



EMPLOYMENT TRIBUNALS

Claimant

Mr Christopher Beales

v

Respondent

Ms Nicola Beales

Heard at: Leeds (by CVP)

On: 27, 28 and 29 June 2022

Before: Employment Judge A James

Representation

For the Claimant: In person

For the Respondent: Ms Y Barlay, counsel

JUDGMENT

The Judgment was issued on 29 June 2020 and is not repeated here. Written reasons have since been requested – these are set out below.

REASONS

The issues

- 1 The agreed issues which the tribunal had to determine are set out in Annex A.

The proceedings

- 2 Acas Early Conciliation commenced on 16 July 2021. The Early Conciliation Certificate was issued on 19 July 2021. The claim form (the ET1) was issued on 12 August 2021.
- 3 The claims made in the ET1 were constructive unfair dismissal, disability and sex discrimination, notice pay, wages and holiday pay.
- 4 A case management hearing took place on 19 October 2021 before Employment Judge Evans. The claimant was ordered to provide further information about the constructive dismissal and disability discrimination claims.

- 5 Further information was subsequently provided. The disability discrimination claim was withdrawn and was dismissed on 10 November 2021.
- 6 A further preliminary hearing took place on 9 February 2022 before EJ Armstrong. The issues were identified and case management orders were made.
- 7 A preliminary hearing was held on 16 March 2022 in relation to the question as to whether or not the sex discrimination and harassment related to sex claims were submitted to the tribunal in time. It was determined that they were not. The claims were struck out. As a result, the remaining claims before the tribunal are for constructive unfair dismissal, holiday pay, and wages.

The hearing

- 8 The hearing took place over three days. Evidence and submissions on liability/remedy were dealt with on the first two days. It was arranged that on the third day, the tribunal would give its decision and reasons on liability in the unfair dismissal claim; and liability and remedy in the holiday pay and wages claims. As the claimant was successful in the unfair dismissal claim, the tribunal went on to deal with remedy for that claim too.
- 9 The tribunal heard evidence from both the claimant and the respondent. There was an agreed trial bundle of 389 pages. The claimant produced a supplementary bundle of 57 pages. The submission of that was not objected to by the respondent.
- 10 At the commencement of oral witness evidence, the respondent stated that her statement was not true, and that she had not checked it properly, she had just signed it. In these somewhat unusual circumstances, the Tribunal went through the statement with the respondent, who confirmed those parts of the written witness statement that were not accurate. The respondent apologised to both the Tribunal and to the claimant, for those inaccuracies.

Findings of fact

- 11 Mr Beales and Ms Beales were previously married. They have a daughter. They divorced in 2005. They are referred to in the rest of this judgment as the claimant and the respondent respectively.
- 12 The claimant started work for the respondent in May 2012, in the role of Personal Assistant (carer). The claimant had previously provided part-time assistance between June 2011 and May 2012. The funding for the role was at all times provided by the local authority, City of York Council (CYC) Social Services Department (SSD).
- 13 It is agreed that the claimant's holiday year ran from 1 April to 31 March. It is also agreed that when he started work, the claimant worked two weeks in hand, before he started to get paid. His hours at that time were 20 hours per week.
- 14 The Respondent is an amputee with multiple complex medical conditions including Peripheral Vascular Disease & Severe Bowel Disease. Due to her

ongoing complex medical conditions, the Respondent requires personal care and assistance.

- 15 The respondent asked Salvere Support Ltd (Salvere) to assist her in relation to the employment law aspects of the claimant's employment. Salvere is funded by the local authority to provide such services to those people who, like the respondent, employ carers to provide care services directly to them.
- 16 In 2015, the claimant's hours of work increased from 20 to 39.25 hours per week. The claimant has another employment role which he carries out during the day. The personal care was therefore provided from 6pm to late evening during the week and during the weekend. In order to provide the necessary personal care required by the respondent, the claimant sometimes stayed overnight, in a separate bedroom, with the respondent's agreement. He moved some of his belongings into the property as a result. Contrary to what the respondent stated in her witness statement at paragraph 11, the claimant did not manipulate the respondent to persuade her to allow him to stay in her bungalow. The respondent sometimes had problems sleeping, and sometimes woke up on the kitchen floor. If such things happened when the claimant stayed in the bungalow, he could assist the respondent.
- 17 In 2019, the claimant's hourly rate was increased to the national living wage. At the time his employment relationship ended, it was £10 per hour.
- 18 On 8 October 2020, there was a heated discussion between the claimant and the respondent. Their daughter then entered the kitchen and joined in the argument. She supported the respondent. During the argument, a mug that the claimant was holding was smashed on the hard, composite surface of the sink. A shard of the mug hit his daughter in the face. The claimant accepted during the hearing that whilst the smashing of the cup was an accident, he did 'let his emotions get the better of him'. The Tribunal accepts that evidence. The respondent was also however, understandably, upset by this incident, as was their daughter. The claimant was asked to leave the property. He did so. He later returned to apologise to the respondent. He explained that he had been upset by her comments.
- 19 On 9 October 2020, the claimant was suspended by the respondent because of the 8 October incident ('the cup incident').
- 20 On 22 October 2020 the respondent messaged the claimant by WhatsApp stating that she had just read an email from Salvere, and she would phone tomorrow. She said that she was: '*not happy about them just going off on their own bat*'. The Tribunal assumes that referred to the suspension decision.
- 21 The respondent sent messages to the claimant about the possibility of making him redundant, or the possible payment of a financial package. The respondent later informed the claimant that Salvere had advised her that they were unable to approve a redundancy package or financial settlement.
- 22 On 4 November 2020 the claimant received a message offering the possibility of a few tasks at the respondent's home, including fitting laminate in her lounge. The claimant went to the respondent's bungalow with her consent. Text messages before the tribunal confirm the respondent telling a mutual friend at this time: '*.. he deserves to be happy. Covered him with a light blanket he's completely shattered ... bless him*'.

- 23 On 10 November 2020 the claimant received a payslip from Salvere with a small tax refund but no suspension pay. The claimant telephoned the respondent to advise her about the error. Salvere later acknowledged that this was an administrative error on their part, for which they apologised. During the conversation that followed, the respondent asked the claimant not to attend her home over the next two days.
- 24 In a message sent to her personal carer on 11 November 2021, just before a report was made to the police, the respondent stated to her then carer, in a WhatsApp message referring to the claimant, that she would '*get him arrested or sent to funnie farm*'.
- 25 On 12 November 2020 the claimant received an email from Salvere inviting him to an investigation meeting about 'the cup incident', on 18 November 2020. He accepted the invitation.
- 26 On 13 November 2020, the respondent made a complaint to the police about alleged coercive and controlling behaviour of her by the claimant, and alleged stalking. In her witness statement, the respondent stated that those allegations were true; and that they were made in October, shortly after the 'cup incident'. In evidence before this tribunal, the respondent stated that the allegations were not true and that she had been encouraged to make them by her then personal carer, and social services. Also, that they were made on 13 November, not before then. The respondent made a statement to the police but she said that she did not have time to read and check that after she had made it, and she just '*blurted things out*'. The respondent accepted in oral evidence that she was wrong to make the allegations that she did to the police.
- 27 The claimant was subsequently arrested on 13 November 2020 for alleged assault, and controlling and coercive behaviour in relation to the respondent. On 14 November 2020 he was further arrested for assault on his daughter, arising out of 'the cup incident' on 8 October. The claimant was interviewed about these allegations on 14 November 2020. He was subsequently released on police bail.
- 28 On 25 November 2020, the police decided to take no further action in relation to the respondent's complaint. The claimant was informed of that decision on 28 November 2020.
- 29 The investigation hearing into 'the cup incident' went ahead on 18 November 2020, with Shayla Arnold and Alex Beall, who worked for Salvere. The meeting took place by video link. The claimant was advised at the close of the meeting that he would be contacted within a few days with the outcome. The notes of the investigation meeting were not sent to the claimant. The claimant had requested a copy of those meeting minutes in December 2020. He only saw those after these proceedings were commenced.
- 30 Although the minutes are not agreed, the claimant accepted that he did say (page 146), words to the effect that the respondent's actions, in relation to the making of a complaint by the respondent to the police, which he argued was untrue:

... has destroyed everything that could have been resolved amicably.

- 31 Ms Beall, for Salvere, sent an email to the respondent on 19 November 2020 stating:

Chris himself said that the situation had become untenable so I cannot see that he will be returning to your employ which will hopefully alleviate some stress for you.

- 32 The claimant remained on suspension following the investigation meeting. The respondent sought advice from Salvere to address issues surrounding the claimant's continuing employment. She wanted to agree a mutual parting of the ways, with the claimant being paid the equivalent of a redundancy package; but she was asking CYC-SSD to fund the cost of that. In the absence of agreement by them to fund any package, the claimant remained on suspension.
- 33 On 3 December 2020, the claimant raised a formal grievance about his employment and suspension, via Salvere.
- 34 On 8 December 2020, the claimant was invited to a formal grievance meeting on 10 December 2020 at 11 am. This was the same day planned for the disciplinary hearing. The meeting is recorded as lasting one hour 17 minutes. Again, the notes of the meeting are disputed, and they were not sent to the claimant for agreement. Nevertheless, the claimant accepts that at that meeting he stated words to the effect of [179]:

There is no way that I can go back to work, she's caused a massive severe problem with the friendship side of things and also the family side of things with me and my daughter, there's a massive problem caused there.

The claimant remained on suspension following the meeting. No further action was taken in relation to the disciplinary allegations.

- 35 On 23 December 2020 an email was sent by Salvere to the respondent, stating that they could not hear the claimant's grievance in her absence, as she was the employer. They explained that it was their role to support her in her role as the employer of the claimant, not to act in any way as the employer.
- 36 The claimant was contacted by the respondent on 23 December 2020, with a request that he remove his belongings from her bungalow. On 3 January 2021 the respondent again requested that the claimant remove his belongings from her bungalow.
- 37 On 4 or 5 January 2021 the claimant attended the respondent's bungalow to remove his belongings. A discussion ensued and it was agreed that he would continue to provide some personal care for her. He continued to do so, despite still being formally suspended. That was at the request of, and with the agreement of, the respondent.
- 38 On 26 January 2021, a meeting took place between the respondent and her social worker, Nancy Bland. The respondent's personal care needs were subsequently assessed as being 14 hours, a significant reduction. The respondent complained about that; but in a letter dated 15 April 2021, the assessment was confirmed by CYC.
- 39 On 10 February 2021, the respondent emailed her social worker Nancy Bland and stated:

Chris is not back on board as my PA and this can only be described as ludicrous to suggest. During his grievance it was clearly understood that to ask him to return to his role would be unreasonable and inappropriate due to the events and accusations which included the manipulated arrest incident. I do not believe that I have indicated nor advised any party of his return to the role.

- 40 On 22 February 2021, the respondent forwarded a copy of an email she had sent to CYC, containing a complaint, amongst other things, about her care needs being reduced, and about her allegedly being manipulated by Social Services staff. That complaint was rejected on 15 April.
- 41 Salvere informed the respondent on 2 March 2021 that they could no longer support the respondent in relation to the grievance and suspension matters and she should contact CYC about those. However, Salvere continued to assist the respondent in relation to the claimant's pay.
- 42 On 24 May 2021 Salvere emailed the respondent to inform her that CYC had confirmed to them that they would only provide funding for the newly assessed hours – 14 in total per week. The claimant's salary would not therefore be covered, during his suspension. They would not therefore be able to pay him his full May salary, at the end of May.
- 43 On 26 May 2021, the respondent emailed Salvere, asking them to start paying the claimant 'as a totally separate new employee'. A further email was sent on 26 May 2021 by the respondent to Salvere, requesting that the claimant's suspension be removed with immediate effect 'as it should have been after the meetings that took place in 2020'. The claimant's suspension was not formally lifted.
- 44 On 9 June 2021 the claimant raised a further formal grievance. He complained that despite having a disciplinary meeting on 18 November 2020, he had never seen any hearing notes or been informed of the investigation outcome or findings. Further, although he had attended a grievance meeting on 10 December 2020, he had not been provided with the notes of the meeting or received any outcome or resolution to the grievances he had raised. He further complained that his hours and pay had been reduced. The respondent sought further advice from Peninsula.
- 45 On 19 June 2021, the claimant sent an email to the respondent tendering his resignation with notice. In that email he stated:
- It is with deep sadness that I feel the need to give yourself the required notice period of 4 weeks as of today.*
- This is due to the manipulation from Social services and Salvere staff following my suspension, which has never been resolved and continues to cause me further distress and discomfort.*
- It would appear clear that after a further formal grievance regarding the events, that no solution to the actions will be addressed. Even my grievance has been refused.*
- 46 On 5 July 2021, the claimant and the respondent mutually agreed to extend the claimant's notice (due to expire on 16 July 2021) for a further 4 weeks, due to the respondent not having any immediate care or assistance in place.

- 47 On 6 July 2021, Salvere wrote to the respondent giving formal notice to end the support that they were providing to her. They asked her to submit the hours to be paid to the claimant up to and including 18 July, which would be paid on 30 July 2021. Salvered confirmed that after that date, their support would cease.
- 48 On 27 July 2021, Nancy Bland sent an email to Ingrid East, confirming why the respondent's personal care needs had been assessed as being reduced. In particular, Ms Bland relied on information given to her by the carers providing personal care to the respondent, after the claimant's suspension. That email was then forwarded to the respondent by Ms East, with a suggestion that they discuss the contents. It was accepted that it would not be '*an easy read*' for the respondent.
- 49 The claimant and respondent mutually agreed to extend the claimant's notice further on 9 August 2021, to 6 September 2021. Again, the reason was because the claimant did not want to leave the respondent without care. In the email confirming that, the respondent stated:
- This as I said is to make further enquiries and legal advice to try to reach a compromise.*
- 50 Shortly after that agreement, there was a further argument between the claimant and the respondent. As a result, the claimant emailed the respondent on 15 August 2021 confirming that:
- after careful thought I have taken the decision that due to the current understanding of events taking place that we must cease any contact.*
- 51 The respondent confirmed her agreement during the hearing that despite the above email, the claimant's employment did not formally terminate until 6 September 2021, on the basis that she would honour the extension agreed between them on 9 August.
- 52 The claimant was paid for 63.41 hours holiday pay on the termination of his employment.

Relevant law

Unfair dismissal

- 53 Section 98(1)-(2) Employment Rights Act 1996 ('ERA'), provides that in determining whether a dismissal is fair/unfair, it is for the employer to show the reason (or principal reason) for dismissal, and that it is either a reason falling within (2), or some other substantial reason justifying the dismissal. A reason falls within (2) if it relates to, amongst others, redundancy.
- 54 Section 98(4) Employment Rights Act 1996 provides that if the employer has shown a potentially fair reason for dismissal, the determination of the question as to whether the dismissal was fair/unfair (having regard to the reason shown by the employer) 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, shall be determined in accordance with equity and the substantial merits of the case.

Constructive dismissal

- 55 An employee is entitled to terminate his contract with or without notice and treat himself as constructively dismissed, when the employer has committed a repudiatory breach of contract, Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, namely:

a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

- 56 If there is a repudiatory breach the employee must show that she resigned, at least partly, in response to the breach, Nottinghamshire County Council v Meikle [2004] IRLR 703 CA.

- 57 The Claimant relies on the following implied term existing in all employment contracts, and a breach of which is a repudiatory breach:

'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' Malik v BCCC SA [1998] AC 20, 34H-35D.

- 58 The material part of the case of Brown v Neon Management Limited [2019] IRLR 30 (Brown) held:

(1) The first two claimants had affirmed their employment contracts by their initial resignation on notice on 16 March 2018.

It was well-established that in the face of a repudiatory breach of contract the employee could not leave it too long before resigning otherwise he would be taken to have affirmed. In the present case, the claimants clearly indicated that they would have been working out the entirety of their notice periods, which, in one case, involved a further year of employment. It would have been unconscionable to keep the right to discharge a repudiated contract alive for that length of time in the absence of any further breaches of contract.

- 59 In WE Cox Toner (International) Ltd v Crook [1981] IRLR 443, Mr Justice Browne-Wilkinson (as he then was) held at 13.

It is accepted by both sides (as we think rightly) that the general principles of the law of contract apply to this case, subject to such modifications as are appropriate to take account of the factors which distinguish contracts of employment from other contracts. Although we were not referred to cases outside the field of employment law, our own researches have led us to the view that the general principles applicable to a repudiation of contract are as follows. If one party ('the guilty party') commits a repudiatory breach of the contract, the other party ('the innocent party') can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may

be evidence of an implied affirmation: Allen v Robles (1969) 1 WLR 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation: Farnworth Finance Facilities Ltd v Attyrde (1970) 1 WLR 1053.

- 60 On the facts of that case, it was held that a delay of six months between the breach and notice of intention to resign unless the breach was rectified, amounted to an affirmation of the contract.

Conclusions

- 61 In order to arrive at the conclusions below, the tribunal has applied the relevant law to the findings of fact above. The tribunal's conclusions are set out under the relevant headings for each claim.

Unfair dismissal

Was the Claimant constructively dismissed because the Respondent did the following things.

Maliciously report the Claimant to the police in November 2020;

- 62 The Tribunal has found that the allegations that the respondent made to the police on 13 November 2020 were untrue. The Tribunal further finds that the respondent was reckless as to whether or not the allegations made would cause damage to the claimant. He was subsequently arrested, and held for nearly 24 hours. Bearing in mind the contents of the respondent's 11 November 2020 WhatsApp message to her carer, the Tribunal concludes that the report to the police on 13 November 2020 was malicious.

Reduce his wages to 14 hours per week from the end of May 2021 without his agreement, despite the Claimant continuing to work full time hours from January 2021;

- 63 It is not in dispute that the claimant's hours were reduced.

Fail to secure funds to cover the Claimant's wages at 14 hours per week in future, and allow the Respondent to become aware of this fact;

- 64 The reduction in the hours was because the respondent's care needs were re-assessed at 14 hours per week, rather than 39.25. The respondent tried to persuade CYC otherwise, but her appeal was unsuccessful. The respondent did therefore, on the facts, fail to secure funding.

Fail to deal with the grievance raised by the Claimant in June 2021 in a timely and appropriate manner? The Claimant says there was no response until after

he had tendered his resignation on 19 June 2021, following which he was offered a grievance meeting on an unspecified date, with a family member of the Respondent

- 65 The respondent relied on Salvere to deal with the grievances for her. Salvere contacted her on 23 December 2020 to advise that it could not take the grievance any further forward. As the claimant's employer, the respondent was ultimately responsible for dealing with the claimant's grievances of 3 December 2020 and 9 June 2021. The respondent did not do so. Whilst the Tribunal acknowledges that the respondent is not legally trained, and it would have been very difficult for her to act in the role of employer, that does not change the legal position that she was under a duty to do so.

Did that breach the implied term of trust and confidence? The Tribunal will need to decide: whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; whether she had reasonable and proper cause for doing so.

- 66 In relation to the report to the police, and failure to deal with the grievances, the tribunal concludes that those amounted to breaches of the implied term of trust and confidence.

- 67 In relation to the reduction in wages, the tribunal concludes that the respondent did attempt to appeal the decision of CYC to reduce her care hours significantly, from 39.25 to 14 hours per week. That was not therefore a breach of the implied term of trust and confidence. Reducing the claimant's pay by so much however did amount to a repudiatory breach of an express term of the contract.

Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

- 68 The tribunal concludes that the claimant did resign as a result of the above breaches. The tribunal notes in any event the legal position that where an employee resigns as a result of a number of alleged breaches, even if only one of the alleged breaches amounts to a repudiatory breach, the claim will still succeed.

Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that he chose to keep the contract alive even after the breach. The Respondent will say that the Claimant affirmed the contract by continuing to work following the alleged breaches, extending his notice period by agreement, and by voluntarily continuing to work further hours beyond the 14 hours he was paid for from January 2022.

- 69 The claimant resigned a short while after his hours were reduced - a period of less than three weeks. By resigning with four weeks notice at that stage, the claimant did not affirm the contract.

- 70 The notice period was then extended by two further periods of four weeks, although the claimant did not carry out any further work after 15 August 2021 at the latest – about 8 weeks after notice of his resignation was first given. The circumstances of this case are highly unusual. The Tribunal concludes that in

such circumstances, the claimant did not affirm the breaches by continuing to work for the respondent beyond his initial notice period, out of concern for her welfare. His grievance was still live. Although the respondent was still trying to deal with the grievances, she was not able to do so satisfactorily. The claimant did not accept the reduction in pay. He was still continuing to complain about it. The 'last straw' principle also applies in relation to the continuing breaches of the implied term of trust and confidence.

- 71 Both the claimant and the respondent were hopeful that during the extended notice period, a mutually acceptable resolution could be reached. That was not possible. That resolution was being sought by the claimant, because he did not accept (or affirm) the treatment that he had been subjected to. In those circumstances, the Tribunal concludes that there was no affirmation of the repudiatory breaches which the Tribunal has concluded occurred.

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

- 72 The tribunal concludes that the principal reason for the dismissal was redundancy. The reduction in hours was because the respondent was no longer able to pay the claimant for the hours that she deemed she still required. That is potentially a fair reason.

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

- 73 The Tribunal concludes that in all the circumstances of the case it was not a sufficient reason. This is because there had not been any consultation with the claimant, prior to his pay being reduced. It is arguably inevitable that given CYC's decision, the claimant would have either had to accept the reduction in hours and pay, or been dismissed by reason of redundancy, with an entitlement to a redundancy payment and notice pay. Those matters are potentially relevant to remedy. They do not however prevent the dismissal being unfair.

Holiday Pay (Working Time Regulations 1998)

- 74 On the basis of the facts found, the calculation of holiday pay is a mathematical exercise. The entitlement is calculated as follows: 159 days (1 April to 6 September)/365 x 5.6 weeks x 39.25 hours.
- 75 That equates to 95.75 hours. The claimant has been paid for 63.41 hours. The balance due is therefore 32.34 hours, at £10 per hour, which equals £323.40.

Unauthorised deductions

Two weeks in hand

- 76 It is agreed that the claimant is entitled to the two weeks in hand that he worked at the commencement of his employment. At 20 hours per week, that equates to 40 hours. When multiplied by the hourly rate of £10 per hour, that equates to £400.

Wages

- 77 It is accepted that between 23 May 2021 and 6 September 2021, the claimant was paid 14 hours per week, rather than 39.25. That equates to a shortfall of 25.25 hours per week, during a period of 15 weeks. The balance due is therefore £3,787.50.

- 78 In his schedule of loss, the claimant claims £72 for costs and late payment charges. No evidence has been submitted in relation to that amount, and therefore that aspect of the claim is not upheld.
- 79 The claimant also claims for the shortfall in relation to his day job, because he was furloughed, due to a perception by his employer that the incident with the respondent was affecting his work. As a result, he suffered a shortfall of 20% of his wage. Although there appears to be a loose causal connection between the facts of this case and that alleged reduction, the amount claimed by the claimant in that respect cannot be recovered as part of the claims before the tribunal for wages and holiday pay from the respondent.

Unfair dismissal remedy

- 80 Having delivered an oral judgement at the beginning of the third day, Wednesday, 29 June, the Tribunal went on to consider the question of remedy for the unfair dismissal claim. The Tribunal heard further relevant oral evidence from the claimant.
- 81 The unfair dismissal remedy issue are set out below in turn, followed by the facts found (if any are relevant to the issue), and the conclusions in relation to them.
- 82 At the outset, the claimant confirmed that he was not seeking re-engagement or reinstatement and that his position had not changed in relation to that.

If there is a compensatory award, how much should it be? The Tribunal will decide:

(Issue 3.2.1) What financial losses has the dismissal caused the Claimant?

- 83 The claimant has lost 39.25 hours work per week, at an hourly rate of £10 per hour. That amounts to £392.50 per week. The loss is ongoing.

(Issue 3.2.2) Has the Claimant taken reasonable steps to replace his lost earnings, for example by looking for another job?

- 84 The claimant is working 10 to 15 extra hours per month in his day job. His hourly rate is £8.61 per hour for that work. That is on average just under 3 hours work per week, or about £25 per week.

- 85 The claimant has not made any formal applications for roles. He has made enquiries with local shops and cafés, but has not been successful in obtaining any further working hours. He feels that his age is an issue. He has not signed up for an agency, to carry out care work. He has been put off by his experiences in his previous role.

- 86 While the Tribunal notes the claimant's distrust of CYC's Social Services Department, care work is also available on a private basis, in private care homes. The tribunal concludes that had the claimant signed up with an agency, he should have been able to obtain an extra 10 to 15 hours per week, by the beginning of November 2020. Given the unique circumstances of the role he carried out for the respondent however, due to his ongoing friendship, and previous relationship with her, the tribunal concludes that it would have been difficult to mitigate entirely the losses that he suffered as a result of the dismissal, particularly given that he works during the day in another job.

(Issue 3.2.3) If not, for what period of loss should the Claimant be compensated?

87 Having regard to the mitigation issues, there would still have been an ongoing loss for a number of years. However, no further conclusions need to be reached in relation to the mitigation issue in light of the tribunal's conclusions in relation to the next issue.

(Issue 3.2.4) Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

88 The claimant accept that there had been a decision by CYC to reduce the respondent's personal care hours. Whilst both he and the respondent continued to dispute that, and the motivation for it, the claimant accepts that the Council's position was not likely to change.

89 The respondent confirmed that from 6 September 2021, she received a grant of 14 hours at the rate of £22.50 to the first week of October, when the hours were increased to 19 hours. £22.50 was paid per hour for the first 15 hours, increasing to £24 per hour for the 4 hours at the weekend. Then on 20 June 2021, the hours were increased to 23, an increase of 4 hours. The first 17 are paid at £23.50 per hour, the next 6 hours, at £25.50 per hour, the current weekend rate. The claimant accepted that, rightly or wrongly, given the history of this matter, the Council would not have offered those hours, at those rates, if he was still providing personal care services to the respondent.

90 The Tribunal concludes therefore that the most likely outcome was that the claimant would be dismissed by reason of redundancy, with a redundancy payment, and notice pay. The tribunal concludes that the process would have been completed by 27 September 2021 at the latest.

(Issue 3.2.5) If so, should the Claimant's compensation be reduced? By how much?

91 On the basis of the above, only a further three weeks pay would have been due to be paid to the claimant, a sum of £1,117.50.

(Issue 3.2.6) If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

(Issue 3.2.7) If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

92 The tribunal has found that whilst 'the cup incident' was an accident, it arose out of a loss of control by the claimant. There was also a heated argument on the day, which coupled with the upset caused to the respondent and her daughter, justified suspension.

93 Following that incident however, the Tribunal has found that the respondent asked the claimant to help her with jobs in November 2020, and asked him to continue to provide care services to her, on both a voluntary and then a paid basis, from January 2021 onwards. Further, the Tribunal has found that on 26 May 2021, the respondent said to Salvere that the claimant's suspension should be removed with immediate effect 'as it should have been after the meetings that took place in 2020'.

94 Bearing the above facts in mind, the Tribunal concludes that the claimant's actions on 8 October 2020 did not cause or contribute to his dismissal. Had the intervening events not occurred, and in particular, (1) the reporting of the claimant by the respondent to the police over matters which the respondent

has accepted were not true (other than 'the cup incident' which the claimant was only arrested for the following day just before his interview and which did not result in any charges); and (2) had the disciplinary process been concluded; (3) the most likely outcome would have been a written warning, not the claimant's dismissal. In those circumstances, the tribunal does not consider that it would be just and equitable to reduce the compensatory award.

(Issue 3.2.8) Does the statutory cap of fifty-two weeks' pay apply?

- 95 The cap applies. This is an unfair dismissal claim, not for example, a discrimination claim. However, given the conclusion above in relation to issue 3.2.4, the statutory cap does not apply.

What basic award is payable to the Claimant, if any?

- 96 The claimant, who was 51 years of age when he was dismissed, and had 9 years' service, is entitled to 13.5 weeks x £392.50 = £5,298.75

Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

- 97 For the same reasons set out above in relation to the compensatory award, the tribunal concludes that it would not be just and equitable to reduce the basic award.

Employment Judge A James

Dated 25 August 2022

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.

ANNEX A – AGREED LIST OF ISSUES

1. Unfair dismissal

2.1. Was the Claimant dismissed?

2.1.1. Did the Respondent do the following things.

2.1.1.1. maliciously report the Claimant to the police in October 2020;

2.1.1.2. Reduce his wages to 14 hours per week from the end of May 2021 without his agreement, despite the Claimant continuing to work full time hours from January 2021;

2.1.1.3. Fail to secure funds to cover the Claimant's wages at 14 hours per week in future, and allow the [Claimant] to become aware of this fact;

2.1.1.4. Fail to deal with the grievance raised by the Claimant in June 2021 in a timely and appropriate manner? The Claimant says there was no response until after he had tendered his resignation on 19 June 2021, following which he was offered a grievance meeting on an unspecified date, with a family member of the Respondent.

2.1.2. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

2.1.2.1. whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent;

and

2.1.2.2. whether she had reasonable and proper cause for doing so.

2.1.3. Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

2.1.4. Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that he chose to keep the contract alive even after the breach. The Respondent will say that the Claimant affirmed the contract by continuing to work following the alleged breaches, extending his notice period by agreement, and by voluntarily continuing to work further hours beyond the 14 hours he was paid for from January 2022.

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

2.3. Was it a potentially fair reason?

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

2. Remedy for unfair dismissal

2.1. The Claimant does not seek re-instatement or re-engagement.

- 2.2. If there is a compensatory award, how much should it be? The Tribunal will decide:
- 2.2.1. What financial losses has the dismissal caused the Claimant?
 - 2.2.2. Has the Claimant taken reasonable steps to replace his lost earnings, for example by looking for another job?
 - 2.2.3. If not, for what period of loss should the Claimant be compensated?
 - 2.2.4. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - 2.2.5. If so, should the Claimant's compensation be reduced? By how much?
 - 2.2.6. If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
 - 2.2.7. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
 - 2.2.8. Does the statutory cap of fifty-two weeks' pay apply?
- 2.3. What basic award is payable to the Claimant, if any?
- 2.4. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

3. Holiday Pay (Working Time Regulations 1998)

- 3.1. The Claimant's leave year was 1 April to 31 March.
- 3.2. How much of the leave year had passed when the Claimant employment ended?
- 3.3. How much leave had accrued for the year by that date?
- 3.4. How much paid leave had the Claimant taken in the year? The Claimant says that that he had taken none.
- 3.5. How many days or hours remain unpaid?
- 3.6. What is the relevant daily rate of pay?
- 3.7. The Claimant contends that he was underpaid by 69.25 hours

4. Unauthorised deductions

- 4.1. Were the wages paid to the Claimant between 1 May 2021 and 9 August 2021 less than the wages that should have been paid?
- 4.2. The Claimant contends that under his contract of employment he was entitled to be paid 39.25 hours per week for this period but in fact he was paid just 14 hours.
- 4.3. How much is the Claimant owed?