THE EMPLOYMENT TRIBUNALS

Claimant: Mr J Cooke
Respondent: UK Direct Business Solutions Limited

Heard at: Newcastle Hearing Centre **On:** 11, 12 and 13 October 2021

Before: Employment Judge Morris (sitting alone)

Representation:
Claimant: Mr S W Heslop, adviser

Respondent: Ms H Hogben of counsel

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that the claimant's complaint that he was dismissed by the respondent by reference to Section 95(1)(c) of the Employment Rights Act 1996 and, by reference to Section 94 of that Act, that his dismissal was unfair contrary to Section 98 of that Act is not well-founded and is dismissed.

REASONS

Representation and evidence

1. The claimant was represented by Mr SW Heslop, adviser, who called the claimant and Miss A Dodd (formerly employed by the respondent as in-house legal counsel) to give evidence.

2. The respondent was represented by Ms H Hogben of Counsel who called the following employees of the respondent to give evidence on its behalf: Mr SA Moslemi, Managing Director; Mrs L Charlton, Head of Operations; Mr NJ Coomber, the claimant's Line Manager; Mr C Barnes, Head of Human Resources.

3. The Tribunal had before it in excess of 250 documents in an agreed bundle. The numbers shown in parenthesis below are the page numbers (or the first page number of a large document) in that bundle.

The claimant's claim

4. The claimant claimed that by reference to section 95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act") he had terminated his contract of employment in circumstances in which he was entitled to terminate it without notice by reason of the respondent's conduct; hence he had been constructively dismissed and, by reference to sections 94 and 98 of the 1996 Act, that dismissal had been unfair.

5. The respondent denied that the claimant had been dismissed but did not advance any evidence or argument, in the alternative, that if he had been dismissed his dismissal was fair.

The issues

6. The parties were agreed that the issues in this case had been clearly set out in the Case Summary arising from a Preliminary Hearing that had been conducted on 3 February 2021. Being a matter of record, it is unnecessary to set those issues out in these Reasons; suffice it that the asserted conduct of the respondent, which the claimant states amounted to a repudiatory breach of the term of trust and confidence implied into the contract of employment between the parties, is recorded as being:

> "Refuse to provide time off and/or flexibility to working hours for childcare between May and August 2020".

Findings of fact

7. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

7.1. The respondent is an energy consultancy that provides services to commercial customers by negotiating and brokering contracts with energy suppliers. It is a large employer with fairly significant resources including an in-house Human Resources Department ("HR").

7.2. The claimant was employed by the respondent from 6 August 2018 until he resigned with immediate effect on 28 August 2020. The claimant was initially employed as a Lead Generator but his job title was subsequently changed to become Energy Analyst. Additionally, approximately one year after the commencement of his employment, he was designated as an assistant manager to Mr Coomber in respect of which he received a salary increase of £5,000. The claimant was highly regarded as one of the respondent's key performers and contributed heavily towards its income. An indication of the regard in which the claimant was held is that he was awarded a prize of a Rolex watch said to have a value of some £10,000.

7.3. The claimant's contract of employment (74) provided, amongst other things, that his normal working hours were 37.5 each week. The claimant's basic salary was £30,000 per annum and he received commission in accordance with the respondent's Commission Plan. The claimant and all other telesales employees were office-based and, although not expressly provided in that contract, the claimant was required to work between 08:30 and 16:30 each day. The contract of employment also contains several clauses, including restrictive covenants, directed at "Confidentiality and Business Protection" (89).

7.4. So far as is relevant to the issues in this case, the claimant's domestic circumstances included that he lived with his partner and her two sons from previous relationships, and they had a daughter together who was born on 22 May 2019. The claimant's partner is a qualified staff nurse who worked on the respiratory ward of a local hospital. Throughout the pandemic she worked on what the claimant refers to as a specialist "red" Covid ward.

7.5. As is well-known, on 23 March 2020 the Prime Minister announced the first national 'lockdown' as part of the government's response to the Covid-19 pandemic. The following day, the respondent's directors decided to close its offices. It made use of the government's job retention scheme ("Furlough") in relation to a number of its employees and set up a core team of other employees to continue the operation of its business working from home. That team comprised the respondent's most effective Lead Generators and one Procurement Specialist. Given his high productivity, the claimant was designated to be a member of that team. As with other members of that team the claimant was provided with appropriate equipment to enable him to work from home.

7.6. The claimant found it extremely difficult to work from home balancing his responsibilities to his children and his employer and, as is indicated in his email to his then line manager of 27 March 2020 (118), his performance fell below expectations. He and that line manager discussed this situation and, understanding the position the claimant was in, it was decided to remove him from the home-working core team and place him on Furlough on 1 April 2020 (107). As with all other employees, during Furlough the respondent 'topped up' the 80% salary received under the government scheme and paid the claimant his full basic salary. Not being at work, however, he would suffer a loss of commission payments.

7.7. To provide financial support to employees who needed it (for example in relation to food or energy supplies), the respondent established a £100,000 support fund. This was administered by Mr Barnes who would discuss the employee's needs to ensure that they were legitimate and, if so, he would approve the loan. As the claimant was struggling financially, he took advantage of this loan scheme.

7.8. As the situation in the Country generally began to improve, the respondent decided that telephone-based sales staff who were on Furlough (the claimant and another 32 employees) should return to their usual work in the office. This was communicated to such employees by Mr Moslemi by way

of a Zoom call on 1 May 2020. He told them that they should return to the office on 11 May 2020, albeit then following the safety rules that were implemented. In oral evidence Mr Barnes fully explained the measures that he arranged to have put in place to ensure, as far as possible, that the respondent's employees were not placed at risk within the office. I consider those measures to have been both comprehensive and impressive. This return to work was confirmed to the employees in an email from Mr Barnes dated 1 May 2021 (129). Other employees such as field sales staff remained on Furlough and the majority of the support functions were operated from home to minimise the number of people in the office and therefore protect the staff who were working there.

7.9. The claimant considered that his returning to his contractual working pattern would cause difficulties for his family. He therefore sent a message to Mr Barnes on the day he was due to return, 11 May, asking if he could remain on Furlough. He explained that his partner was on the front line as a fully qualified nurse and that nurseries were closed until June at the earliest (130).

7.10. In response, Mrs Charlton suggested that the claimant might make use of the respondent's parental leave policy (55), which he initially declined as he could not afford to be away from work (131). The claimant asked if he could remain on Furlough and drew Mrs Charlton's attention to government guidance that employees could be furloughed if they were unable to work due to childcare commitments. The respondent's position, however, was that the requirements of the business to service its customers were increasing and it was not deemed responsible take advantage of the Furlough Scheme given that there was ample opportunity for employees to work and earn the same or more than previously. Further, it was considered that the respondent's business would probably not survive at all if all employees who had childcare responsibilities were placed on Furlough.

7.11. The claimant then requested parental leave, and although the respondent's policy required at least 21 days' notice, his request for parental leave from 11 to 31 May 2020 was approved that day (133). In passing I record that in addition to the formal arrangements made by the respondent to enable the claimant to have leave, Mr Coomber permitted him to have occasional time off on an informal basis in acknowledgement of the claimant's contribution in terms of income and as his assistant.

7.12. The claimant and his partner managed to secure a full-time place at a nursery for their daughter, which she commenced on 18 May 2020. At that time the nursery was operating restricted hours from 09:00 until 16:00 meaning that the claimant could not take his daughter to or collect her from the nursery. Additionally, the requirements of the nursery at the time were that only a member of the same household could take a child to or collect him or her from the nursery. The claimant and his partner were able to make arrangements in this regard by his partner's mother taking care of the child on two days each week and his partner, by working weekends, being able to care for her on two other days in each week. This left Wednesdays, however, which neither the claimant's partner nor her mother were able to cover; hence she went to the nursery.

7.13. It would appear that at about this time the claimant began to become dissatisfied with his employment. He wrote to Mr Coomber on 19 May stating that he was feeling like he should start looking for a new job as he did not think he could work for a company he had lost respect for and he had to enjoy the place he worked for in order to perform (136). Mr Coomber's response was to encourage the claimant to remain (136 and 137). This encouragement appears to have had some impact as towards the end of May the claimant wrote to Mr Coomber stating, "I'm going to get some finance and make it work at dbs" (138).

7.14. Despite not being required to return to work from parental leave until 1 June, the claimant informed Mr Barnes that he no longer required parental leave and would be able to return to work on 18 May 2020; the day his daughter would begin to attend the nursery. He said, however, that in order to take his daughter to and collect her from the nursery he would need to start work an hour late at 09:30 and finish an hour early at 03:30. Mr Barnes was content to accommodate the claimant's request but explained that this would have to be by way of unpaid leave. Although this was agreed it was never implemented because the claimant was concerned at losing pay and, at Mrs Charlton suggestion, it was later agreed (the claimant stated in evidence that this was begrudgingly on his part) that the time off required by the claimant would be by way of him taking annual holiday instead of unpaid leave.

7.15. This was not straightforward as the respondent's annual leave management system ("Timetastic") required employees to take leave in multiples of either a full day or a half day. Nevertheless, the respondent changed its system to accommodate the claimant taking annual leave on an hourly basis. A similar arrangement with made in respect of two other employees. The claimant was content with this arrangement as it meant that he would receive his full pay. The arrangement applied from 18 May 2020 until the end of June 2020 during which time the claimant submitted his start and finish times to Mr Barnes by email (139 -142 & 145). By 1 July 2012, however, the claimant had used his full year's entitlement to annual leave apart from half a day (184).

7.16. The claimant's evidence is that on 27 May 2020 he had symptoms of Covid and that Mr Barnes told him that as he did not have a temperature he had to remain working, which the claimant suggests was consistent with the respondent's "very relaxed attitude in terms of Covid regulations". I do not accept this evidence of the claimant and prefer the evidence of Mr Barnes and Mr Coomber that if an employee had Covid symptoms he or she was not permitted to attend the office or, if already in the office, immediately had to go home. In regard to the specific incident on 27 May the evidence of Mr Barnes was succinct, "no Covid symptoms were reported". Neither do I accept the general allegation that the respondent had a relaxed attitude to the Covid regulations: I repeat, as found above, that I found Mr Barnes' explanation of the measures he put in place to be both comprehensive and impressive.

7.17. With the situation in the Country generally continuing to improve, the restrictions that were directed at limiting the spread of the coronavirus were

eased: for example, childcare support 'bubbles' were permitted from 13 June 2020.

7.18. On 19 June the claimant again informed Mr Coomber that he might have to start looking for jobs that were not Monday to Friday as, if his partner did not work every weekend, childcare costs would be nearly £600 per month and there was no way that they were paying that (143).

7.19. On 24 June Ms Dodd and Mr Barnes were discussing matters not relevant to these proceedings when Mrs Charlton entered the room. There is a stark conflict of evidence between the parties as to what then occurred. Mrs Charlton accepted that she had gone to Mr Barnes and Ms Dodd seeking advice. She could not remember why but thought it was possibly about the respondent's field staff returning to work. Mr Barnes recalled Mrs Charlton coming to ask about the terms for childcare (generally, rather than about the claimant alone) to which Miss Dodd had responded along the lines more comprehensively set out in an email to Mrs Charlton, copied to Mr Barnes, that day (206). The evidence of Miss Dodd was that Mrs Charlton had come to the meeting to have a word with Mr Barnes and began complaining about the claimant and another employee saying that they were "taking the piss" and saying that they could not work due to childcare and their partners being nurses and at risk of Covid. Miss Dodd maintained that Mrs Charlton had then said that she wanted to "get rid" of them and asked how she could do that. Miss Dodd's evidence was that at this point she had interjected that without some genuine concern around gross misconduct Mrs Charlton could not just sack them, to which she had replied that she would "create" a gross misconduct concern if it meant she was able to sack them. Both Mrs Charlton and Mr Barnes denied the account of Miss Dodd. Mr Barnes stated that her account was "100% untrue – it didn't happen" and that while Mrs Charlton did ask for advice from time to time there had been "nothing along the lines alleged". He was also very clear that there was nothing about creating gross misconduct, "I would say how do you 'create' gross misconduct and would have raised it with her line manager". In this respect the evidence of one of these two witnesses of the respondent is corroborated by the other but there is also some corroboration of the evidence of Miss Dodd in her email of 24 June in which she makes reference to the possibility of the employee being "investigated for misconduct in terms of their refusal to follow a reasonable management instruction, and their unauthorised absence, if they do not attend work on that day. However, the context of the refusal to attend work would need to be closely considered before disciplinary action were taken …. So, before any decision is made please seek further advice from myself". Essentially, however, I do not consider that I need to seek to resolve this conflict of evidence given that there was no suggestion by either party that the claimant was aware of whatever was or was not said on 24 June until after his resignation (as Mr Heslop said, "well after") and, therefore, any such discussion could not have impacted upon the claimant's decision to resign. That said, I acknowledge that what Mrs Charlton is alleged to have said at this meeting could be relevant to the assertion by the claimant that the respondent's managers wanted rid of him but, for the reasons explained below, I reject that assertion.

7.20. In light of the further relaxation referred to above and as alternative arrangements in respect of childcare could now be made, Mr Moslemi decided to limit the flexibility that had previously been allowed to employees, including the claimant, who had been given special arrangements in respect of their childcare responsibilities.

7.21. In consequence of this decision, on 9 July 2020 Mrs Charlton sent an email to relevant managers (including Mr Coomber) asking them to inform affected staff in their teams that the respondent would not continue the flexible start/finish times with effect from Monday, 13 July 2020: "Could you speak to them and make them aware please …." (147). Mrs Charlton's oral evidence was that her email was intended to give the employees notice so that they could put other options for childcare in place. I do not read that email in that way: it was sent at 10:02 on Thursday 9 July and the special arrangements were to cease and the employees were to revert to normal hours on the following Monday. Additionally, by email timed at 13:08 that same day Mrs Charlton advised HR that her earlier instructions had been actioned and, therefore, the employees' payroll and holiday arrangements should revert to normal from Monday. That said I do accept that Mrs Charlton concluded her email to the line managers with, "let me know if there are any issues", and her oral evidence was that only one of the three employees had raised any issues and Mrs Charlton had allowed her to continue to take advantage of the flexible arrangements for another week after 13 July.

7.22. Despite this cessation of the special arrangements that had been made for the claimant, on 22 July 2020 he unilaterally sought to continue those arrangements and sent an email to Mr Barnes advising him that he had only attended work from 09:30 to 16:30, "so one hour holiday please" (156). Mr Barnes emailed Mrs Charlton to enquire whether she had approved this. She replied that she had not and asked Mr Coomber to sort it out. The outcome was that a deduction of 30 minutes was made from the claimant's wages on account of his unauthorised absence that day (154).

7.23. On 29 July 2020 the claimant sought a meeting with Mr Barnes at which he explained his continuing childcare difficulties and, in particular, requested that the previous flexibility regarding working hours should continue throughout August with the respondent allowing him four hours absence during that month (ie in relation to the four Wednesdays) rather than the eight hours absence he had previously enjoyed. Mr Barnes discussed the claimant's situation with Mrs Charlton but wrote to him to advise him that the outcome remained the same in terms of him fulfilling his full-time hours; he added that the respondent had supported the claimant during lockdown but had to draw the line and ensure the rules were the same for everyone (162). The claimant replied that he needed the four hours during August otherwise his daughter could not go to nursery. He asked, "So where do we go from here do you want to discipline me now for being AWOL or terminate my contract as I can not come in those 4 hours." (161). In reply, Mr Barnes suggested that the claimant should contact the nursery for further support as the respondent's rules still stood but the claimant answered that he had done so and the nursery would not fully reopen until

September. Mr Barnes asked if the claimant had looked into a childminder to take his daughter to nursery on the four days in question adding that he may have a contact if the claimant was interested. The final part of this exchange was the claimant's response that having discussed matters with his partner, "a childminder is not at a option she wants to go down she point blank refuses to use one so that's out of my hands" (159).

7.24. On 30 July 2020 the claimant sent an email to Mrs Charlton (166). In the context of the above exchange, the subject heading to that email is noteworthy: "Childcare solved". In that email the claimant explained to Mrs Charlton, for the first time, that his daughter's nursery was "not allowing any one to drop kids off apart from people that live with the kids it has been like that since putting her into nursery, it is due to change in September where others can drop her off but they will be open full-time then anyway so childcare will not be a issue then." The claimant then went on to advise Mrs Charlton that his partner's mother had made a proposal whereby she would be able to deliver the claimant's daughter to and collect her from nursery. He commented, "… so we are sorted in that way so I don't need the time off …". He continued that there was another issue in that he had been intending to go to Blackpool for his partner's birthday at the end of August but, as he did not have any annual leave left (other than that which employees of the respondent were required reserve to take during the respondent's Christmas shutdown), he asked if Mrs Charlton would "please authorise two days unpaid leave to go away with the family either the 25th and 26th of august or the 26th and 27th of august". Mrs Charlton was surprised at this request given what the claimant had previously explained about his financial situation but she knew that he had found it difficult transitioning his daughter into nursery and, after speaking with his line manager and HR, as a favour to the claimant, she granted his request in respect of 26 and 27 August provided the claimant met his targets for that month, which he did.

7.25. Although it was not known to the respondent until after the claimant's resignation, he had actually fabricated the basis for his request as he only wanted the leave in order to take his daughter to nursery on Wednesday 26 August. In oral evidence he explained that he "had no other option" as he knew that the respondent would refuse a request for time off for childcare. Another factor 'after the event' is that as the respondent's payroll for August had already been run at the time of the claimant's resignation, he was actually paid for the days in respect of which he had been granted unpaid leave.

7.26. The morning after the claimant had had this unpaid leave (ie 28 August) he contacted HR to say that his daughter had been unwell overnight and continued to be so, and he would be unable to attend work. The HR manager responded sympathetically to the effect that if his daughter was unwell the claimant would have to be absent.

7.27. Mrs Charlton became aware of the claimant's absence. Conscious of the fact that this would be his third consecutive day of absence, Mrs Charlton considered that it was fair to explore what options he had available to him to enable him to come into work. As such, she sent a message to the claimant. As

the claimant says that this was the "last straw" that led to his resignation, Mrs Charlton's message bears setting out in full:

> "Hi Jamie
>
> Can Naomi come back from work so you can get in for lunchtime? I've just given you 2 days extra off work – it's not ideal that you're off today as well" (167a)

7.28. The claimant replied that he very much doubted it as his partner had started work at 6 am and she had been making back hours lost when she had been off for childcare, and he was sure that she was running a bay on her own with only healthcare assistants and would not be able to leave. He acknowledged that Mrs Charlton had given him the time off, which he appreciated, but his daughter's illness could not be helped and he never rang in sick (167a). It appears that Mrs Charlton accepted this explanation as she did not pursue the point further with the claimant.

7.29. Despite this apparently measured response of the claimant to Mrs Charlton, his evidence was that her text message, "really boiled my blood. Laura was demanding that I asked my partner "to come back from work" (a Covid ward) so that I could go into work". The claimant's evidence continued that he was "angry" and "absolutely disgusted that she would suggest my partner, a staff nurse on a Covid ward, should drop everything to come home so her partner could go to work in what I thought was a less important role than taking care of very sick people. This text was the last straw for me."

7.30. The claimant stated that he decided at that point that he would leave the respondent's employment. He said that he had never felt so angry and betrayed as an employee in that the respondent clearly had no care or respect for him and no care for the NHS or his partner. It was as if the respondent had not been listening to him over the last few months in relation to his childcare difficulties. He was distressed at feeling he had no option left other than to leave, even without alternative employment, but he had no choice. He would resign to avoid being sacked.

7.31. In the circumstances he arranged to meet Mr Coomber at a local park at 17:30 that day and told him that he was going to resign and had drafted a letter to that effect. He handed Mr Coomber his work pass and explained that he would confirm his resignation. The claimant returned to his car and sent Mr Coomber the draft email that he intended to send to Mr Barnes. He then sent his resignation, which he said was to be "effective immediately", to Mr Barnes and an HR manager at 18:13 that day, Friday, 28 August 2020 (173). Key excerpts from that resignation email are as follows:

> "my decision to leave was for no other reason but the lack of support in regards to my childcare issues and expecting Naiomi as a key worker on the front line to make all the sacrifices and take unpaid leave from work, holidays and on the odd occasion lie to get the time off when you wouldn't allow me to have the time off"

> "today was a prime example asking me to ask naiomi to leave work so I can come in. If naiomi is at work it's not possible for her to leave. This has caused massive problems within my family and unnecessary stress … i need to put my family first"
>
> "I wish the business the best of success for the future."

7.32. The claimant's evidence was that he then started to put out a few feelers for alternative employment and made a few calls. He said that at about 18:15 on the day of his resignation, he contacted a person who had previously been Operations Manager at the respondent but now worked for a competitor. The claimant told him that he had resigned and the individual replied that he could be accommodated as an employee of the competitor. He then telephoned the owners of that competitor before returning to the claimant to tell him that he could start his employment on the following Monday. In fact, I note that the following Monday was a bank holiday and, therefore, infer that the claimant's start date was to be Tuesday, 1 September 2020. The claimant's basic salary with the competitor was to be £10,000 more than that he had earned with the respondent. The respondent's position is that the claimant had already secured an offer of employment with the competitor prior to his resignation and resigned so as to take up that employment.

7.33. It is perhaps ironic that on that day on which the claimant commenced employment with the competitor, 1 September 2021, the nursery attended by his daughter was to commence longer opening hours and lifted the restriction that a child only be taken to or collected from the nursery by a member of the same household. It would appear, therefore, that the claimant's childcare issue would then have been resolved.

7.34. The HR manager to whom the claimant had sent his resignation email replied to the claimant by email at 20:18. He explained that if someone phoned in sick, as the claimant had done to care for his daughter, he or she would always be asked if there were any alternative childcare arrangements that could be made. He said that he would not want the claimant's resignation to be a quick decision as he had been a great asset to the respondent, asked if his resignation was his final decision and concluded that if the claimant would like to chat "by all means give me a call" (172). It appears that the claimant did not respond.

7.35. As is the respondent's practice, Mr Barnes wrote to the claimant on 2 September 2020 to remind him of the terms of his contract of employment, including the restrictive covenants, which continued to be binding upon him (175).

7.36. At this time there were also some fairly unedifying messages sent by Mr Moslemi to the claimant demanding the return of the Rolex watch (170), which I need not address given that they came after the claimant's resignation, except to note that the messages demonstrate Mr Moslemi's disappointment and annoyance at the claimant's resignation, which I consider to be inconsistent with the respondent seeking to drive the claimant from its employment.

7.37. Having identified that the claimant was working for a competitor, the respondent instructed solicitors to write to him in relation to the restrictive covenants in his contract of employment and, it appears, they suggested that he should resign from his new employment. The claimant replied on 1 October 2020 stating that that was not an option (179). He said that he had been constructively dismissed as the respondent would not accommodate his childcare needs after lockdown. He added that Mr Moslemi had said that if he wanted time off he would have to participate in what was called "beef of the week", which he explained was basically putting on boxing gloves and fighting another employee: he attached two videos of such fighting. [*A photograph is at page 248*.] The claimant continued that he would abide by all of the covenants apart from that stating that he could not work for a competitor. He concluded that he had informed ACAS of his employment tribunal claims. The solicitors responded on 2 October amongst other things denying that the claimant had been constructively dismissed and stating that it was considered that he had attempted to formulate such a claim as an attempt to avoid his contractual obligations (178).

7.38. The claimant replied that day (182) repeating that he was clearly constructively dismissed. Amongst other things, he referred to the following: the respondent "did not provide me with a safe working environment" contrary to the health and safety act; the respondent's culture was "degrading and bullying" and he other employees had been "discriminated against, harassed and bullied. So I believe they have also breached the equality act"; the respondent was defrauding customers, bribing staff and even telling staff to work whilst claiming furlough; 'beef of the week' was continuing, was not consensual horseplay and often led to employees sustaining injury; the respondent had refused to accommodate his childcare issues for months despite knowing that his partner worked as a nurse on the covid ward; he had lost all trust and confidence in the respondent; he had been threatened with legal action if he did not hand the Rolex watch back; after calling in sick and exercising his right to emergency time off for parental leave to look after his child, Mrs Charlton told him to get his partner home from work to look after her so he could come to work instead; the respondent had also discriminated against him due to his disability. He "resigned because of all of this" and the press should know about it. As Ms Hogben submitted, this represents a considerable expansion upon the claimant's reasons for his resignation as he set them out in his resignation email of 28 August.

7.39. Despite the claimant's reply (as he said in oral evidence "fighting fire with fire"), in the above circumstances he nevertheless resigned from his employment with the respondent's competitor on 9 October 2020 (222) and decided to wait for the three months referred to in the relevant restrictive covenant to elapse. He returned to that employment on 1 December 2020 but after two weeks he was placed on Furlough and that business then went into administration. He nevertheless found another job fairly quickly, which he commenced on 6 January 2021 albeit at a salary of £26,000, which he considered to be "a massive pay cut".

Submissions

8. After the evidence had been concluded, the parties' representatives made submissions, which addressed the issues in this case. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account in coming to my decisions. That said, the key points in the representatives' submissions are set out below.

9. On behalf of the respondent, Ms Hogben made submissions by reference to a detailed skeleton argument (in which she referred to many leading authorities in this area of the law) including the following:

9.1. Addressing the principal issue in this case, the respondent had not refused "to provide time off for childcare and/or flexibility to working hours for childcare between May and August 2020". In this, respect Ms Hogben referred to many examples which she said indicated that the respondent had, to the contrary, provided time off for the claimant and flexibility in respect of his working hours for childcare. Asking the claimant to fulfil his contractual obligations in respect of place and hours of work, after making numerous accommodations, cannot amount to a repudiatory breach because it is lawful: see Spafax Limited v Harrison [1980] IRLR 442: "Lawful conduct is not something which is capable of amounting to a repudiation." The Covid guidance at the time did not mandate employers to place employees on Furlough if they had childcare responsibilities or give employees an entitlement to limitless paid leave.

9.2. The claimant seems to say that the respondent not exercising its discretion in respect of not putting him back on Furlough or not continuing his paid leave amounts to a breach of contract but it is not enough to argue that the decision was unreasonable it must be shown to be irrational under the more stringent Wednesbury principles: see Braganza v BP Shipping Ltd [2015] UKSC 17 and IBM United Kingdom Holdings Ltd v Dalgleish [2018] IRLR 4.

9.3. In cases involving a course of conduct culminating in a "final straw" the final act has to contribute something (London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493) and must form part of the series (Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978).

9.4. For the same reasons, the respondent's actions had not amounted to a breach of "the Malik term": ie 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. The claimant's case that his managers had taken a dislike to him was wholly without foundation. This for four reasons: he was one of the respondent's top performing lead generators and it would be illogical for the respondent to dispense with his services; it was contradicted by the documentary evidence, which showed the respondent repeatedly accommodating the claimant; it was

contradicted by the respondent's witnesses who enjoyed an excellent working relationship with the claimant; the respondent had the opportunity to commence disciplinary proceedings against the claimant, thus paving the way for dismissing him, when he took unauthorised absence leave on 22 July 2020 but did not do so.

9.5. The claimant's evidence was inconsistent, unreliable and unsatisfactory. His explanation for the reasons for his resignation had changed four times since he emailed his resignation on 28 August 2020. The claimant had been dishonest including fabricating a story about booking a holiday in Blackpool in August 2020 and making up the allegation that Mr Moslemi had told him that he could get time off if he participated in "beef of the week". That activity had ceased in early 2019 and, in any event, the photograph shows the claimant filming that activity with a smile on his face.

9.6. The claimant relies on the last straw being the text message from Mrs Charlton on 28 August, which he describes as "demanding" that he should ask his partner to come back from work but it is clear that she made no such demand and only made an enquiry. Applying Omilaju, it cannot be said this contributes anything to the alleged breach as it is an entirely innocent enquiry.

9.7. The claimant did not resign in response to the alleged breach. He started work with the competitor on Tuesday, 1 September 2020 and it is inconceivable that he did not have an offer of employment at the time he resigned at 18:13 on Friday 28 August, particularly as he had managed to negotiate a £10,000 pay increase and a different working pattern. Also, it is clear from the documentary evidence that the claimant had been looking for another job for some time, motivated in large part by financial considerations.

9.8. Mrs Charlton's text message being entirely innocuous, the Tribunal needs to consider whether the earlier alleged conduct itself entails a breach of the 'Malik' term and whether that conduct had since been affirmed. For the above reasons the earlier conduct could not amount to such a breach and even if it did, the claimant had affirmed the breach before the alleged last straw in that, having had the correspondence referred to above with Mr Coomber in late May 2020, the claimant then went on to continue to work until 28 August.

10. On behalf of the claimant, Mr Heslop handed in extremely comprehensive written submissions to which he had attached the authorities upon which he relied together with a print of section 95 of the 1996 Act. Having been invited to supplement his written document by making oral submissions he replied that he was content to rely on the written document. Key aspects of Mr Heslop's submissions included the following:

10.1. Despite the claimant having drawn to the attention of Mrs Charlton government advice that childcare issues could be a reason for Furlough, no account was taken of his individual circumstances and his requests were denied.

10.2. The claimant was the primary parent responsible for childcare matters and even as the pandemic receded the nursery had restrictions in place meaning that only those living with the child could drop off/pickup, and they operated restricted hours yet the respondent generally concluded that childcare was readily available and there were various options to cover the claimant's needs. The respondent either ignored such needs and/or failed to ask sufficient questions as to why the claimant had such issues.

10.3. The claimant required flexibility in his hours but the respondent told him his only option was to take holiday.

10.4. This lack of flexibility was unreasonable behaviour but was also possibly orchestrated to make matters worse for the claimant.

10.5. On or around 22 July the claimant was denied one hour's leave and as a result of dropping off his child at nursery he was 30 minutes late for work, and Mrs Charlton confirmed that 30 minutes pay should be deducted.

10.6. Mr Moslemi suggested to the claimant that if he wanted time off he should participate in "beef of the week".

10.7. The claimant's call to HR on 28 August to say that his child was ill and he was the only person available to take care for her was met with some sympathy and it was acknowledged that the claimant would stay at home. In what was the final straw, however, Mrs Charlton then sent the message asking if the claimant's partner (halfway through a shift) could come home so he could go into work. This was an incredibly upsetting question and finally tipped him over the edge. He was made to feel betrayed as an employee and all respect, trust and confidence in the employment relationship was broken. He decided he had no option other than to resign.

10.8. The pattern of behaviour and acts perpetrated against claimant, including what Miss Dodd said Mrs Charlton had said at the meeting on 24 June, were orchestrated to increase pressure on him with the objective of either bringing about actions by the claimant that could be used against him or bring about his resignation. Mrs Charlton's refusal to approve leave was or had the intent to cause problems rather than, as she claimed, to provide consistency.

10.9. The following, taken as a whole, took the claimant to the point where his continued employment was made impossible: he believed his health and safety was at risk, the employment relationship was irretrievably broken and all trust and confidence had been destroyed; Mrs Charlton's refusal to apply the Covid guidance of both the government and the respondent in respect of dealing with employee childcare issues and specifically the refusal to put the claimant on furlough leave; no account was taken of the claimant's individual circumstances, his partner's role, their vulnerability, needs, risk factors or the restricted nursery rules being applied to the claimant; bullying directly related to the childcare issue when Mr Moslemi suggested that he should participate in beef of the week; the respondent ignored the specific restrictions of the claimant's nursery and instead relied on generalities and supposition; Mrs

Charlton docking 30 minutes pay due to childcare needs; the claimant being required to take holiday for childcare purposes but that being changed to a unilaterally applied policy that no one could have time off for childcare; in August the claimant's request for one hour per week to meet his childcare needs being denied; the health and safety of the claimant and other employees being put at risk by the claimant being told to work despite having symptoms of Covid; the final straw of Mrs Charlton asking if the claimant's partner could return from an active Covid ward, mid shift so he could go to work in what was a much less important role. Thus the claimant was put in an intolerable position and he was justified in resigning without notice. The respondent had no reasonable or proper cause to act as it did and, ultimately, the relationship was irretrievably damaged.

10.10. Following the claimant's resignation, the respondent's threat of legal action in respect of the Rolex watch and the restrictive covenants was a continuation of the treatment received by the claimant.

10.11. The claimant fervently denies the allegation that he already had a job lined up before resigning. Mr Coomber was a very close and trusted friend and would be the one person the claimant would have told if a new job had been secured.

10.12. The claimant denies that affirmation applies in this case noting, firstly, that the acts in question all happened over a relatively short period and also relying upon the decision in Kaur in which the Court of Appeal confirmed that a later act can be relied upon to revive earlier breaches.

The Law

11. The above are the salient facts and submissions relevant to and upon which I based my judgment. I considered those facts and submissions in the light of the relevant law being primarily the statutory law set out below and relevant case precedents in this area of law many of which were relied on by either or both of the representatives.

12. The principal statutory provisions (with some editing so as to be relevant to the claimant's complaint) is as follows:

Employment Rights Act 1996

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if

……

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

"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.

…….

(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."

Application of the facts and the law to determine the issues

13. As in any case involving a claim of constructive unfair dismissal, the first question is whether there was a dismissal at all. As mentioned above, the claimant relied on section 95(1)(c) of the 1996 Act that he had resigned in circumstances where he was entitled to do so by reason of the respondent's conduct: commonly referred to as constructive dismissal.

14. The decision of the Court of Appeal in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 has stood the test of time for over 40 years. It is well-established that to satisfy the Tribunal that he was indeed dismissed rather than simply resigned, the claimant has to show four particular points as follows:

14.1. The respondent acted (or failed to act) in a way that amounted to a breach of the contract of employment between the respondent and the claimant.

14.2. If so, that breach went to the heart of the employment relationship so as to amount to a fundamental or repudiatory breach of that contract.

14.3. If so, the claimant resigned in response to that breach.

14.4. If so, the claimant resigned timeously and did not remain in employment thus waiving the breach and affirming the contract.

15. To establish the required breach of contract, the claimant relies on a breach, not of an express term of his contract of employment but of the term implied into all contracts of employment that the parties will show trust and confidence, the one to the other. As was said in Woods v WM Car Services (Peterborough) Limited [1981] IRLR 347,

> *"… it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee …. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunals' function is to look at the employer's conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly, is such that the employee cannot be expected to put up with it …. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed."*
>
> *"… the conduct of the employer had to amount to repudiation of the contract at common law. Accordingly, in cases of constructive dismissal, an employee has no remedy even if his employer has behaved unfairly, unless it can be shown that the employer's conduct amounts to a fundamental breach of the contract."*
>
> *"Any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of contract"*

16. The decision in Malik is summarised by Hale LJ in Gogay v Hertfordshire County Council [2000] EWCA Civ 228 thus:

> "*This requires an employer, in the words of Lord Nicholls of Birkenhead in Malik v BCCI [1998] AC 20, at p 35A and C,*
>
> *'. . . not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages. . . . The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer'. Lord Steyn emphasised, at p53B, that the obligation applies 'only where there is "no reasonable and proper cause" for the employer's conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship . . . '"*

17. With regard to the second of the above factors in Western Excavating (ECC) Limited, as the parties agreed, in general terms a breach of the implied term of trust and confidence "will mean, inevitably, that there has been a fundamental or repudiatory breach going necessarily to the root of the contract": see Morrow v Safeway Stores plc [2002] IRLR 9 applying the decision in Woods.

18. It is also well-established that, "the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment": see Lewis v Motorworld Garages Limited [1985] IRLR 465. In this case the claimant relies upon such cumulative conduct on the part of the respondent and what is sometimes referred to as the last straw doctrine. This was explored in Omilaju in which it was said that a final straw does not have to be a breach of contract in itself but,

> "*it should be an act in a series whose cumulative effect is to amount to a breach of the implied term…. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant*."

19. The cumulative conduct relied upon by the claimant spanned a fairly short period of time. Indeed, I repeat that at the Preliminary Hearing on 3 February 2021 the conduct relied upon by the claimant was said to be the respondent's refusal "to provide time off and/or flexibility to working hours for childcare between May and August 2020".

20. An aspect of what I consider to be the respondent's flexibility actually occurred before that period, however, when the claimant found that he was unable to work efficiently as a member of the respondent's home-working core team of Lead Generators and, following discussions with his line manager, it was agreed that he would be removed from that team and placed on Furlough on 1 April 2020, when he continued have his Furlough pay 'topped up' to his full salary.

21. The claimant and other telephone-based sales staff who were on Furlough were then required to return to the office on 11 May 2020. Given his childcare difficulties the claimant asked if he could remain on Furlough. Mrs Charlton did not consider that to be an appropriate use of the government's job retention scheme (as I am satisfied she was entitled to do) as there was ample work for its employees but she suggested, instead, that the claimant might make use of the respondent's parental leave policy. Although that suggestion was initially declined by the claimant, he then requested parental leave on the day on which he was due to return, which was granted that day. Thus, the respondent showed considerable flexibility in dealing swiftly with the claimant's request (including waiving the required 21 days' notice) and provided the claimant with time off to address his childcare needs.

22. Further flexibility was shown when the claimant decided that he wanted to cut short his parental leave and return to work not on 1 June 2020 but on 18 May 2020, which the respondent agreed.

23. The claimant requested, however, that he be allowed to start work an hour late and finish an hour early so that he could take his daughter to and collect her from nursery. Mr Barnes responded flexibly by agreeing that the claimant could have such time off albeit that it would have to be unpaid. Although that was initially agreed it was never implemented as the claimant opted to take the required time off by using his annual holiday. That, however, required further flexibility on the part of the respondent as it had to amend its annual leave management system to allow holiday by the hour

rather than by reference to a full or half day. Additionally, Mr Coomber permitted the claimant to have occasional informal time off.

24. As set out above and is common knowledge, the Covid-19 situation in the Country generally was improving by the middle of the year and it became possible to make alternative arrangements in respect of childcare including 'support bubbles'. In these circumstances the respondent decided that the previous flexible start and finish times that had been allowed to the claimant and other employees to address their childcare responsibilities should come to an end. I am satisfied that that was a reasonable decision in the circumstances. That decision was implemented by Mrs Charlton on 9 July to become effective on Monday 13 July. The claimant did not raise any issues in this regard although another employee did so and was permitted to continue the flexibility that had been provided for her for a further week.

25. Thus the special arrangements that had been made for the claimant came to an end yet he unilaterally sought to continue the arrangement by advising Mr Barnes on 22 July that he required one hour's holiday. That was not allowed and a reduction of 30 minutes' pay was made from the claimant's wage but the respondent did not take any form of disciplinary action against him, as it might reasonably have done.

26. The particular problem for the claimant arose from the fact that the nursery attended by his daughter was operating restricted hours meaning that the claimant could not take his daughter to or collect her from the nursery and did not allow a child to be taken to or collected from the nursery by someone who did not live as part of the child's household. This was to change from 1 September 2020 but impacted upon the claimant in respect of the four Wednesdays in August on each of which he continued to need one hour off work. He therefore met Mr Barnes on 29 July "to tell him the good news that I only needed 4 hours and not the usual 8 hours a month". For some reason the claimant did not tell Mr Barnes why he required those four hours, ie the rule particular to the nursery attended by his daughter that she needed to be taken to and collected from the nursery by someone in the same household. The decision whether the claimant should be allowed time off work was one to be made by Mrs Charlton rather than Mr Barnes but in oral evidence he indicated that he thought that the claimant's request might have been accommodated. She did not agree, however, and Mr Barnes informed him that he had to fulfil his full-time hours.

27. As set out above, the claimant reacted adversely suggesting that he might go AWOL or be disciplined but I find that Mr Barnes responded supportively by suggesting that the claimant should approach the nursery for further support and asked if the claimant had looked into a childminder to take his daughter to nursery on the four days in question; indeed, adding that he may have a contact if the claimant was interested. That suggestion was firmly rejected by the claimant, however.

28. That decision by Mrs Charlton not to allow the claimant to have four hours' leave during August seems to have been predicated on an understanding on the part of the respondent's witnesses that at this time, as Mr Barnes put it, "childcare provision was now back to pre-lockdown". That understanding does not take account, however of the particular rules of the nursery attended by the claimant's daughter, which effectively meant that only one of her parents could take her to and collect her from nursery. That being so, Mrs Charlton's decision might have been unreasonable, might

have amounted to the respondent refusing "to provide time off and/or flexibility to working hours for childcare between May and August 2020" (that being a key issue identified at the February Preliminary Hearing) and might even have formed the basis for an argument that it constituted a breach of the implied term of trust and confidence paving the way for the claimant successfully to claim that he had been constructively dismissed. The claimant's difficulty in that regard, however, is twofold. First, at the point when his request was refused by Mrs Charlton the claimant had told neither her nor Mr Barnes of the particular rule applied by his daughter's nursery. The claimant did make Mrs Charlton aware of that rule in the email he sent to her on 30 July but in that same email he told her that childcare issues were sorted in any event. Secondly, having made his request to Mr Barnes on 29 July the claimant then returned to him that same day to inform him that his partner's mother had agreed to assist for the days in August and he no longer needed the time off. As set out above, the claimant confirmed this in the email he sent to Mrs Charlton on 30 July with the subject "Childcare solved", within which he explained "so we are sorted in that way so I don't need the time off". In submissions, Mr Heslop suggested that this was "construed by Mrs Charlton as the childcare issue being "sorted out" but in realty the Claimant still required 4 hours off during the month of August". I reject that submission. The email was clear; it was not a matter of construction by Mrs Charlton and if, as Mr Heslop submitted, the reality was that the claimant still required four hours away from work she had no way of knowing that.

29. On a point of detail, I am not satisfied that Mr Moslemi told the claimant that if he wanted more time off he would have to participate in "beef of the week" this for two reasons: first, that practice had been brought to an end (rightly in my opinion) with the arrival of a new health and safety officer in January 2019; secondly, there was no reason for Mr Moslemi to make that remark, as the claimant's requirements to have time off had been accommodated up until mid-July and at the end of July he had informed Mrs Charlton that the matter was "sorted".

30. A final aspect of the respondent providing time off and/or flexibility for the claimant between May and August 2020 (again to quote from the issue set out above), albeit not in relation to childcare, was Mrs Charlton's accommodating the claimant's request that he should be allowed to take two days' unpaid leave in relation to the trip to Blackpool on 25 and 26 August.

31. In light of the above findings as to the respondent providing the claimant with time off or being flexible, I reject the assertion by the claimant that the respondent's managers conducted themselves towards him in the manner alleged because they wanted to be rid of him. Similarly, I reject the submission by Mr Heslop that "there was a well-orchestrated plan to ignore government guidelines or internal advice but instead treat him badly, reject any reasonable requests for time off for childcare and to bully him." To the contrary, I am satisfied on the evidence before me that there is no basis for this assertion of the claimant. I accept the submission by Ms Hogben that that would be entirely illogical given that the claimant played such an important part in the respondent's business and income; and that such an assertion is not borne out by the documentary evidence referred to above, which shows the respondent repeatedly seeking to accommodate the claimant, and is contradicted by the oral evidence of the respondent's witnesses as to the working relationship they enjoyed with the claimant

and by the fact that no disciplinary action was taken against the claimant in respect of his unauthorised absence from work on 22 July 2020. The evidence of Mrs Charlton as to the close working relationship she had was particularly clear, which is important given that it is she whom the claimant identifies as the perpetrator of the last straw incident. Additionally, as set out above, Mr Moslemi's disappointment and irritation at the claimant's leaving, as indicated in his messages to the claimant requiring return of the Rolex watch, is inconsistent with the respondent seeking to drive the claimant from its employment.

32. Thus I come to the final straw relied upon by the claimant: namely the message from Mrs Charlton sent to him on 28 August 2020. The claimant's evidence is that Mrs Charlton was "demanding" that he should ask his partner to come back from work. I do not read that message as containing any demand; rather, I accept Mrs Charlton's evidence that she was merely making an enquiry, "Can Naomi come back from work so you can get in for lunchtime?" I am satisfied that it was reasonable for Mrs Charlton, as Head of Operations to explore what options the claimant had available to him to be able to come into work; not least in the circumstances she mentioned in her message of having just allowed the claimant two days off work. That evidence reflects what was stated in the email to the claimant from the HR manager on 28 August that an employee would always be asked, "If there any alternative childcare arrangements?".

33. Furthermore, when the claimant replied that he doubted that his partner could come back from work and explained why that was so, Mrs Charlton appears to have accepted that explanation as she did not pursue the matter any further, and the claimant was allowed the time off work to care for his daughter.

34. The claimant's evidence is that the message from Mrs Charlton "really boiled my blood" and "absolutely disgusted" him such that he had "never felt so angry and betrayed as an employee". For this reason he decided that he would resign and did so citing in his resignation email that his "decision to leave was for no other reason but the lack of support in regards to my childcare issues".

35. Given my decision below it is not necessary for me to make any findings as to whether the claimant resigned in response to a breach of his contract of employment. His evidence is summarised above while the respondent suggested that he resigned because he had already secured an offer of employment from its competitor on better pay. Although not making any finding as to why the claimant resign, I interject that I do note that his evidence regarding the timing of events late on 28 August appears to be somewhat awry. He said that he met Mr Coomber at 17:30 following which he emailed his resignation at 18:13. He then started to put out a few feelers for alternative employment and made a few calls, which presumably took some time yet he said that at about 18:15, which is some two minutes after he emailed his resignation, he contacted the respondent's former Operations Manager who effectively offered him alternative employment.

36. In the decision in Omilaju it is stated,

> "… *an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and*

> *destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective* …"

I am satisfied that that assessment applies in this case. Although I accept that the claimant's reaction was anger, disgust and betrayal, I repeat that I am satisfied that it was reasonable for Mrs Charlton to make the enquiry that she did and, assessing this matter objectively, I am not satisfied that the claimant's trust and confidence was undermined even though he might have 'genuinely, but mistakenly, interpreted the act as hurtful and destructive of his trust and confidence'. As was also said in Omilaju,

> "*Viewed objectively, it did not have the quality of contributing to the undermining of Mr Omilaju's trust and confidence in his employer. The reason why it did not have that quality was that, in all the circumstances, the failure to pay was perfectly reasonable and justifiable conduct*."

Although the particular facts of the case before me are obviously different, I am satisfied that this principle is equally applicable: i.e. viewed objectively, Mrs Charlton's message to the claimant did not have the quality of contributing to the undermining of his trust and confidence in the respondent as, in all the circumstances, for Mrs Charlton to ask the claimant the question that she did was "perfectly reasonable and justifiable conduct".

37. In the decision in Kaur, upon which the representatives both relied, the Court of Appeal gave guidance to employment tribunals in the following terms:

> *"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) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation ….)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?*

38. Applying that guidance and utilising the same notation, on the evidence before me and for the reasons set out above I am satisfied as follows:

> (1) The most recent act on the part of the respondent which the claimant says caused, or triggered, his resignation was the message he received from Mrs Charlton on 28 August.
>
> (2) The claimant did not affirm the contract since that act.

(3) That act did not by itself amount to a repudiatory breach of contract.

(4) It was not part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term.

39. Given my findings in relation to point (4) above I have considered the further guidance given in the decision in Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589, upon which the representatives again both relied. In that decision the Employment Appeal Tribunal considered the position if the answer to the fourth of the above questions posed by Underhill LJ is, "No". It stated as follows,

> "*if the most recent conduct was not capable of contributing something to a breach of the Malik term, then the Tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the Malik term, has not since been affirmed, and contributed to the decision to resign*."

40. In light of my findings above in relation to the respondent's approach in seeking to accommodate the claimant in the context of his childcare responsibilities by providing him "time off and/or flexibility to working hours for childcare between May and August 2020", I am not satisfied that the respondent's conduct prior to the last straw incident relied upon by the claimant did itself entail "a breach of the Malik term."

41. In summary, the question in issue is whether, applying the approach of Lord Steyn in Malik, the respondent's conduct, first, destroyed or seriously damaged the relationship of trust and confidence and, secondly, was without reasonable and proper cause. As Lady Hale noted in Gogay, "The test is a severe one".

42. In that context, for the reasons set out above, I am that satisfied, as to the first two factors in Western Excavating (ECC) Limited that the conduct on the part of the respondent did not constitute a breach of the contract of employment between it and the claimant amounting to a fundamental or repudiatory breach of that contract.

43. In these circumstances, it is unnecessary for me to consider the final two factors in that decision of whether the claimant resigned in response to any breach or affirmed the contract of employment thereafter.

Conclusion

44. In conclusion, the judgment of the Tribunal is that the claimant's complaint that he was dismissed by the respondent by reference to Section 95(1)(c) of the 1996 Act and, by reference to Section 94 of that Act, that his dismissal was unfair contrary to Section 98 of that Act is not well-founded and is dismissed.

EMPLOYMENT JUDGE MORRIS
JUDGMENT SIGNED BY EMPLOYMENTJUDGE
ON 19 October 2021

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