into. In both cases, the damages must be a probable result of the breach **Hadley (above)**

117. What is "probable" is decided using a commonsense approach **Galoo Limited v Bright Grahame Murray [1994] WLR 1360.**

118. Damages for the manner of a wrongful dismissal are not recoverable following **Johnson v Unisys Ltd [2001] UKHL 13.** Consequently, personal injury damages or injury to feelings are not recoverable.

**Repudiatory breach of contract**

119. In **Cantor Fitzgerald International v Callaghan [1999] IRLR 234** the Court of Appeal held that any deliberate failure to pay any element of remuneration will constitute a repudiatory breach. This was applied in **Singh v Metroline West Ltd [2022] EAT 80 (8 March 2022, unreported).**

120. If there is breach of the obligation to pay wages, that in itself can establish constructive dismissal; unlike breach of the implied term of trust and confidence, there is no employer defence of 'reasonable and proper cause' (e.g. through financial difficulties) after **Mostyn v S & P Casuals Ltd UKEAT/0158/17 (22 February 2018, unreported).**

**Gross misconduct**

121. The test about what justifies summary dismissal is helpfully summarised in a number of cases namely **Briscoe v Lubrizol Limited [2002] EWCA Civ 508, Dunn and Davidson v AAH Limited [2010] EWCA Civ 183** and **Palmeri v Charles Stanley & Co Limited [2021] IRLR 563 (HC).** The test is brought together, after reviewing all the authorities, at paragraph 42 in **Palmeri** as follows:

> *"42. The test I am required to apply for that is variously formulated in the authorities. It includes considering whether, objectively and from the perspective of a reasonable person in the position of Charles Stanley, Mr Palmeri had "clearly shown an intention to abandon and altogether refuse to perform the contract" by repudiating the relationship of trust and confidence towards Charles Stanley* ***(Eminence Property Developments v Heaney [2011] 2 All ER (Comm) 223****). In a case like this "the focus is on the damage to the relationship between the parties"* ***(Adesokan v Sainsbury's Supermarkets Limited [2017] ICR 590 per Elias LJ paragraph 23****). There is relevant analogy with the formulations in the employment cases: "the question must be — if summary dismissal is claimed to be justifiable — whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service."* ***(Laws v London Chronicle [1959] 1 WLR 698, pages 700-701****) It must be of a "grave and weighty character" and "seriously inconsistent – incompatible – with his duty as the manager in the business in which he was engaged"* ***(Neary v Dean of Westminster [1999] IRLR 288, paragraph 20)****, or "of such a grave and weighty character as to amount to a breach of the confidential*

> *relationship between employer and employee, such as would render the employee unfit for continuance in the employer's employment" (**Ardron v Sussex Partnership NHS Foundation Trust [2019] IRLR 233 at paragraph 78).***

122. In addition, unlike the situation in unfair dismissal, after discovered misconduct can justify a summary dismissal even if the decision maker at the time did not know of the conduct at the time they made their decision. **Boston Deep Sea Fishing v Ansell (1888) (39) Ch D 339** at 364 **and Cavanagh v William Evans Ltd [2013] 1 WLR 238,** paragraph 5.

123. The motives of the parties are also irrelevant, meaning that if a party was already going to commit a breach of contract by denying an employee their notice, that does not prevent that party from relying on conduct that then happened or was later discovered to have happened giving the employer the right to summarily dismiss an employee, which it would otherwise not have had. This means that it is legally legitimate to terminate an employee's contract and then look for reasons to justify the summary dismissal after the event **Williams v Leeds United Football Club [2015] IRLR 383.**

124. In **Mbubaegbu v Homerton University Hospital NHS Foundation Trust UKEAT/0218/17**, it was held that it is possible for gross misconduct to be justified through a series of breaches taken collectively, even if each one in itself would not have passed the threshold of being described as gross misconduct.

125. Consequently, there is no test of reasonableness for the dismissal and no band of reasonable responses. Unfairness is irrelevant when considering a breach of contract case. A person is entitled to terminate a contract if grounds exist even when acting capriciously or without knowledge of the grounds that existed at the time until after the dismissal. After justification of a dismissal is therefore allowed at common law.

**Acceptance of the breach and causation**

126. The acceptance of the breach of contract by the innocent party must be clear and unequivocal **Hunt v British Railways Board [1979] IRLR 379.**

127. The repudiatory breach must be at least part of the reason for the resignation but does not need to be the principal or operating cause of the resignation **Meikle v Nottinghamshire County Council [2004] IRLR 703.** However, in employment contracts a series of acts that aren't of themselves repudiatory can be relied upon cumulatively with the final incident being the last straw as stated above.

128. The focus of the enquiry into a constructive dismissal is the employer's conduct not the employee's reaction to it after **Tolson v Governing Body of Mixenden Community School [2003] IRLR 842.**

**Affirmation and timing of the resignation**

129. However, an employee must resign promptly once they have established the employer's repudiatory conduct or refusal/failure to rectify it has been

established.

130. Affirmation will occur where the behaviour of the employee is inconsistent with working under protest at the repudiatory conduct or contradicts electing to accept the breach see for example **Bashir v Brillo Manufacturing Co [1979] IRLR 295.**

**Constructive dismissal – statutory wording**

131. This is covered by s95 of the Employment rights Act 1996, which says where relevant:

*"**95 Circumstances in which an employee is dismissed.***

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

*(a)…*

*(b)…*

*(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.*

*(2) …"*

**Constructive unfair dismissal**

132. If it is decided that the employer constructively dismissed the employee, then the case falls to be determined under the statutory regime of unfair dismissal and the contractual issues for unfair dismissal purposes fall into the background of the case. The statutory test needs to be the focus of the enquiry.

133. The starting point for unfair dismissal is section 98 of the Employment Rights Act 1996, which states where relevant:

***"98 General***

*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

*(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

*(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) …*

*(4) Where the employer has fulfilled the requirements of subsection (1), the*

*determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case.*

*(5) …*

*(6) …"*

134. The correct approach for the Tribunal to adopt in considering section 98(4) of the ERA (as set out in **Iceland Frozen Foods v Jones [1982] IRLR 439**) is as follows:

*(1) the starting point should always be the words of [s 98(4)] themselves;*

*(2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;*

*(3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;*

*(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*

*(5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair'.*'

135. When considering the employer's potentially fair reason for the dismissal, the burden of proof is on the employer to establish that the reason for the repudiatory breach or breaches of the contract that caused the employee to resign falls within a potentially fair reason in s98 (1) **Berriman v Delabole Slate Limited [1985] IRLR 305.** It is essentially a consideration of section 98 (4).

136. The Tribunal must focus on the reasonableness of the Respondent's decisions, based upon what the Tribunal finds the reason for the Respondent dismissing the Claimant was **(Beaumont v Costco Wholesale Limited EAT UKEAT/0080/15/DA).**

137. The Tribunal should decide whether the action or inactions of the Respondent, including the dismissal, fell within the band of reasonable

responses open to a reasonable employer. This includes all procedural steps and decisions **(British Leyland v Swift [1981] IRLR 91 and Sainsburys Supermarkets Limited v Hitt [2002] EWCA Civ 1588).**

138. When considering any decisions made, the Tribunal must focus on what information and circumstances were present and in the mind of the dismissal and appeal managers at the time they made their decisions **(West Midlands Coop v Tipton [1986] IRLR 112 HL).**

139. The Tribunal must also not fall into the trap of substituting its view for that of the disciplinary and appeal decision makers, unless there is only one possible outcome from the application of the relevant legal principles to the case **London Ambulance Service v Small [2009] EWCA Civ 220.**

140. Recently in **Vaultex UK Limited v Bialas UKEAT [2024] 19**, this issue was revisited. The tribunal should approach identifying the reason for the dismissal on the basis of *"'the set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee', to adopt the timeless definition of the reason for dismissal formulated by Cairns LJ in **Abernethy v Mott, Hay and Anderson [1974] ICR 323**"* as per the court of appeal in **Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401** discussed in **Vaultex**.

141. When considering the above guidance in light of a constructive dismissal, as **Berriman** makes clear, the tribunal must focus on the conduct of the employer that caused the Claimant to resign and whether that fitted into a potentially fair reason, not artificially consider the resignation to be a decision of the Employer or look at the employees reaction to the behaviour as indicative of the employer's reason.

142. When considering the procedure in an SOSR case, the employer must consult the employee and must consider alternatives to the dismissal. It is also necessary to balance the interests of the employer faced with the situation with those of the injustice or hardship the employee may suffer if dismissed. Through the lens of a constructive dismissal, again the alternatives that must be considered are the alternatives to the Employer's conduct that caused the employee's resignation.

143. The ACAS Code of practice does not apply to SOSR dismissals unless the reason advanced is akin to a disciplinary situation.

## Discussion and conclusions – unfair dismissal

### The Claimant was constructively dismissed

144. Applying **Canter Fitzgerald,** it is clear the Claimant was constructively dismissed. The payment of any part of the remuneration package goes to the heart of the contract and in my view both the failure to pay pension payments into the pension scheme and/or the failure to pay wages are fundamental breaches when focusing on the employer's conduct after **Tolson.**

145. No reasonable and proper cause arguments arise after **Mostyn** because the

failure to pay wages and pay into the pension scheme were breaches of express terms of the contract, the pension payment arrangements being included at para 14 of the contract summary referred to in the contract.

146. I am not persuaded the Claimant resigned because of the failure of the Company to give her notice under clause 24 of her contract or give her notice in any other way. It is clear the Claimant resigned because of the compound reason of non payment of wages, non payment of pension payments into the pension scheme and because Mr. Portman decided against paying her the requested January 2024's salary payment for her to continue working.

147. Given the above, after **Humby,** I need not consider any breaches of implied terms and in any case, the Claimant relied on no implied terms.

**The Claimant did not affirm the breaches**

148. Applying **Kaur,** despite continuing to work without pay for a couple of months, which was evidence of affirmation of the failure to pay those months' money, the Claimant drew a proverbial line in the sand on 28 March 2024 and when she was not going to be paid again she accepted the Respondent's repudiatory breaches and resigned within 3 days. This reignited the past non-payment of pensions and wages issues in a last straw scenario.

149. In any case, the non payment of March 2024 wages would have been sufficient on its own to be a fundamental breach and that payment clearly wasn't affirmed at all.

150. After **Brillo Manufacturing,** the Claimant has not behaved in any way about the March payment to suggest any affirmation of the contract.

**The Claimant did not commit any gross misconduct prior to her dismissal.**

151. The respondent has failed to sufficiently evidence any gross misconduct.

152. Looking at the principles in **Palmeri,** there is insufficient evidence the Claimant downed tools or deliberately behaved in any way to indicate that she intended to abandon or refuse to perform the contract. In fact, quite the opposite is evidenced by the undisputed fact the Claimant worked for free for three months and encouraged colleagues to do the same.

153. There is insufficient evidence the Claimant was to blame for any of the misconduct she was alleged to have committed. Following **Louton**, it is for the Respondent to prove those facts on balance and it has failed to sufficiently do so.

154. The timing of such gross misconduct allegations coming to light is suspicious and, given that the tone of the relationship between the Claimant and Mr. Portman changed instantly when she resigned and the allegations of misconduct only appear to have been communicated to the Claimant upon her issuing a statutory demand, I am not persuaded the allegations of gross misconduct are legitimate.

155. The vague investigation and lack of specific documents linking the audit trails

of even a few of the problematic transactions alleged to the Claimant, and the lack of any specific named witness evidence showing the Claimant was aware of the items due for return and was responsible for their processing, supports that view.

156. I am also not persuaded that there were any breaches at all that could collectively be considered gross misconduct as envisaged in **Mbubaegbu.**

157. It is likely the Claimant did not work as hard as she would have done had she been being paid. However, there is no evidence close to proving that she effectively turned up to work and failed to perform her duties to such a grave extent as required for gross misconduct to be proven.

158. Consequently, the Respondent's counter claim fails and is dismissed.

**The Claimant accepted the respondent's breach and did so promptly**

159. Following **Hunt,** the resignation was clear and unequivocal. She resigned within a reasonable time of the breach within 72 hours and after **Meikle**, I find that non payment of wages, the refusal to repay some of the wage arrears and the missed pension payments were all part of the composite reason for why the Claimant resigned.

**Breach of contract claims for wages and pension payments - conclusion**

160. Consequently, the wages and failure to make pension payments into the NEST scheme, were all done in breach of contract and they are arising out of the termination of employment.

161. Similarly, the contract was terminated without the Respondent paying any notice pay to the Claimant.

162. Given the above, the stand alone breaches of contract claim for these payments succeed.

**The respondent had a potentially fair reason for some of its behaviour but not all of it**

163. What triggered the resignation, and was ultimately the last straw after **Lewis,** was Mr. Portman's refusal to pay January 2024's wages to the Claimant after she requested this payment to allow her to continue working.

164. The Respondent has proven that it had the potentially fair reason for non-payment of wages, namely SOSR because it was plunged into a financial crisis by Amazon, which was not its fault.

165. However, I am not persuaded that there was a potentially fair reason for the Respondent failing to make pension payments into the NEST scheme in November and December 2023 as there was for the January – March 2024 payments. That reason was not operating in November and December 2023 and the Respondent admitted that by confirming that those pension payments weren't paid because of an administrative oversight.

**Fairness in all the circumstances s98 (4)**

166. Parking the pension payments for November and December 2023 for a moment, I am content that there was some consultation about the situation with the employees in general, through updates via the Slack system. I am also content that Mr. Portman kept the Claimant individually up to date about the financial situation and its effects via at least two meetings.

167. Considering the guidance in **Vaultex,** I find that Mr. Portman believed the reason he could not pay the requested wages was because he had still not received full payments from either Amazon or HMRC. He believed that the Respondent should have been focussing on the Company's orders, funding and paying couriers. He also believed this focus was working because he had pretty much halved the projections deficit.

168. I am also live to the point that Mr. Portman had in his mind the need to consider all the unpaid employees rather than the Claimant in isolation. This is evidenced by the Claimant's husband raising this with Mr. Portman in a meeting by asking if the money that had been received by the Company so far would have been enough to pay all the wages, Mr. Portman was reported as saying that it wouldn't have been.

169. I reminded myself that it is not for me to substitute my view for that of the respondent after **Jones** and **Small.** In that light, it strikes me the Respondent had the following main options when faced with the Claimant's request to pay January 2024's arrears of wages:

    169.1. It could have paid nothing, like Mr. Portman decided;

    169.2. It could have paid something to the Claimant short of the January wage total requested because it had some limited funds available, albeit they were coming in sporadically;

    169.3. It could have complied with the Claimant's request;

    169.4. It could have paid more than the request or the arrears in full.

170. When considering **Swift** and **Hitt,** given the above range of responses, the fact that the Respondent had by this time improved its projections from 92% down, to 50% down and given the Claiamnt had already worked 3 whole months for free with no wages at all, the range of reasonable responses excluded paying nothing and giving no definite timeline for at least a part payment of the arrears, however small that might have been in the eyes of the Claimant.

171. To pay nothing at all in the backdrop of there being no definitive date about when even a token payment might be made was unreasonable. The Respondent could not have reasonably expected the Claimant to have worked any more for free in circumstances where there was no comfort being given to the Claimant that she would receive any money at all. Yes, the Respondent repeatedly reported that certain payments were imminent. However, they had been imminent for weeks and had not materialised or when any payments had been received, none of that money made it to any of

the employees.

172. I reminded myself that I must consider procedural points and substantive points of fairness together.

173. Given the Respondent's unreasonable decision about the Claimant's request and the fact it had no potentially fair reason for the non-payment of the November and December 2023 pension, the Claimant's dismissal was unfair in all the circumstances even though Mr. Portman was keeping employees regularly informed and updated.

174. The unfair dismissal claim therefore succeeds.

**Unlawful deduction of wages**

175. For such a claim to succeed und s13 of the 1996 Act, there first need to be a proven deduction of wages.

176. That deduction must have been an unlawful one to make and there must have been no excepted reason to make the deduction.

177. The Claimant performed work during January – March 2024 and she was repeatedly not paid for that work, which amounts to a deduction of wages. This was admitted by the Respondent.

178. The Claimant's contract entitled her to the payment of wages for work done.

179. The deduction of wages was in breach of contract and was therefore unlawful.

180. There were no excepted reasons for why the deductions were made within the meaning of the 1996 Act or indeed argued.

181. Therefore, the unlawful deduction of wages claim therefore succeeds.

**Disposal**

182. The Claimant succeeds with all her claims.

183. The Respondent fails in its defence and counterclaim.

184. This case will be set down for a remedy hearing if necessary.

185. Given the Claimant's outstanding wages, pension payments, notice pay (one calendar month) and basic award are easily calculable, and given my direction that injury to feelings are not recoverable combined with the fact there are no future losses claimed, I request the parties consider the use of ACAS to try to come to a sensible settlement of at least some or all of those remedy items.

186. It is my strong provisional view that the compensation for the Claimant's claims can be agreed and settled without the need for a remedies hearing.

187. I therefore order the parties to write to the Tribunal **within 28 days** of this Judgment being sent to the parties to confirm whether a remedies hearing is needed and, if one is, why the parties have been unable to come to an agreement about the compensation figures.

_____
EMPLOYMENT JUDGE SMART

6 November 2024

**ANNEX 1:**
**LIST OF ISSUES FROM DAY 1 OF THE FINAL HEARING**

**1) Time limits and jurisdiction**

a) All claims are in time.

b) ACAS conciliation has been complied with.

c) It was common ground the Claimant had two years' continuous service to bring her unfair dismissal claim.

**2) Unfair dismissal**

a) **Was the Claimant dismissed?**

**Constructive dismissal:**

b) Did the Respondent do the following things:

i) Fail to pay the Claimant for January, February and March 2024?

ii) Alter the contract of employment in breach of clause 24 of the contract?

iii) Was the breach a fundamental one? 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.

iv) 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.

v) Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

c) If the Claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract?

i) The Respondent says this was because it had a cash flow crisis due to the behaviour of Amazon withholding funds from it, which amounted to Some Other Substantial Reason; and/or

ii) The discovery of gross misconduct listed at paragraphs 9.4 (A) – (C) in the attachment to the ET3 form presented to the Tribunal.

d) Was either reason a potentially fair reason?

e) Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

f) Was the dismissal procedurally fair? For the SOSR dismissal, were alternatives to dismissal discussed and reasonably rejected by the Respondent.

g) Was the dismissal within the band of reasonable responses open to a reasonable employer?

**3) Constructive wrongful dismissal / breach of contract because of no notice pay/ breach of contract failing to pass on pension deductions**

a) Did this claim arise or was it outstanding when the Claimant's employment ended? It is common ground that the money claimed by the Claimant has not been paid after termination of her employment.

b) What was the Claimant's notice period? It is agreed between the parties the Claimant was entitled to 1 calendar months' notice.

c) Was the Claimant paid for that notice period? It is accepted the Respondent paid no notice to the Claimant because she resigned without notice.

d) Did the Respondent deduct pension contributions from the Claimant's pay and then fail to pay them into the pension scheme?

e) Was the Claimant guilty of gross misconduct prior to the breach of contract alleged?

f) Did the Respondent fundamentally breach the Claimant's contract first therefore disentitling the Respondent from relying on the Claimant's breach.

**4) Unauthorised deductions**

a) Did the Respondent make unauthorised deductions from the Claimant's wages by:

i) Failing to pay the Claimant any wages for January – March 2024? The Respondent accepts no wages were paid for this period but says it had a good reason why.

ii) Failing to pay the Claimant notice pay. The Respondent accepts no notice pay was paid, but does not agree any notice pay was due.

b) Was any deduction required or authorised by a written term of the contract?

i) Did clause 18 of the contract of employment allow the Respondent to deduct wages owed to the Claimant because it had discovered she committed gross misconduct resulting in approximately £30,000 stock and other losses.

c) Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made? It was common ground the Claimant had a copy of the contract before the deduction was made.

d) If relevant, did the Claimant agree in writing to the deduction before it was made?

e) How much is the Claimant owed if an unauthorised deduction was made?

**5) COUNTERCLAIM**

a) Does the Claimant owe the Respondent damages for loss of stock or other losses as a result of breaching her contract before she resigned?

b) The Tribunal will need to decide:

i) Whether the Claimant's conduct amounted to a breach of contract;

ii) Whether the Claimant's conduct was authorised by the Respondent via its managers and if so whether that amounts to a defence;

iii) Whether the Respondent is entitled to rely on the alleged Claimant's breaches of contract when it too is alleged to have breached the Claimant's contract of employment.

END