

- b. £844 gross for unpaid wages for the period 25 December 2017 to 3 January 2018 inclusive.
7. Under s.38 of the Employment Act 2002, the Second Respondent is ordered to pay to the First Claimant the sum of £996 for breach of the s.1 Employment Rights Act 1996 obligation to provide a statement of employment particulars.
8. The total award is £2,455.42.

REASONS

1. In accordance with the order of Employment Judge Gumbiti-Zimuto, the claims against Abington Taxis Ltd (the First Respondent) are dismissed on withdrawal. The claim continued against the Second Respondent. In these reasons the sole remaining respondent is referred to as the Respondent.
2. The Second Claimant (Mr Martin Fathers) and the Third Claimant (Mr Lee Lewis Fathers) settled their claims against the remaining Respondent prior to the commencement of the hearing. As part of that settlement they withdrew their claims and I therefore issue a dismissal judgement. In these reasons the First Claimant, Mrs Alison Fathers, is referred to as the Claimant since she is the sole remaining claimant.
3. The Claimant started employment with the Respondent as an office manager or controller in June 2006. She was initially employed by a limited company owned and controlled by the Respondent, but her employment transferred to the Respondent when he started to operate his business as a sole trader. Her husband, Martin, started work for the Respondent as a driver on 14 March 2016 and their son, Lewis, also started work as a driver on the 29 February 2016.
4. In essence the Claimant's complaint is that she was subjected to personal and offensive abuse by the Respondent, in particular from the time of the appointment of his friend Anthony Pocock who started working for the Respondent in March 2017 (according to the Claimant) or June/July 2017 (according to the Respondent). The Claimant started to look for alternative employment no later than August 2017. Part of the background was that the Respondent had been the subject of an investigation by HM Revenue and Customs. According to the Claimant, Mr Pocock unfairly criticised her for the way she had organised things and was also personally abusive towards her. She says that things came to a head in December 2017 following a visit by the Respondent's accountant. Her husband and son decided to resign.
5. It is important when considering the allegations and such conduct as may be proved to have reference to paragraph 11 of the Claimant's statement. It is common ground that in the time period material for this claim, the latter half of 2017, the Claimant weighed 22 stone. Since leaving the

Respondent's employment, she has had bariatric surgery and has lost 6 stone in weight. Such comments as are proved to have been directed towards the Claimant which relate to weight must be seen in the context that, at the time, the Claimant was clinically obese. Quite apart from any conclusions in the case, she is to be congratulated for having succeeded in improving her health and quality of life so much.

6. There was an incident when the Respondent went to the Claimant's house on 29 December 2017 to recover the Mercedes car which was driven for his business by Martin Fathers. The Claimant and Mr Fathers were due to be paid their wages on 28 December 2017 and accused the Respondent of not paying them in full. He said that he had found discrepancies in the cash records of the business and, according to the Claimant, falsely and unreasonably accused her of being responsible for it. She resigned later that day in circumstances which she says amounted to a constructive dismissal.
7. The Respondent disputes this and alleges not only that the probable explanation for discrepancies that he has found between the expected turnover of the work booked with his taxi business and the cash generated by the individual drivers is that the Claimant was stealing from him but also that she left because she and her husband had decided to set up in competition. This, in very broad terms, is the nature of the dispute between the parties.
8. After a period of conciliation that lasted between 22 of March 2018 and 16 April 2018 all three original Claimants presented claim forms on 11 May 2018. The final form of the grounds of resistance is dated 6 September 2018 and a preliminary hearing to define the issues was conducted on 13 February 2019 by Employment Judge Gumbiti-Zimuto. There had been some confusion about the identity of the correct Respondent. Mr Atherton having clarified that the relevant transfer of staff from him to his limited company took place on 9 April 2018, it was accepted by the Claimants that the correct Respondent was him personally. The identity of the Respondent was therefore clarified at the preliminary hearing
9. The case was listed for a full hearing including liability and remedies. I have the benefit of an agreed chronology and an agreed bundle running to 354 pages. I heard from the following witnesses all of whom had had witness statements prepared for them which they adopted in evidence and upon which they were cross-examined: the Claimant; Martin Fathers; Jonathan Kogel, a friend of the Claimant who was present during the incident of 29 December 2017; Bernadette Kelly, a friend of the Claimant and formerly a self-employed driver working for Abington Taxis; the Respondent; Antony Pocock; Matthew Bird, formerly a self-employed taxi driver working for Abington Taxis; Leah Atherton, the wife of the Respondent's son, Ashley, who has been helping the Respondent with his accounts since the resignation of the Claimant; and Macauley Atherton – also known as Max, the Respondent's younger son who was a witness to the incident on 29 December 2017.

The Issues

10. it was agreed at the start of the hearing that the issues were those recorded in the record of preliminary hearing together with the allegation of a failure to provide a statement of employment particulars in accordance with section 1 of the Employment Rights Act 1996 (hereafter the ERA). It was clarified by Mr Parry that the conduct relied upon by the Claimant as amounting to a breach of the implied term of trust and confidence was that set out in paragraphs 2 and 3 of the claim form. Ms Murphy clarified the conduct relied on the Respondent as amounting to conduct that should be taken into account when reducing any compensation for unfair dismissal under section 122 and 123 of the ERA and also as conduct for which the Respondent would have fairly dismissed the Claimant had she not resigned.

11. Taking into account those additional matters the issues for me to decide in relation to unfair dismissal are the following:
 - a. Was the Claimant dismissed? The Claimant relies on an alleged breach of the implied term of trust and confidence.

 - b. Did the Respondent without reasonable or proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee? The Claimant alleges that for some time but in particular from May 2017, she was the victim of personal and offensive abuse by the Respondent and his associates, Mr Pocock and JW. She alleges that she was persistently shouted and sworn at; items of personal property was stolen from her; her work was criticised inappropriately. The comments included:
 - i. Comments relating to her weight and looks such as
 - ii. "Is that chair strong enough with how fat she is?"
 - iii. "Someone that desperate to sleep with her."
 - iv. "Sort that bitch out."
 - v. "Your time is limited in this company."
 - vi. "The way you run this company is appalling."
 - vii. "Keep your fucking nose out of it."
 - viii. "fucking bitch."
 - ix. "I'm not interested in what you think-do what you're fucking told."
 - x. "I'm fed up of listening to your shit about my best friend."

- xi. "Get your head out of your arse, do what you're told to do."
 - xii. "You've totally screwed up the accounts."
 - xiii. The accounts are "all fucked up and all your fault".
- c. The Claimant also alleges that on 29 December 2017 the Respondent came to her home, banged on the front door and demanding to take back his taxi. The Respondent falsely accused the Claimant and her husband of responsibility for discrepancies in the company's finances.
- d. If such conduct is proved against the Respondent then does it amount to a repudiatory breach of contract entitling the Claimant to resign with or without notice?
- e. Did the Claimant resign because of the Respondent's conduct?
- f. Alternatively, did the Claimant affirmed the contract?
- g. If the Claimant was dismissed, what was the reason for the dismissal? Was it a potentially fair reason?
- h. Was the dismissal, if any, fair or unfair?
- i. If the Claimant was unfairly dismissed, did she contribute to the dismissal?
- i. The Respondent says there was a discrepancy in the accounts which amounts to contributory conduct.
- j. Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? The Respondent argues that it would have fairly dismissed the Claimant for gross misconduct because of,
- i. the discrepancies in the accounts;
 - ii. the purchase by the Claimant of a bicycle using the company credit card;
 - iii. the failure by the Claimant to account for particular monies handed to her following her resignation by the self-employed driver SS.
- k. It is accepted by the Respondent that if the allegations concerning the purchase of the bicycle and the monies from SS are proven against the Claimant they are only relevant to deduction from compensation to the extent that they would have led to a fair dismissal (under the principles set out in Polkey v A E Dayton Services Limited [1987] IRLR 503) and cannot be relied on under section 123 ERA because they were not discovered until the

autumn 2018 and were not known to the Respondent at the time of the Claimant's resignation.

- I. If the Claimant is successful then compensation for unfair dismissal would need to be calculated, taking into account any findings about deductions.
12. The questions for me to decide in relation to the complaint that the Respondent has failed to pay to the Claimant sums due in respect of annual leave accrued but not taken on termination of employment are,
- a. what was the Claimant's leave year?
 - b. How much of the leave year had elapsed at the effective date of termination?
 - c. In consequence, how much leave had accrued for the year under regulations 13 and 13A of the Working Time Regulations 1998 (hereafter the WTR)?
 - d. How much paid leave had the Claimant taken in the year?
 - e. How many days remain unpaid?
 - f. What is the relevant net daily rate of pay?
 - g. How much pay is outstanding to be paid to the Claimant?
13. The questions for me to decide in relation to the complaint that the Respondent has failed to pay wages properly payable to the Claimant (unauthorised deduction from wages claim) are,
- a. How much was properly payable to the Claimant on 28 December 2017 and 3 January 2018?
 - b. How much has been paid by the Respondent to the Claimant? The particulars claimed are set out in the claimant's schedule of loss at page 277.

Findings of Fact

14. I make my findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. I do not set out in this judgement all of the evidence which I heard but only my principle findings of fact, those necessary to enable me to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts I have done so by making a judgment about the credibility or otherwise of the witnesses I have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

15. A number of the witnesses gave evidence which was problematic and potentially inconsistent with other evidence in the case. Further details of inconsistencies and implausibilities will be given in the relevant part of my findings of fact however the extent to which I have felt it right to rely upon the evidence of the Claimant, her husband and the Respondent is affected by the following:

- a. Mr Martin Fathers departed from his witness statement about the date of his resignation from employment despite having confirmed the truth of that statement at the start of his oral evidence. He gave a frankly implausible account of the circumstances in which he obtained the black Mercedes which he now uses as a vehicle in the business, Ali's Cabs, run by him and his wife. He had generally poor recall of specific dates but a better recall of how events fit into a sequence. I do not say that to be critical of him but simply to record that I needed to take his poor recollection of dates into account when evaluating his reliability as a witness.
- b. The Claimant's evidence about the process that she followed when cashing in and according the work done by the drivers and cash delivered to the office by them was problematic in that she appeared to agree with the process outlined to her by the Respondent's counsel but then, when it became clear that this would not account for discrepancies that she accepted existed, described the Respondent taking cash at a particular point in the process. One might have expected, since that was not a new allegation, that she had introduced it at an earlier point in her oral evidence. She did refer to the allegation in general terms in her written statement where she said that the Respondent regularly took out lump sums. However she did not specify the point in the process in which he took it in her written evidence. She gave the same implausible account as her husband of the circumstances in which they had obtained the black Mercedes. She accepted that she used foul language in the office on occasions and examples of the language that she used can be seen in the text messages between her and Cheryl at pages 133A to L. However she claimed to be insulted by similar language directed towards her. She said that that was not double standards because she herself was not guilty of personally targeted abuse.
- c. The Respondent seems to me to have run his previous company business and sole trader business in a way that overlaps to a degree such that his finances became muddled. He effectively admits that he had little or no control over the finances of the business. He appears to run another unrelated business and my sense is that in the relevant period his attention was somewhat distracted possibly in part by the HM Revenue & Customs investigation and partly because of personal matters. The manner in which he gave evidence was somewhat confrontational and

evasive; my impression was not that he was not, in general, making positively misleading statements but he did not volunteer a full and frank account to all questions and that itself can be misleading. There were differences between his oral evidence and his witness statement (despite the fact that he confirmed the truth of it)-for example about who opened the door on 29 December (see JA paragraph 45). There were some surprising omissions from his statement-for example the counterpart of Mr Bird's evidence in his statement MB paragraph 9 and 10.

16. Additionally, there were some missing documents which one might have expected to see. For example, there was no s.1 ERA statement of employment particulars, which had significance for the holiday pay claim, in particular. The parties were agreed that the holiday year ran from 1 April to 31 March. However, the claimant was not given a relevant agreement which satisfied the requirements of reg.2 of the WTR and therefore, by default and contrary to the belief of both parties, the holiday year in fact ran from 1 June to 31 May by reason of reg.13(3)(b)(ii) of the WTR.
17. In relation to the alleged discrepancies, the Respondent had produced spreadsheets (pages 345 – 348) and Leah Atherton gave evidence about having compiled that information. Despite her evidence being that a version of that spreadsheet had been in existence in early 2018, it was not disclosed to the claimant's representative until 27 February 2019. Although the cash book is in the bundle, as well are sample driver sheets, the driver sheets for Martin Fathers for December 2017 are not in the bundle. This is curious since, according to the Respondent, it was the difference between the cash recorded in the cashbook as having been handed in by Martin Fathers and the jobs recorded as having been done in December that caused him to make the allegations that he did.
18. The Claimant, on whom is the burden of proving her loss, has been working for the business Ali's Cabs since 4 January 2018 but has not drawn an income from it. She is employed by Toots Taxis but also spends time engaged in Ali's Cabs business. She has not disclosed the accounts from this business because she alleges that they are not relevant since she is not drawing income from it. However, in the first place, that presupposes that it is accepted that she is not drawing an income from the business of which she is co-owner with her husband. In the second place, there must be an argument that she has failed to mitigate her loss by spending time engaged in a business the profits of which are not shared between the co-owners.

The background to the dispute and the Claimant's role

19. The Claimant's evidence, which I accept on this point, was that her role in preparing the accounts was to input the raw data from receipts for fuel, driver's job cards, payments in and out of the cash book and wages paid into the computer program (called xero). The Respondent retains an

accountant, DC, whose former assistant, CN, produced the reconciliations, and management accounts even though she no longer worked for DC.

20. The Claimant accepted in cross examination that the process which was supposed to be followed was that the driver made a written record of the work done in a day. That was the driver sheet which would include a record of the cash taken by them for particular jobs. 99% of the time, the Claimant would receive the cash and drivers' sheets but the Respondent would receive them if she was on annual leave or sick. She agreed that it was part of her role to verify that the cash she received corresponded with the cash disclosed by the drivers' sheets.
21. The cash book had been introduced in mid-2016 and it was part of her role to fill in the cash book: "*I had to record what the drivers gave me on a particular day*". She set out the date, name of the driver and the amount and the cash book also recorded the money spent in cash, for example to pay the escorts for schoolchildren on the school runs. The Respondent checked the cash balance every Friday. Her role included inputting the data into the computer every month.
22. Calls to book a taxi were logged on the Mercury system and the Claimant accepted that it would have a record for every booking she took a call for. If the booking had been taken and not fulfilled it was cancelled off on Mercury. That was what was supposed to happen.
23. As I have said, the background to this dispute was an investigation of the Respondent's business and his previous incorporated taxi business by HMRC. Against that background, his statement (JA paragraph 21) that he wanted to improve the paperwork and get his finances more organised is entirely plausible and I accept it. The Respondent also says that he had noted that the cash flow of the company did not seem to match its apparent turnover. I accept that he wanted assistance to get financial control over his business and understand his finances and that was the reason for inviting Mr Pocock to work for him. That seems entirely sensible in the circumstances.

The Claimant's relationship with Mr Pocock

24. It is not material whether Mr Pocock started work in March 2017 or July 2016 but, in this instance, I prefer the evidence of the Respondent and Mr Pocock that he started work in about July 2016. On the other hand, the Respondent's determination to improve financial accountability is not very deep-rooted because his limited company has been trading for at least 18 months and page 351 suggests that it is yet to file statutory accounts.
25. I accept the Respondent's evidence that the Claimant was unhappy with Mr Pocock's appointment. I have considered carefully the texts sent by the Claimant to CN during the visit by DC and PR on 11 December 2017. Although they are a snapshot of what the Claimant was thinking during that visit, what is said by CN and the Claimant to each other leads me to conclude:

- a. That the Respondent's business as a sole trader and the limited company were being run alongside each other with cost allocated by CN and not by the Claimant: page 133C "*They said no fuel in limitef (sic)*" "*Credit card goes out of Abingdon taxis not Ltd so that's why.*" (at page 133G) "*They said it's such a mess there's lot to do but I think it's an insult as they think it's me that does it – So angry I could cry*".
 - b. That DC and PR thought that this was unsatisfactory and the accounts needed to be rewritten.
 - c. That the Claimant thought that the accounts were fine and that the problem was that DC and PR couldn't understand what had been done by CN – but she herself was unable to explain.
 - d. Whether justifiable or not, the Claimant's reaction was to feel anger and she expressed that to CN using foul language the most obvious example of which is page 133F when she says "*U make sure u tell him to poke it up his arse cos I am not doing fuck all no more*".
26. I consider the events of 11 December 2017 further below, but I infer from Mr Pocock's evidence and from the Claimant's reaction to DC and PR's scrutiny of the accounts that she was resentful that the Respondent had employed someone to look into the accounts and that that resentment caused her to be suspicious of the Respondent's motives and hostile towards Mr Pocock. It may be that Mr Pocock's role was not explained to her but as a matter of fact I accept that she was hostile and suspicious.
27. Mr Pocock cross-referred the driver records to the Mercury record of bookings but did not have access to the cash ledger at any point. I accept that he found that what was on the driver's sheets did not match what was shown on the Mercury system and showed the results of his investigation to the Respondent in July 2017.
28. So far as the comments alleged to have been made by him about the Claimant is concerned, he accepted that he did make comments about the Claimant's weight but not her looks. He said that he hadn't made the comment about whether the chair was strong enough to hold the Claimant's weight and that anything he had said was in response to something thrown at him by the Claimant (metaphorically rather than literally). He accepted that he had once said "*sort that bitch out*" because he had lost his temper with the Claimant and had apologised because it was unprofessional. He accepted that he had said that the Claimant's time in the company was limited. He reiterated his AP paragraph 13 statement evidence that the Claimant had made offensive personal remarks about him
29. All of the witnesses agreed to a greater or lesser extent that the office of the taxi business was a workplace in which swearing was commonplace.

For example, Ms Kelly said that swearing was part of the normal method of communication including the use of the “F” word in a joking, casual way. The Claimant accepted that she would herself occasionally use the “F” word in a lighthearted way and described it as a very male environment. She said about 60% of the staff would use the “F” word although some drivers never would and that this had been the case throughout her employment before the period complained of from 2016 onwards. She drew a distinction between people swearing generally, which she “*never had an issue with*” and swearing being aimed at her which she thought was not acceptable.

30. My conclusion about the Claimant’s behaviour towards Mr Pocock is that, based upon her extremely intemperate reaction to being challenged by DC and PR on 11 December 2017, her suspicion and resentment about his appointment did lead her to behave towards him in an offensive way. Foul language was commonplace within the office but I accept Mr Pocock’s evidence that the Claimant did not merely generally use foul language, she directed abusive language towards him. However, he conceded that he gave as good as he got.
31. The Claimant exchanged text messages with the Respondent on 15 December 2017 which provide an insight into her relationship with Mr Pocock and also the Respondent’s handling of it. For example, on page 311 she complained that “*u allow that weasel to talk to me like shit When No Ones around and u bang on about loyalty u should be telling him to get on with Your So Called Office Manager Not the other way around*”. Although these texts date from a point where the relationship between the Claimant and Respondent was under strain (to put it lightly) and after the 11 December (which was something of a turning point) the Claimant is clearly referring to earlier incidents. Again this is an example of the Claimant using foul language as part of her way of speaking and at page 317 is a text where she refers to Mr Pocock as “*that twat*”.
32. I accept that in principle there is a distinction between using abusive language generally and directing it at an individual. Those texts from December 2017 reinforce my conclusion that the Claimant did not merely swear generally, she was abusive towards Mr Pocock.

Treatment of the Claimant by the Respondent prior to December 2017

33. Her evidence about her language towards the Respondent, who had been a friend of hers for many years before she worked for him, was that she had not used bad language towards him because he was her boss but may have used the “F” word towards him in anger near the end. My conclusion is that this understates the position and that for long as she was feeling belittled because the Respondent had appointed another friend to look into the accounts she was probably using bad language towards the Respondent as well.
34. Broadly speaking there are two kinds of abusive conduct complained of by the Claimant: abuse and insults directed to her weight and abusive

language generally; and challenges or abuse about her compilation of the accounts, for example when she says that she was locked in the office by the Respondent with JW and JW's wife who had shouted at her for getting the accounts wrong and the events of 11 December 2017.

35. Ms Kelly gave relevant evidence about the general treatment of the Claimant prior to July 2017 when she herself left. She described in her paragraph 3 witnessing behaviour towards the Claimant which, notwithstanding the general office atmosphere, she regarded as bullying. She supported the allegation that the Respondent had referred to the Claimant as "the Fat Controller" and as "Marjorie" – one of the characters from the "Little Britain" sketch show who runs weightwatchers despite herself being clearly overweight. These are patently unflattering and, indeed, potentially hurtful comparisons. Ms Kelly specifically said that she had never heard the Claimant refer to herself as "Marjorie" but that she could not recall the Claimant complaining about its use at the time. Her perception was that JW was encouraged by the general "*chatter and looks and stuff*" to behave in a similar way towards the Claimant. She also gave evidence about finding the Claimant shaken and tearful at work and explaining to her that she had been locked in the office with JW and his wife. In generally, I found Ms Kelly to be a fair witness who readily accepted where her knowledge was second hand and stated her story without heat or embellishment. She had a reasonably clear recollection but her evidence was limited to a period prior to July 2017.
36. Ms Kelly's evidence paints a picture of the Respondent being at best uncaring that his way of talking to the Claimant apparently encouraged insulting behaviour towards her by people who did not have the excuse of his long friendship with the Claimant for familiarity. When he was questioned about the Claimant's specific allegations he conceded that she had complained to him about the way she was spoken to by Mr Pocock and that he had had conversations about that and about Mr Pocock's complaints about the Claimant. When asked what kind of comments by Mr Pocock the Claimant had complained about he said "*the comments that are listed here*" indicating page 92 of the bundle and paragraph 2 of the particulars of claim: "*the chair and someone that desperate*". This contradicted his witness statement (JA paragraph 27) where he said that the Claimant hadn't raised any specific concerns about Mr Pocock or his behaviour "*she just didn't want him there*".
37. I also note that the Respondent did not deny the allegations against him in the Grounds of Resistance. In fact the specific denials (paragraph 16) of aggressive, derogatory or hostile behaviour towards the Claimant on 29 December 2019 contrasts with the response to the claim of constructive dismissal (paragraphs 26 to 29 of the Grounds of Resistance) avers that the Claimant resigned to set up a competing business and then says "if, which is denied, the Tribunal is of the view that the [Respondent] acted in such a manner as to constitute a fundamental breach of contract," the Claimant would have been dismissed in any event.

38. I would not lightly rely upon a professionally pleaded document by a represented party as the basis for a finding of fact because pleadings in the Employment Tribunal do not carry a statement of truth and are therefore not previous inconsistent statements. However, had the Respondent considered that he, JW and Mr Pocock were falsely accused of the statements particularised against them in paragraph 2 it might have been expected that he would have made sure that there was more than a bald denial
39. When put together with the clear contradiction of his witness statement in oral evidence my conclusion is that the Claimant had complained in strong terms to the Respondent about Mr Pocock making the following comments to her: "Is that chair strong enough with how fat she is?" "Someone that desperate to sleep with her" "Sort that bitch out" "Your time is limited in this company" and "The way you run this company is appalling". The last three are admitted by Mr Pocock and I find that the other two were probably said by him to the Claimant.
40. The Claimant also complained that JW had taken her glasses on two occasions but since the Respondent replaced one of the two missing pairs, that incident does not carry as much weight in my decision making on whether there was a repudiatory breach of contracts as the abusive comments.
41. The Respondent has sought to minimise the insulting behaviour towards the Claimant and I have found that he, himself habitually behaved towards her in a way which encouraged others in the office to think it was acceptable. On the other hand, the Claimant herself was rude, foul-mouthed and abusive towards Mr Pocock who had come into a workplace atmosphere where this passed for humour.
42. What, in my view, made the difference and caused the Claimant to feel that her position was under threat were the criticisms of the way she carried out her job. I am not able to reach a conclusion about who was insulting to whom first. I am of the view that the Respondent held responsibility as the employer for reining in insulting language by everyone concerned and took no effective action. However, I am of the view that the Claimant would not have started to look for alternative employment, as she did no later than August 2017, were it not for the criticisms of the way she carried out her work. That is also reflected in the Respondent's text to the Claimant of 15 December 2017 (page 310) where he says "*my biggest concern is that for the last year you have resisted and blocked most changes I have tried to implement as you don't like change*". I conclude that the Claimant thought that the way she carried out her job, including inputting data into the accounting software, was perfectly fine and needed no improvement whereas the Respondent knew that it wasn't because there was a mismatch between the apparent activity of the drivers and the cash flow and that lax accounting systems had contributed to the difficulties he had been experiencing with the HMRC. Instead of working with Mr Pocock, the Claimant reacted with hostility and appears to have felt threatened.

11 December 2017

43. This came to a head on 11 December 2017 when the Respondent's accountant, DC visited the office to carry out a full audit of the accounts (JA paragraph 32) along with the Respondent's partner, PR, who was training to be an accountant and had offered to help. I have already set out at paragraph 25 above extracts from the Claimant's texts to CN. I accept the Claimant's evidence that CN's involvement in the accounts was being kept from DC by the Respondent who did not want his accountant to know that his former employee was helping the Respondent on the side.
44. The gist of a number of the texts between the Claimant and CN does support the Claimant's case that she knew that there were a number of questions that she wouldn't be able to answer (see page 133A) and which referred to work done by someone else (see page 133G "*I think it's a insult as they think it's me that does it*"). These are contemporaneous statements that suggest that the Claimant felt put on the spot to answer questions which she was unable to and felt angry and humiliated. The upshot was that apparently DC and PR decided to input all of the accounting data from November 2016 to December 2017 (page 133H) and the texts record the Claimant's allegation that on that occasion, in the presence of the Respondent, PR said that the accounts the Claimant was responsible for were "*all fucked*".
45. The Claimant accepted in oral evidence that DC and PR had a legitimate reason for coming into the office to audit the accounts. The texts at page 133A are timed from before the arrival of DC and PR but suggest, contrary to her oral evidence, that the Claimant was anxious about the visit. Her case is that the Respondent set up the meeting knowing that she would look bad because he knew she was both unable to answer questions and would be unable to direct DC and PR to CN would be able to answer them. The Claimant also denied that, after this visit, she was concerned about her job but I reject that (page 307 from the texts with the Respondent dated 14 December "*Also U need to start being honest with me regarding m job as u r making it very hard to stay here*"
46. See also the Respondent's answers at pages 309 to 310 where he said "*you have been told countless times your job is not available and no plans to change unless you decide but still that is the one thing you have chosen not to listen to*"
47. The Claimant was sufficiently angry still on 21 December 2017 to tell people, in the presence of Mr Bird, that she was going to resign by Easter 2018 and would wipe the computer records when she left so as to leave the Respondent in difficulty (MB para 9 – a threat which was admitted by the Claimant).
48. My conclusion is that, although the Claimant was worried that she would be expected to answer questions to which she did not know the answer and it was unfair of the Respondent not to make clear to DC and PR when

the Claimant's role did not include the matters they wanted answers to, overall the story of 11 December 2017 is of the Claimant being uncooperative because she was defensive, suspicious and afraid that she was under suspicion.

49. The Respondent, while he did speak in a derogative way to her in inappropriate abuse, did not, as late as 21 December, consider that the Claimant's role was under threat. So I reject the Claimant's allegation that the Respondent deliberately engineered the meeting of 11 December to make her look incompetent. I also have the impression that the accounts were not well maintained and that that was, at least in part, down to the Claimant. See paragraph 55 below.
50. The messages between the Claimant and the Respondent at pages 305 to 323 date from 13 December to 27 December 2017. She describes the behaviour of DC and PR as "disgusting". I accept that they had used foul language to describe the accounts, which the Claimant had been involved in compiling although not to the extent apparently believed by DC and PR. She blames the Respondent for making her feel "*thick*" (page 312) and my conclusion is that although she was angry at Mr Pocock's behaviour to her it was her inability to respond to the criticism of the accounts which she clearly thought was misplaced that made her so angry at that point in time. She had already applied for alternative employment but the tenor of her texts is that she is challenging the Respondent to back her but he wants his chosen team to get on with each other. I also note that the Claimant referred to Mr Pocock as "*that twat*" when asking whether he would be in but the Respondent does not once in his reply to the Claimant use foul language and responded "*No Tony that is his name is not in tomorrow*". Overall, the Claimant is confrontation and belligerent in these exchanges. The Respondent is much more measured and defends his actions while maintaining that he is not looking for a replacement for the Claimant.

29 December and the Claimant's resignation

51. On 27 December the Claimant went to work to cash-in; to check the drivers' sheets so that they could be paid the following day. Both the Claimant and Mr M Fathers confirmed in oral evidence that, contrary to their written statements, this was the date on which he resigned his employment. The significance of that is that when the Respondent attended at the Claimant's house on 29 December it was after Mr Martin Fathers' resignation and, therefore, I accept that it was to collect his car which Mr Fathers' had been using in his employment.
52. This gives a different context to the visit of 29 December to that set out in the Claimant's statement and Martin Father's statement. On their statement account by that time neither had resigned although Mr Fathers had said that he would in the future. In fact, the Respondent had a legitimate reason to come to collect the car. By then he had been told by Mr Bird that the Claimant was intending to leave to set up a competing taxi company (MB statement paragraph 10).

53. In the meantime, the Claimant, Martin Fathers and Lewis Fathers should have been paid their wages on 28 December. The details of the payments which were made to the Claimant and the extent of the shortfall for the weekly payment due on 28 December are set out in paragraph 6 of her statement and evidenced by her bank statements. Eventually, £368.88 of the £417.56 owed to her for the week ending 24 December was paid to her on the due date and a further £42.18 the following day leaving a shortfall of £6.50.
54. The Claimant texted the Respondent during the course of 28 December asking when she was to be paid (pages 324 to 337). The resignation of Martin Fathers had prompted the Respondent to look at his documentation and his evidence was that he had realised that there were jobs recorded on his driver's sheets as having been paid for in cash which did not tally with the cash recorded as entered in the cash book (JA paragraph 37). The Claimant appeared to the Respondent to have approved the timesheets for payment when the cash received did not tally and also the driver's sheets did not tally with the bookings disclosed on the Mercury system.
55. The Claimant denies that she had failed to account for cash declared by the drivers. If the cash book had been kept accurately and systematically, one would expect to see, for example, that where Martin's driver's sheet had been kept for, say, Friday 1 December 2017 – which shows one job paying cash of £8.00 and a number of payments via accounts (page 212) – then the cash book entry against Martin for 1 December 2017 would show a payment into cash of £8.00. However, page 184 shows that there is no entry for Martin on 1 December. One entry which is as you would expect is that for 28 November (page 184) which shows £9.60 paid in which corresponds with page 209 although the Respondent alleges that there was a job omitted from that day's sheet so the paperwork is alleged to be deficient in a different way.
56. Based upon the Claimant's evidence, the payments due to her and her husband on 28 December should have been for the period 18 to 24 December. If the Respondent is right, that is the period which he was looking at which alerted him to the discrepancy (although the text exchange suggests he looked at 12 to 24 December). The cash book at page 184 shows cash declared by Martin Fathers on 20 December but on no other date in that period. However, the drivers sheets for 15 and 20 December are not in the bundle – those being the ones for the dates referred to by the Respondent in his text at page 337. It is surprising that the Respondent has not put that evidence before me when it is material to the case he is running that those documents were the reason why he accused the Claimant of accounting discrepancies.
57. Leah Atherton (who gave her evidence in a straightforward way and appeared to be doing her best to assist the tribunal) subsequently carried out an analysis of the paperwork from April 2017 until the Fathers left the

Respondent's employment in December 2017 (see LA paragraph 13). She created spreadsheets at pages 345 to 348 which set out the discrepancies she found between the figures declared in the cash book, the figures for cash on the driver's sheet and the total on the Mercury booking system. The spreadsheet for Martin Fathers (page 345) does not include an entry for any period after 3 December 2017 and therefore does not include the figures which the Respondent said were what alerted him to the problem.

58. It is not at all clear to me, looking at the evidence as a whole, that the data that I have been presented with, allegedly from the Mercury system – see column D on page 345, can be relied on as indicating which jobs were booked and carried out and paid for in cash (rather than by some other method of payment). There was contested evidence about whether it was possible to cancel jobs from Mercury and about the extent to which Mercury was updated automatically when the drivers recorded that a job had been fulfilled on their mobile devices.
59. The Claimant's answer when asked to explain the macro discrepancy for the period 27 March 2017 to 3 December 2017 set out on page 345 which Ms Atherton claims to have found was not to deny that the discrepancy existed but to allege that it was caused by the Respondent himself taking cash out of the business in an uncontrolled way. She started by accepting that she had inputted the figure in the cash ledger and agreed that it should tally with the figure on the driver's sheet for the day. She agreed that the cash book should record the cash she actually recovered from the driver and correlate with the sheet and that part of her job was effectively to verify the details provided by the driver. However, she also said that she took the cash after the Respondent took what he needed out. She said her responsibility was to note the cash in the cash book that was left after the Respondent had taken cash from the driver. It did therefore appear that she first gave evidence that she entered a figure in the cash ledger which equated to the cash received from the driver. She then appeared to change her evidence to say that she entered a figure in the cash ledger which equated to whatever was left after the Respondent had taken some cash directly from her desk.
60. On the one hand this accusation has some plausibility because, as I have found, the Respondent ran his personal and corporate business without proper attention to separate financial accountability. On the other hand, his recent experience of the HMRC investigation had, as I find, caused him to try to sort his finances out: hence the appointment of Mr Pocock and, probably, the visit by DC and PR. I think that the Respondent probably was fairly lax about cash management and historically had probably always been so. The cash ledger was apparently a surprisingly recent innovation. The Claimant's allegation goes beyond carelessness. I have to try to decide between the competing claims of serious misconduct: on the one hand that the Claimant and/or her husband were taking cash from the business and the Claimant was ensuring that the cash ledger tallied with the cash in the safe and on the other that the Respondent was taking the

cash before the Claimant processed it and required her to make up the cash ledger to cover for him.

61. Take the period 1 November to 3 November (pages 186 to 188). On 1 November Martin Fathers apparently took £26.40 in cash during the day (excluding a job which has been added later as the Respondent alleges it was recorded on Mercury – so is part of the alleged discrepancy between drivers' sheets and Mercury). The cash ledger (page 183) records him as handing in £35.60 – that is to say more than he apparently had taken. On 2 November he apparently took £60 in cash and none is listed in the cash ledger. On 3 November he apparently took £45.40 and £25.00 is listed in the cash ledger. On 6 November he apparently took £11.80 (page 190) and none is listed on the cash ledger. On 7 November he apparently took £27.60 in cash (page 191 and see also page 189) and none is listed in the cash ledger. On 8 November he apparently took £6.80 in cash (pages 192 and 189) and £21.80 is listed in the cash ledger. Then there are no entries in the cash ledger for Martin Fathers for the rest of that week despite the drivers' sheets at pages 193 and 194 showing cash was received.
62. This certainly shows that the cash ledger was completely unreliable as a source of information about how much cash the business was generating. When asked how the Respondent could have taken the cash when he was driving (and not always in the office) and drivers could drop their takings off at any time of the day, the Claimant said that mostly the money would be in piles on her desk for her to log in the cash book. She said that the Respondent would say that he can't steal from his own company. On the one hand she said in evidence that "*Whatever cash was in my hand I put in the ledger*". On the other she suggested that the Respondent took the money off the driver before they put their sheets in to her: this was not in Martin Fathers' or Lewis Fathers' statements. Then she seemed to say that cash was taken out of the cash tin – which would mean that it did not tally with the ledger – while also saying it was taken from her desk before it was put in the tin.
63. It was alleged by the Claimants' representative in cross examination of the Respondent that the first time he had alleged that she was responsible for the discrepancies was after Mr Father's resignation, despite – on his account – both CN (JA paragraph 20) and Mr Pocock (TP paragraph 22) expressing their concerns about the Claimant's honesty. By that time he believed that the family were setting up in competition and it was alleged that the reason for his failure to make the allegation sooner was that the Respondent was well aware that he and not the Claimant was responsible for the inconsistency. He said that he had not wanted to believe she was responsible. I accept that explanation.
64. I also accept Leah Atherton's evidence that she found the discrepancies – the issue is rather whether the Respondent has proven that the Claimant was responsible for them.
65. It can be seen from the above that the fact that there are discrepancies does not, by itself, indicate whether the cash had been taken by the

Claimant or by the Respondent. In particular, the cash ledger is a confusing document because it sometimes indicates more money being booked in than was apparently taken in the day. I have found that both parties have, on occasion, given evidence which is unreliable or positively untrue (see 15 above, for example, and also my findings about the holiday form at paragraph 78 below). There are documents which have been omitted from the bundle which cover the period relied on by the Respondent as having triggered his conclusion that the Claimant and/or Mr Martin Fathers had been withholding his money. There is no satisfactory explanation for that omission.

66. The parties' contemporaneous statements are in their texts sent on 28 and 29 December (pages 325 to 338). An edited exchange for 28 December is:

"R: I have however when checking found some jobs missing from martins sheets that haven't been accounted for ... I noticed you had filled in some of his sheets so I am assuming this was just an oversight ... I will need to through these with you to make sure they are correct and any monies unaccounted for are rectified ...

R You made your decision I would have respected that but I am confident you understand my feelings after the way you have chosen to do this and obviously you have been happy to write off our friendship ...

R: I have as your aware now had Lewis resignation I didn't want to leave she either martin or Lewis as they have both been an asset to my business But I have to accept that you have all made your decisions

C: U will pay all our money tonight and u have still got both our week in hand money and remaining or our holiday ... So u need the full amount today u can then go threw paperwork which don't play that card that money isn't correct ...

C: ... Don't try and make out we have not cashed in enough money either

...

C: No this week money has to be paid so u can try everything u like to do us out of our money

...

C: U r missing the point about our wages we worked for I need the amount on your sheet paid today as I will have loads of bank charges as I said after paying that u will still owe me and Martin over 800 pounds so u can withhold that until we sort it out

R: .. I have paid half I am entitled to hold back if monies are missing for the week the wages apply to ... Now look at what you've done and how you have gone about it and tell me who's loyalty is in question"

Some entries for 29 December (starting at 07.44) include:

"R: Having checked the cashing up book from the 12th onwards there are only two entries for Martin totalling £126.90. This is considerably different to his sheets notwithstanding the jobs missing from sheets ... I will need your explanation for this as to why these monies are not

accounted for ... I will need your explanation for this as to why these monies are not accounted for and where the money has gone?

C: *That's fine so that's Martin's wages u have no right holding back mine. So u owe me rest of mine plus my week in hand plus I think about 3 days hoikday ...*

R: *... I will now be checking back to see how long this has been going on and take legal advice*

C: *... Don't u dare try and put that on us Cheryl use to check that so u want to go there I will tosane"*

67. The gist of the underlined sections of the Claimant's texts is that she denies that she and her husband have not cashed in enough money. However, she does appear to counter the Respondent's statement that he can withhold money with the concession that he has the right to withhold sums from Martin's wages because of his suspicion that the cash isn't all accounted for. It is noteworthy that the Claimant does not respond by saying something to the effect that it's not surprising that there is a discrepancy because the Respondent has been taking cash out himself. She was recalled to the witness stand to be asked why she hadn't made that allegation on 28 or 29 December and had no explanation for the omission.
68. I am of the opinion that the Respondent was more angered by the discovery that the Claimant and her husband intended to set up a competing business than by the Claimant's resistance to the changes he wished to put in place and the difficulties there had been in managing her since Mr Pocock's appointment. Judging by the exchange of texts, in particular, it is the information that the couple intended to compete with him coupled with Martin and Lewis Fathers' resignations which is behind statements such as "*you made your decision*" and "*You all made your decisions*" – said prior to the Claimant's resignation.
69. So far as I can make out, that whole exchange took place before the Claimant resigned, despite her making clear demands for a terminal payment. It also probably took place before the Respondent went to the Claimant's home to ask for the return of the car (that is the implication of paragraph 43 of JA's statement).
70. This means that when the Respondent went to the Claimant's house, she already knew that he said that he had found discrepancies in the figures. The Claimant's complaint about his behaviour on that occasion is that he falsely accused her and her husband of discrepancies in the business's finances and banged on the front door demanding the return of his taxi. The Claimant's witness, Mr Kogel, substantiated her account of banging on the door and denied that the Claimant had been shouting but said that she had been upset. He denied that Mr Atherton senior had said words to the effect "*Would you pay your staff more if they realised they had been taking from the business*"? I do not see why Mr Atherton would not have said that – he had already made that allegation via text. My sense is that the Respondent, by then, was angry and disappointed that the Claimant

and her husband and son were planning to go into competition with him. I think that he felt betrayed and had started to believe that the Claimant had been stealing from him. I accept that he did say the italicised words above. I accept that he probably did bang forcefully on the door and did accuse the Claimant of having taken from the business.

71. The Claimant had no right to seek to withhold the taxi formerly driven by her husband because he had resigned, whether or not the Respondent still owed her and her husband money.
72. The order of events after the visit was that the Claimant went to the Respondent's office to discuss the money owed to her. Macauley Atherton was present in the office during that meeting. During that meeting the Claimant resigned orally and confirmed that in writing later the same day (page 140) in which she says that in the light of the way she's been treated over the past year or so it's best that she leave. According to the Respondent, and his son, during the meeting he showed the Claimant the discrepancies. Macauley Atherton was taking another call during the meeting and therefore not fully concentrating on the conversation between the Claimant and his father. The Respondent asserts that the Claimant accepted that there were discrepancies but offered no explanation. In her statement the Claimant says that she knew that her husband's paperwork was correct. Indeed I have only the Respondent's say so that the paperwork for the period he was considering at that meeting was inaccurate.
73. I do not believe the Claimant's and Mr Martin Fathers' account of finding the black Mercedes car on their drive completely unsolicited. In my view one or other of them must have had discussions with the owner. Their evidence was that they hadn't even discussed it between themselves prior to 29 December when the Claimant resigned during the day. It is completely implausible that up until 29 December the plan was that Mr Martin Fathers would become an HGV driver and then between the middle of the day on 29 December and their return from shopping on 30 December not only had they discussed and decided to go into business together but an unknown well-wisher got to hear of it and proffered an unsolicited Mercedes for their new venture. They must have had discussions with the owner of Toots Taxis prior to 30 December in order for it to be delivered on that date. However it may not have been before 27 December when Mr Martin Fathers resigned; there is no proof that it was before then. There is no proof that active steps had been taken by the Claimant prior to her resignation to set up a competing business, even if she had formed the intention to do so when her job applications did not lead to alternative employment. I conclude that she has formed the intention but am not satisfied that she had taken active steps to set up in competition prior to resignation.

Holiday Pay and Unauthorised Deduction from wages

74. Both the Claimant and the Respondent agree that there was a conversation about the number of holidays taken by the Claimant, her husband and her son during the meeting on 29 December 2017 in the office. It is common ground that the Claimant said that there were days' leave which needed to be added to Martin and Lewis Fathers' records (page 341).
75. As at the date of resignation, had the holiday year run from 1 April to 30 March as the parties believed, the Claimant would have been entitled to 21 days' holiday. She believes that she had taken 18 days (her paragraph 9) and was owed 3 days. She then accepted in cross-examination that the ½ day at the end of the line recording her holidays on page 341 had been taken by her when she had the morning off to go to the hospital. She said that the 4 strokes at the end of the line had not been written by her. The 3rd week marked on her holiday sheet has "Foot July" underneath it which relates to a period she was recuperating from a foot operation in July 2017. That means that from 1 June 2017 onwards she accepts that she had taken 10 ½ days' holiday and disputes the final 4 days which the Respondent alleges she had also taken as holiday.
76. Therefore, on her updated evidence she had taken 20 ½ days rather than 18 days from 1 April 2017 or 10 ½ days from 1 June 2017. If the Respondent is correct and the final 4 strokes represent days taken then she had taken more holiday than had accrued had the holiday year started on 1 April 2017. However, given that it in fact starts on 1 June 2017 she had accrued 16.33 days at the effective date of termination and taken either 10.5 days (on her account) or 14.5 days (on the Respondent's account).
77. When this revised position was put to the Respondent in his oral evidence, and it was put to him that the last 4 figure "1s" were different in appearance to the others, he accepted that there was a difference but said that he believed them to be in the Claimant's handwriting. However he was also very unwilling to accept that the Respondent owed the Claimant anything for unpaid holiday, although the adjustment of the start of the holiday year means that, even on his case, that the Respondent owes the Claimant 1.83 days' holiday pay accrued but not taken on termination of employment. The Respondent refused to accept this in oral evidence and seemed to me to proffer changing evidence which would explain why he did not have to accept that he owed the Claimant money.
78. I infer from that, and from other unsatisfactory evidence from the Respondent (see paragraph 15 above) that in this instance the Claimant is reliable and the last 4 figures in the record of her holiday pay have been added by the Respondent with a view to ensuring that he did not appear to owe her any money. I am of the view that the Respondent thought that the Claimant might have been stealing from him and certainly believed that she was going into competition with him and tried to ensure that he did not have to pay her holiday pay – his attempts would mathematically have meant that she had used all her accrued holiday pay but for the fact that

the lack of written contract meant that their agreement about the date on which the holiday year started in her case was ineffective.

79. The Claimant was not paid for the last days prior to her resignation (25 to 29 December) nor for the one week's notice which she gave – the period from 30 December 2017 to 3 January 2018 – and I accept that the Respondent told her to keep away from the business. I am of the view that that is just the sort of thing he would have said. This should be paid at the normal rate of £517 gross per week. There is therefore owed one week and 3 days' pay at £517 per week gross.

The Discrepancies

80. I need to reach a conclusion on the competing allegations of misconduct in relation to the discrepancies. I have rarely heard a case in which so much unsatisfactory and false evidence has been given by both parties and remind myself that both have changed their evidence under oath and the Respondent has put forward a document as an accurate record of holiday taken by the Claimant which, as I find, he amended in order to try to avoid paying her sums to which she was entitled. I remind myself that the burden of proving the acts upon which she relies as amounting to a repudiatory breach of contract is on the Claimant but that the burden of proving the misconduct alleged to be grounds for a fair dismissal or contributory conduct deduction is on the Respondent.
81. Despite the Respondent's unreliability as a witness of truth in respect of the holiday pay form, I have reached the conclusion on the balance of probabilities that the Claimant's revised account that the Respondent would remove piles of cash from her desk is not credible (see paragraph 59 above for her oral evidence). He may have taken cash from the business for personal expenditure but not at the point in the process which she described and that is not the explanation for the discrepancy between the driver's sheets and the cash ledger. I reach this conclusion because the Claimant did not detail or even refer to this account in her texts of 29 December, she changed her oral evidence about it under cross-examination and, had it been true, it would have required her to carry out complex calculations to make the cash in the safe tally with the cash ledger. Setting aside the question of why that would be necessary if the Respondent who verified the balances knew the reason for the difference, had Mr Atherton removed a pile of notes from her desk, then in order to make the cash ledger tally with the cash, she would have had to work out which driver's sheets to omit from the cash ledger or how much to amend the figures by in order to add up to the cash taken by the Respondent. As Ms Murphy argued in her submissions, anyone looking at the cash ledger would presume that a particular named driver had handed in the cash attributed to him or her but on the Claimant's version of events that would be an unsafe presumption and one which put the drivers at risk. Her description was of the Respondent just coming along and taking a handful of cash. Most of the time the discrepancies are not whole numbers of pounds, as it would be more likely were the Claimant's description true.

This task of covering up the Respondent's tracks would have been time consuming, onerous and the cash ledger was not kept in a way which suggests to me that such a task was within the Claimant's mathematical competence. If she'd had to do all that, surely she would have mentioned it in her defence in the texts of 29 December 2017?

82. That leaves the most probable explanation for the discrepancies as being that the Claimant and/or others removed cash before processing the driver's sheets. The unexplained lack of documentary evidence in relation to the specific period 12 to 24 December 2017 is troubling but I infer from the clear discrepancies for the earlier periods that the Respondent did have good reason to make his contemporaneous accusations of discrepancies for the period for which the Claimant and her husband were due to be paid on 28 December 2017. Indeed, the Claimant accepted that there were legitimate grounds for his concern.

Why did the Claimant resign?

83. In her paragraph 10 the Claimant says that she resigned because of the way she was treated by the Respondent and Mr Pocock in finding fault with the way she did things and abusive language. In her paragraph 26 she says that the final straw was the 29 December when the Respondent came to her house, banged on her front door and shouted at her, demanded the return of the car and then falsely accused her of discrepancies between her husband's timesheets and the cash ledger. She had started applying for work elsewhere in August 2017.
84. My conclusion is that there are 2 parts to the actions which triggered her resignation: the Respondent's behaviour when he turned up at her home and what she claims to be the false allegation of discrepancies. She added in answer to my questions that it was also the failure to pay their wages and that is consistent with the contemporaneous texts where she starts by demanding the unpaid wages and moves to demanding what she regards as the sums due as a terminal payment. Page 92 of the particulars of claim sets out the catalogue of insulting behaviour over a period of time culminating in the events of 29 December and includes the allegation of theft of her glasses (which I have found the Respondent made partial reparation for).
85. My conclusion is that, set against her own behaviour towards the Respondent and Mr Pocock and the atmosphere generally, it was not the personal gibes which caused her to reconsider her employment but the challenges to her competence implicit in the appointment of Mr Pocock, made clear in his attempts to change the accounting systems and brought to a head on 11 December 2017. Those were reasons why she resigned but the triggers were the failure to pay wages in full, the 29 December 2019 visit to her home and the allegations of discrepancies. The Claimant may have intended to set up in business with her husband when she resigned but her reasons for resigning were various acts of the Respondent.

Other alleged misconduct

86. I have been shown a receipt for the purchase of a bicycle on 13 June 2015 which the Respondent says the Claimant purchased without his authority using the business credit card and which the Claimant says was purchased by the Respondent to support her because her place of work was moving to his home (paragraph 38). Her evidence was that she repaid him. The purchase was not questioned by the Respondent until these proceedings and the documents added to the bundle comparatively late in the day – hence the lack of documents to support the Claimant's evidence that she repaid the debt. I believe her. There is no misconduct in relation to the bike.
87. There is also a difference of evidence in relation to cash which the Claimant accepts was given to her by one of the other drivers, SS. The Respondent gives evidence that SS told him that it was about £400 and that it has never been given to him by the Claimant. The Claimant says that it was about £200 and that when she was entrusted with the money she asked SS's wife to photograph the money and the driver's sheet to prove that it existed and then left the money and the form in the red box on her desk when she visited the office on 29 December after having been accused of the discrepancies. On this instance I reject the Claimant's account. Had she been worried enough by the accusations of discrepancies to obtain photographs of money belonging to the Respondent she would not have merely left it in on her desk when both the Respondent and his son were in the office. She would have obtained a receipt to protect herself. I make no finding about how much money there was but accept that SS did hand some money to the Claimant and she did not remit it to the Respondent as she should have. The Respondent found out about this sometime after the Claimant's resignation.

The Law applicable to the claim

88. Section 95(1)(c) of the Employment Rights Act 1996 makes it clear that a dismissal includes the situation where an employee terminates the contract of employment (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal and the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or which shows that he 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 of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned then the tribunal must consider whether the employer's behaviour played a part in the employee's resignation.

89. In the present case the claimant argues that she was unfairly dismissed because she resigned because of a breach of the implied term of mutual trust and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the authoritative guidance given in the case of Malik v BCCI [1998] AC 20 HL. The term imposes an obligation 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 confidence and trust between employer and employee.
90. The question is always first whether, judged objectively, the failures of the employer were calculated or likely to destroy or seriously damage the relationship of trust and confidence, not merely whether they were unreasonable. Secondly, the tribunal must consider whether there was reasonable and proper cause for the conduct. In relation to that part of the test, it is unlikely that an employer will have reasonable and proper cause to behave unreasonably. However, whether the employment tribunal considers the employer's actions to have been reasonable or unreasonable can only be a tool to be used to help to decide whether those actions amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause: Bournemouth University Higher Education Corp v Buckland [2010] I.C.R 908.
91. If the conduct is a significant breach going to the root of the contract of employment (applying the Western Excavating v Sharp test) and the employee accepted that breach by resigning, then he or she was constructively dismissed. The conduct may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence (see Lewis v Motorworld Garages Ltd [1986] ICR 157). If some of the alleged incidents are found not to have occurred, then a Tribunal must consider those events which it has found did occur and ask objectively whether they amounted to a repudiatory breach of contract. The same must be true where events are found to have occurred but not precisely in the way alleged by the claimant.
92. Once she has notice of the breach the employee has to decide whether to accept the breach, resign and claim constructive dismissal or to affirm the contract. Any affirmation must be clear and unequivocal but can be express or implied.
93. If an employee has affirmed the contract, he or she is still entitled to rely upon the totality of the employer's acts in a so-called "last straw" case where, following affirmation, there has been another incident provided that the later act forms part of the series (Kaur v Leeds Teaching Hospitals [2018] I.R.L.R. 833 CA). In paragraph 39 of Kaur the Court of Appeal quoted extensively from Omilaju v Waltham Forest London BC [2004] EWCA Civ 1493 repeating the directions that although a final straw may be relatively insignificant, it must not be utterly trivial. At paragraph 40 of Kaur, the Court of Appeal quoted paragraphs 19 to 21 of Omilaju where it is explained that the final straw does not have to be of the same character as

the earlier acts but it must add something to the breach of contract, however insignificant. It was further explained that if the employee has affirmed the after a series of acts (or indeed an act) which amounts to a repudiatory breach of contract then they cannot rely upon that breach as entitling them to resign unless he or she can point to a later act which enables them to do so. If the alleged “last straw” which follows affirmation is entirely innocuous then the employee cannot rely upon it.

94. The Court then went on (at paragraph 50) to advise that, in order correctly to apply the *dicta* in Omilaju,

“In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- (2) Has he or she affirmed the contract since that act?
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)⁶ breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para [45], above.)
- (5) Did the employee resign in response (or partly in response) to that breach?”

95. Once the tribunal has decided that there was a dismissal they must consider whether it was fair or unfair in accordance with s.98 ERA 1996: Savoia v Chiltern Herb Farms Ltd [1982] I.R.L.R. 166 CA.

“Section 98 Employment Rights Act 1996

- (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) A reason falls within this subsection if it-
 - (a) ...
 - (b) Relates to the conduct of the employee,
 - (c) ...
- (3) ...

- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was 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."

Conclusions on the Issues

96. I now set out my conclusion on the issues, applying the law as set out above to the facts which I have found. I do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but I have them all in mind in reaching those conclusions.

97. I have concluded that some of the matters complained of by the Claimant in paragraph 2 of her particulars of claim (page 92) are made out.

- a. The Claimant was, over a period of time but particularly from the appointment of Mr Pocock in July 2016, sworn at and subjected to personal abuse. The allegations set out in paragraph 11.b.i. to xi. are made out but the context of the acts of the Respondent and Mr Pocock was that the Claimant herself behaved in an offensive way (paragraph 30 to 33).
- b. On about 11 December 2017, the comments set out in paragraph 11.b.xii & xiii were made by DC or PR towards the Claimant in the presence of the Respondent. The Claimant was only partly responsible for the accounts being in an unsatisfactory state and the Respondent did not make that clear to DC and PR.
- c. The Respondent did come to the Claimant's home, bang on her front door, shout and demand to take his taxi back. This was because her husband, who was the driver of the taxi, had resigned and no longer needed it.
- d. On 29 December 2017 the Respondent did accuse the Claimant and her husband of responsibility for discrepancies in the company's finances.
- e. The Respondent also paid the Claimant late. I conclude that he genuinely, but inaccurately, believed that the sum paid on 29 December 2017 was the balance due to her for that payment period. Although not in paragraph 2 of her particulars of claim, this was one of the reasons for her resignation.

98. The next question is whether that conduct amounted to a repudiatory breach of contract. I need to consider whether by those acts, taken singly

or cumulatively, the Respondent behaved without reasonable and proper cause in a way which was calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

99. I have found that a difficult question to answer in the present case. It seems to me that Mr Pocock may well have had reasonable and proper cause to say to the Claimant that the way she ran the company was appalling. DC and PR may well have had reasonable and proper cause had they said that the accounts were in a mess and that the Claimant was, at least in part, responsible for it. The Respondent did have reasonable and proper cause for saying "*I'm fed up of listening to your shit about my best friend*". In reaching that last conclusion I am acutely aware that, in general, it is not reasonable behaviour for an employer to use bad language towards an employee.
100. However, up to a point, bad language is excusable when it is in response to bad language used by the employee who is a long-term friend of the employer, who uses foul language herself and where the workplace atmosphere was such that swearing was commonplace. My conclusion is that the Respondent behaved in a way towards the Claimant which encouraged bad behaviour towards her by others and did not react appropriately to her complaints. He must bear some responsibility for the behaviour of others. He failed to defend her on 11 December. However, she probably behaved uncooperatively and unprofessionally on that occasion and at least some of the muddle was down to her – quite apart from the discrepancies in the cash accounting.
101. I also bear in mind that the Claimant was equally abusive to the Respondent and, in particular, to Mr Pocock. I have read her texts which are very coarse: she does not merely use swearwords descriptively or for effect – see paragraph 25.d. above. Her spoken language was probably very much the same. I do not say that the Claimant's behaviour provided a reasonable and proper cause for the Respondent's insulting behaviour. Had the criticisms of the Claimant's work been expressed without any bad language then there would be no doubt but there was reasonable and proper cause for the criticism. I am also mindful that the Respondent made very clear to the Claimant by text prior to 27 December that he did not regard her continued employment by him as under threat.
102. Taking all that into account, with some reservation, I have concluded that the Respondent's acts prior to 29 December 2017 did not, either individually or cumulatively, amount to a *repudiatory* breach of the implied term of mutual trust and confidence in all the circumstances.
103. There were reasonable grounds for the Respondent to come to the Claimant's home to ask for the return of his taxi. There were reasonable grounds for him to accuse the Claimant and/or her husband of responsibility for discrepancies in the accounts on 29 December. He did not behave reasonably by shouting and banging on her door. However, it seems to me to be worth remembering that the test for a breach of the

implied term of mutual trust and confidence is not whether the employer behaved reasonably (see paragraph 90 above). There was more that was justified in the Respondent's behaviour on the 29 December than was unjustified. I have concluded that the acts of 29 December 2017 did not amount to a repudiatory breach of the implied term of mutual trust and confidence.

104. Although the Claimant resigned in response to the acts of the Respondent, those acts did not amount to a repudiatory breach of contract and I have therefore concluded that the Claimant was not dismissed and that her claim of unfair dismissal is not well founded. Although I do not need to go on to consider the other issues set out in paragraph 11, had I been required to do so, I should have found that the Claimant contributed to her dismissal and that a relatively high deduction from compensation would have been just and equitable because of that. Furthermore, I am of the view that had the discrepancies been investigated and the failure to remit the cash from the driver SS come to light and been investigated there is a 100% chance that the Claimant would have been dismissed within a month of the date of her resignation.
105. The Claimant's claim that she was not paid in full for annual leave accrued but not taken on termination of employment is well founded. She had accrued 16.33 days and taken 10.5 days. She therefore was entitled to be paid for 5.83 days at the rate of £105.50 gross. The Respondent is to pay to her £615.42 gross (to be paid after deduction of tax and national insurance contributions) in respect of this head of claim.
106. The Claimant was not paid for the period 25 December 2017 to 3 January 2018 and should have been paid both for the days prior to her resignation and for the notice period which she gave, since the Respondent told her not to work her notice period. A total of £844 gross is due under this head, to be paid after deduction of tax and national insurance contributions.
107. Finally, the Claimant having succeeded in her claim under s.23 of the ERA of a breach of s.13, the jurisdiction under s.38(3) of the Employment Act 2002 to make an award for a breach of the duty under s.1 of the ERA to provide a statement of terms and conditions of employment. Unless I consider it unjust or inequitable to do so I must award the minimum amount of two weeks' pay at the statutory rate set out in s.227 of the ERA (£498 in the present case) and may, if I consider it just and equitable in all the circumstances to do so, award four weeks' pay. The only explanation that the Respondent gave for the failure to provide a statement of terms and conditions was that he hadn't got round to doing so; it was not that he was unaware of the obligation to provide one. His evidence was that he had become aware of his obligations "a few years ago". Mr Parry urges me to consider this a suitable case for the maximum award.
108. I am mindful that one of the consequences of the failure is that the parties' admitted agreement that the holiday year should run from 1 April

was ineffective and that this has had the consequence that the Claimant had taken less of her accrued statutory leave than she thought she had when she started proceedings. It seems to me that the consequences of the lack of a statement having been visited upon the Respondent in this way, it is not just and equitable in all the circumstances for more than the minimum award to be made in the present case.

Employment Judge George

Date: ...19 June 2019
21 June 2019

Sent to the parties on:

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For the Tribunal Office