



EMPLOYMENT TRIBUNALS

Claimant: Mrs S. Clark
Respondent: Arden Coffee Sales Limited
Heard at: Nottingham Employment Tribunal via Cloud Video Platform
On: 25 and 26 May 2022
Before: Employment Judge R Broughton

Representation

Claimant: In Person
Respondent: Mr Williams – solicitor

JUDGMENT

The claim for holiday pay is dismissed on withdrawal.

The claim of constructive unfair dismissal is well founded and succeeds.

The respondent is ordered to pay the claimant the following sums:

1. A Basic Award : **£4,738.50 to be paid gross**
2. A Compensatory Award made up of the following elements:
 - 2.1 Financial losses up to the tribunal hearing **£11,650 net pay**
 - 2.2 Loss of statutory rights : **£500**
 - 2.3 Compensation under section 38 EA 2002: **£486**
3. The Recoupment Provisions apply (see Appendix which explains what must be paid when) :
 - I. The **Prescribed period** is: 18 November 2020 to 16 May 2022.
 - II. The **Prescribed Element is:** £11,650 (compensatory award less sum for loss of statutory rights and aware under section 38 EA 2002)

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- III. The **Grand Total** is: **£17,374.50** (all monetary awards)
- IV. The **Balance** is: **£5,724.50** (the amount by which the monetary award exceeds the Prescribed Element)

REASONS

Background

- 1. At a preliminary hearing on 8 February 2022 the claims were identified as claims of constructive unfair dismissal and holiday pay. The claimant was recorded as alleging that the respondent had breached the implied term of mutual trust and confidence in response to which the claimant had resigned from her employment. The breach it was alleged consisted of a series of acts culminating in an incident on the 27 September 2020.
- 2. Orders were made for case management, including that the respondent prepare a file of documents with an index and page numbers and send a hard copy to the claimant by 22 March 2022.

Issues

- 3. At the start of the hearing I asked the parties if there was any reason why we could not deal both with liability and remedy at this hearing, both parties were in agreement that we could proceed to deal with both, a separate hearing for remedy should the claims be successful, would not be required. The case management orders had provided for evidence as to remedy to be addressed in the documents exchanged and witness statements.
- 4. The claimant confirmed that she was withdrawing the claim for holiday pay.
- 5. The acts which the claimant relies upon in support of her claim, were not easily ascertained from her claim form which contained particulars of claim in a narrative style. The record of the preliminary hearing on 8 February confirmed that her claim related to a series of acts culminating in a discussion on the weekend of 27 September 2020 at her late father's home where she was told; "*don't bother coming into work, you're done*" however, the claimant had not at that hearing identified each of the other acts relied upon.
- 6. The claimant had provided a fairly full witness statement and prior to Mr Williams conducting his cross-examination, I clarified with the claimant the acts she was relying upon as the acts which gave rise to the alleged breach of trust and confidence and which incidents/acts were by way of background to the claim only. No objection was raised by Mr Williams to this clarification of her claim. I enquired of Mr Williams whether he would feel he needed to ask any supplemental questions of the respondent's witnesses, he decided that he did not.
- 7. As identified with the claimant, the acts she relies upon are as follows;
 - 7.1 *That Shaun and Susan Lawrence (directors of the respondent) would comment that family matters were not to be brought into the workplace, commenting that; "no one is family when they walk through the door" [to work]. The claimant complains that although she stuck to that rule Shaun and Susan Lawrence brought family issues into work and would "take things out on her". She alleges that this happened a few times over the years, she was not able to say when.*

7.2 *That she was spoken to in a way which was belittling and humiliating by Susan Lawrence and this happened in front of other staff and customers.*

7.3 *That comments would be made that the claimant would never leave the respondent's employment because she needed to work there for the money, she has no self-confidence and would not get another job. These comments she alleges were made by Susan Lawrence. The claimant could not recall when they occurred but believed it happened on two or three occasions over the last couple of years prior to her employment terminating, the last occasion being about February 2020, just before Furlough started in March 2020.*

7.4 *That she was moved into a new role working 2 days in the office and 1 day delivering, and there was no choice but to accept the change to her role. It was established by reference to a letter sent to the claimant at the time [B1 - 69] that this would have been in or around July 2018.*

15 January 2019:

7.5 *That although her normal hours of work were 8am to 5pm, that there was no work for her to do on this day and she was told she should leave at 4 pm and was not paid her full wages i.e. not paid until her normal hours of pm.*

24 January 2019

7.6 *She was told to go home at 4pm but stayed as there were jobs she needed to complete however, she was told that she would not be paid for the hours she worked past 4 pm. She further complains that she was told that the pay was being deducted because she was too slow when operating the computer and then told it was because she had broken the van key, which she denied.*

28 February 2019:

7.7 *The claimant's normal hours of work were;*

Monday and Tuesday: in the warehouse and office

Thursday : out on deliveries

A letter was left on her desk with a new rota which she had not agreed. Her Thursday hours had been given to another driver during March, April and May 2019 and she was required to work on Wednesday in the office. She was unhappy because she had an arrangement whereby she collected her granddaughter from school on Wednesdays and therefore had to change her commitments. From June 2019, she returned to her normal pattern of work. The claimant also complains that she had booked off a day's holiday for Thursday 9 May 2019 but was told she could not take the day off.

7.8 *That she very often received text messages from Shaun Lawrence late on Sunday night asking her to change her hours for the following day. This occurred she believed 2 or 3 times over about an 18 month period, she could not recall the dates other than an occasion on 28 February 2019 when she was told she had to work 9am to 6pm, to learn the computer for a temporary period but as other staff finished at 4:30 pm she had no one present in the office to ask for assistance.*

7.9 *Susan Lawrence would give her a 'good talking to' about being too slow on the computer and told her not to bother other staff by asking for their help.*

12 March 2019

7.10 *That when she had 7 hours holiday left to take, which happened on one occasion at the end of the holiday year, over the last 3 years, she would work two hours 8am to 10am and then take the rest of the day as leave however on this occasion she was told by Shaun Lawrence that she had to work 4 to 6pm, she could not take off the hours she wanted to take.*

7.11 *She was also told that in the future no leave would be allowed in the month of March, the week prior to a bank Holiday and the week of a bank holiday and she complains about those changes.*

23 and 24 March 2019

7.12 *She received a text message on those dates from Susan Lawrence informing her that her hours would be changing permanently when she worked in the office, from 9am to 6pm and there was no discussion. The claimant worked those hours.*

26 March 2019

7.13 *The claimant complains that she refused to come into work on a day she was not due to work and was told by Shaun Lawrence that she was not then allowed to work her delivery run the next day and therefore lost those hours of work.*

26 March 2019

7.14 *That Ashley Lawrence accused her son of deliberately failing the MOT on one of the respondent's vans.*

3 June 2019

7.15 *That Susan and Shaun Lawrence were constantly commenting that that the other driver, Malcolm Emberton was better than she was, and this was said in front of customers and staff which left her feeling belittled and humiliated.*

13 June 2019

7.16 *That she would receive text messages mostly from Susan Lawrence but occasionally from Shaun Lawrence, as late as 10pm about items missing on the van and/or that there were not enough 'spares' (ie spare boxes of tea and coffee) on the van and she was blamed unfairly, the fault was with the warehouse.*

18 July 2019

7.17 *That a letter was left on her desk telling her that she had to work on Sunday 21 July 2019.*

21 August 2019

7.18 *That she was told she had to work on her day off by Susan Lawrence.*

27 August 2019

7.19 *That she was 'told off' by Shaun Lawrence and told that cameras had been fitted in the warehouse and he remarked; "if you're [stealing], you're being watched".*

27 August 2019

7.20 *That she was treated differently to other staff in that she was required to work a bank holiday week and her Thursday hours were not paid for.*

13 September 2019.

7.21 *The respondent contacted the claimant while she was on annual leave and said they needed her to cover for a driver who had requested leave at the last minute on 19 September 2019, she refused.*

14 October 2019

7.22 *The claimant was told she had to work on Wednesday 13 November 2019 which was a day she was not due to work, she refused due to a hospital appointment. She complains that they became 'nasty' and a letter was put through her door saying she had to sign an agreement to confirm she will work on her non-working day when they say so and that this treatment was not the same for other staff [page B1- 76].*

11 November 2019:

7.23 *That Susan Lawrence spoke to her in a sharp and nasty tone which was unlike how she spoke to others.*

12 November 2019

7.24 *That Susan Lawrence spoke to her in a sharp and nasty tone which was unlike how she spoke to others and said the claimant was not quick enough in her work.*

27 March 2020

7.25 *The claimant complains that while on furlough and paid furlough paid, she was asked by Ashley Lawrence to come into work to do some painting [B1- 71] . She complains that she should not have been asked to do so because she understood that the government rules did not allow employees to work while employers claimed furlough pay for that employee a copy of a text message was contained within the bundle [page B1- 71].*

27 September 2020

7.26 *That Shaun Lawrence told her ; "not to go into work as you're done" and they were "fed up with me". She did not return to work, she was absent on sick leave and later decided to resign.*

8. The respondent does not seek to defend the claim on the grounds of 'Some Other Substantial Reason' namely a personality clash or that there had been a breakdown

in personal relationships, arising from the 27 September 2020 event. At the start of the hearing Mr Williams confirmed that the respondent is defending the claim on the basis that the events did not occur as described by the claimant and did not amount to a breach of the implied term of trust and confidence. No application was made to amend the defence to the claim.

Evidence

Witnesses

9. The claimant produced a witness statement, she gave evidence under oath and was cross examined. She did not call any additional witnesses.
10. I was informed on the first day of the hearing that the respondent would only be calling Shaun Lawrence and Susan Lawrence as witnesses.
11. There was some confusion over the witness statements. Mr Williams informed me that the respondent's witness statements were all attached to an email dated 24 May 2020 and Shaun and Susan Lawrence had prepared one joint statement. It transpired on the second day of the hearing, that Shaun and Susan Lawrence had in fact each prepared another separate statement which they wanted to rely upon as their evidence in chief and which had been included within the joint bundle. The claimant had received those statements and thus had read them before the hearing and had time to consider them. The claimant raised no objection and those witness statements were admitted into evidence.
12. The respondent had also included in the bundle emails from a number of current and former employees which are in effect, testimonials. Those include a short email from Patricia Smith dated 15 February 2022, commenting on her experience working for the respondent, an email dated 15 February 2022 from Jane Preece, another former employee of the respondent commenting on the support she had received from the respondent when her father had died and an email from Malcolm Emberton dated 14 February 2022 again commenting generally on his positive experience of working as a driver for the respondent from July 2018 to July 2020 when he retired due to ill health. There is also a document from Kia Tromans who worked in the office with the claimant at the respondent, commenting on the working environment but also the support she gave the claimant on the computer.
13. There was additionally a witness statement from Matthew Lawrence. The statement did not attach a statement of truth and although present throughout most of the hearing as an observer, Mr Matthew Lawrence, was not called as a witness.
14. There was no objection by the claimant, to the admission of those statements and other documents.
15. I took all those documents into account. I attach less weight to the statement from Matthew Lawrence taking into consideration that he did not give his evidence under oath and allow the claimant to challenge it by way of cross examination.
16. On the morning of the second day of the hearing, Mr Williams made an application to call Mr Ashley Lawrence to give evidence. His evidence was clearly relevant. It is not in dispute that he was present at the incident which took place on 27 September 2020. A witness statement had been prepared for him and had been exchanged with the other witness statements. The claimant confirmed that she would be in a position to deal with it. The application to call Mr Lawrence, was granted,

I considered that there was no prejudice to the claimant who had expected Mr Lawrence to be called as a witness and that having relevant evidence to give, it was in accordance with the overriding objective.

Bundle

17. There was also some confusion at the commencement of the hearing over the documents. The Tribunal had been sent direct from the respondent, on 16 May 2022, a bundle of documents numbering 78 pages with a handwritten index, which I shall refer to as **B1**.
18. On 24 May 2022, Mr Williams, instructed by the respondent the day before the hearing, had sent in a further bundle and index by email to the Tribunal and to the claimant. This bundle numbered only 44 pages and I shall refer to as **B2**.
19. We were conducting the hearing by CVP and at the commencement of the hearing Ms Clark confirmed that she had received B2 from Mr Williams the day before the hearing, but as she only had an electronic copy she did not have another device to access it (e.g. laptop, PC or iPad). She could only access it on her mobile telephone. The claimant did not have a printer at home.
20. The claimant had been sent a copy of B1 direct from the respondent, but in breach of Employment Judge Hutchinson's orders at the preliminary hearing, this had not been sent to her as a hardcopy, only electronically. The claimant also informed me that B2 did not contain all the documents that she had sent to the respondent for inclusion in the bundle however she was having difficulty locating B1 on her mobile telephone.
21. We had an adjournment, during which time the respondent sent a further copy of B1 to the claimant. We were then able to identify within that bundle the additional documents that were not contained within B2. Despite the reluctance of Mr Williams for the Tribunal to use B1, that original bundle which the respondent had itself prepared, was of more assistance.
22. There was also an issue around late disclosure of a document produced by the respondent. There was a dispute over whether or not the claimant had been issued with a contract of employment. If I were to find in favour of the claimant in respect of the constructive unfair dismissal claim, I am required to consider an award under section 38 the Employment Act 2020. The claimant's case was that she had never been provided with a contract of employment. Despite the respondent's position being that a contract had been produced and despite highlighting to Mr Williams that no contract was contained within the documents disclosed, he in rather robust terms, informed me that it was not part of the claims the claimant had issued, by which I understood he meant that a separate section 11 claim had not been brought and further that as she had never signed it anyway, we should '*move on*'.
23. During submissions however in the afternoon at the end of the second day of the hearing, Mr Williams mentioned for the first time that he had sent across to the Tribunal office that morning an email attaching an electronic version of a contract of employment which had been issued to the claimant. Unfortunately Mr Williams had not thought to bring this to my attention until making submissions and rather surprisingly, he had not raised this with the respondent's witnesses when they were giving evidence on the second day. Mr Williams informed me that he had sent the contract to the Tribunal 'as reference'. Only when it was pointed out that I would not be taking the document into consideration unless it was formally admitted into

evidence, did he make an application, breaking off from his submissions to do so. I heard his application. The claimant raised an objection on the basis of late disclosure. The existence of a contract of employment was however relevant not only to the issues of liability but potentially to remedy and specifically a section 38 award. The document however was not signed, the name of the respondent and the claimant was typed in, but neither party had signed or dated it and there was no evidence from the respondent to evidence the date this document was created.

24. The claimant however identified no particular prejudice and on balance I decided to allow the document to be admitted into evidence, even at this late stage. The claimant applied to be recalled to give sworn evidence about the document and was allowed to do so. She did so briefly merely to deny that she had ever seen the document. There was no application made by Mr Williams to recall any of his witnesses and therefore they led no evidence regarding who created the document and on what date, when it was allegedly sent to the claimant and why it was not at least signed by the respondent. Mr Williams conceded that the provenance of this document could not be ascertained.

Findings of fact

25. I explained to the claimant that if she failed to put her case on a point in dispute to the respondent's witnesses and they therefore were not given the opportunity to agree or disagree with it, it may be taken that the claimant tacitly accepts what that witness has said on that point.
26. All findings of fact are based on a balance of probabilities.

Background

2007 : Warehouse work

27. The respondent business is a family business which was started by two directors, husband-and-wife, Shaun and Susan Lawrence. Shaun Lawrence is the claimant's brother. They have two sisters; Jennifer and Angela. The respondent employs Shaun and Susan Lawrence's two sons, Matthew and Ashley Lawrence. Ashley Lawrence is in charge of the workshop. Matthew Lawrence is the Products Manager and overlooks the orders and vehicles and had some line management responsibility for the claimant, she had to report to him if she had to leave work or was off work sick.
28. When the business was first set up, the claimant's mother and father helped with deliveries. The claimant helped her father build up the warehouse and she worked flexibly as and when required. There is no dispute that her employment commenced in 2007.

2008: Delivery driver

29. The claimant took over delivering duties from her father, in 2008.
30. It is not in dispute that initially the claimant worked three days a week; Tuesdays, Wednesday and Thursdays. The claimant worked 9 hours per day and was paid an hourly rate and monthly.
31. The claimant's evidence that her normal hours of work were 8am to 5pm on each day she worked was not challenged in cross-examination and the respondent's did

not lead any evidence on this. I therefore find that those were her normal hours of work at that time.

Contract of employment

32. The claimant denies that she was provided with a statement of particulars. Ms Susan Lawrence, gave evidence on the second day of the hearing and alleged that a contract of employment was offered to the claimant but she refused to sign it. In response to a question I asked, Susan Lawrence gave evidence that she could not recall whether the contract of employment addressed the arrangements around notice and counter notice for holidays, because her evidence was she could not recall what was in the contract. Mr Williams as addressed above, mentioned during his submissions at the end of the second day of the hearing, that the respondent had located a copy of the alleged contract provided to the claimant. Despite therefore apparently the respondent locating the relevant contract of employment and sending it across to the Tribunal office before the hearing had started on the second day, neither Susan Lawrence, Mr Ashley Lawrence or Shaun Lawrence, made any reference to this document, that it had been located, when or by whom. Mr Williams in submissions, conceded that the respondent was not able to confirm the provenance of it.
33. The claimant's evidence was that she had never seen the contract before.
34. The document is unsigned by either party and was presented in a word processed format. There was no meta data provided to confirm when that word processed document was created and no covering letter or email.
35. There were occasions when the respondent would send a letter to the claimant to confirm discussions, including around holiday arrangements [B1-76] and change of role [B1- 69] but had not produced any letter which had been sent either providing the contract of employment or recording that the claimant had been provided with it and had refused to sign it.
36. I find on the balance of probabilities, given that the only evidence about the contract of employment which was disclosed, was from the claimant who denied receiving it, and given that it was unsigned and a word processed document with no evidence Mr Williams conceded, of its provenance, the claimant's evidence is to be preferred. I find that the claimant had not at any stage in her employment, been provided with this or any other contract of employment or a statement of particulars which complied with the provisions of section 1 ERA.
37. On balance of probabilities, I find that the claimant was not provided with a statement of particulars either within two months after her employment started and further did not provide a statement of change after her job changed.

Grievance

38. While I accept the claimant's evidence that she objected on a number of occasions to the treatment she complains about, she did not she accepts, ever submit a formal grievance about her treatment. However, I take into account that this was a family run business and the two most senior individuals, the two directors Shaun and Susan Lawrence, who she alleged were primarily responsible for the treatment of which she complains, were a married couple. It is therefore hardly surprising that she did not submit a formal grievance about one or both of them in those circumstances and therefore I do not consider it reasonable to draw any inference

adverse to the claimant, by her failure to do so. Further, the claimant's evidence which I accept, is that she was not provided with a contract of employment and the respondent witnesses do not allege that she was provided with a separate grievance policy or employee handbook.

Alleged incidents/acts undermining trust and confidence

39. The cross examination of the claimant was extremely brief. Counsel did not challenge the claimant in cross examination on any of the alleged acts other than the events of the 27 March 2020 and the 27 September 2020s, he merely put it to the claimant which she accepted, that she had no evidence to support her case regarding the other alleged incidents..

July 2018 change of role

40. In 2018 the claimant complains that she was offered a change of role working the same hours but rather than working 3 days per week delivering, she would be working 2 days per week in the office and 1 day in the warehouse/delivering.
41. The claimant in her evidence in chief refers to the respondent taking on another delivery driver, Mr Emberton to do 2 days of her delivery runs before she was asked whether she wanted to change her role and that she therefore felt that she had no choice but to accept the change. In cross examination, Shaun Lawrence gave evidence that their parents had wanted the claimant to work indoors. The claimant was the main carer for their father. Mr Shaun Lawrence alleged that they had discussed the change of role and how it would be easier for her to leave work in circumstances where she needed to attend to their elderly father, which would be more difficult if she was out on a delivery run.
42. The claimant in evidence referred to being "*asked*" if she would like to move into the office on Monday and Tuesdays but that before she gave the respondent her decision, the new driver was taken on. There is a letter in the bundle [B1 69] which while undated, refers to the respondent wanting the claimant to commence the "*new role*" on 23 July 2018. The letter, in the opening paragraph states; "*to follow up with our meeting*". That there was a meeting was not put to the claimant in cross examination however, she put it to Mr Shaun during his cross examination that no meeting had taken place, it was; "*just said as coming and going*". Mr Shaun Lawrence gave evidence that it had been discussed and there was a meeting and she "*could have said no*".
43. The letter proposing a start date of 23 July 2018 was not dated and neither party gave a date for when the letter was sent or received. The email in the bundle from Malcom Emberton, the second driver, states that he was employed from July 2018 to July 2020, it is not more precise as to the date his employment started.
44. Mr Shaun Lawrence gave evidence that the letter about the change of role would have been sent before 23 July 2019 and before Mr Emberton was recruited. The claimant did not challenge that account of the dates with Mr Shaun Lawrence.
45. I find on balance, that there was a discussion with the claimant about her working in the office and that the claimant had not confirmed her response to the offer but, given that this would better accommodate her caring responsibilities for her father, there was an expectation that she would agree. She does not allege that she actually refused the offer or voiced any protest. I find that she may have felt that she had not been properly consulted but did not voice her objection to the change

of role and that there had been some discussion prior to the appointment of Mr Emberton with her, albeit given the family dynamic, not a formal meeting.

46. The claimant also complains about a lack of training to work in the office. Under cross examination the claimant put it to Shaun Lawrence that she had received hardly any training on computers and could do only limited tasks such as invoicing ,recording messages and bringing up stock information. Shaun Lawrence under cross examination gave evidence that Kai Tromans trained the claimant on the Sage system , emails, how to take credit card payments but accepted she was not trained to do accounts and returns but could do number of other tasks including using word processing and writing letters and checking stock control.
47. The document from Kia Tromans in the bundle states; *“I would try and help her where possible with any of the more technical sided tasks of the business since I had more experience with computing, so I would try and explain things to her **as easily as I could** to help her get along with this part of the job”...[Tribunal stress].* I find that this document indicates that the claimant required ongoing support and needed guidance to be explained in ‘easy’, non-technical language because she was not familiar with using computers. The claimant does not dispute that Ms Tromans did provide her with some support. However, I accept the claimant’s evidence that she struggled to learn to use the computer and that she was not confident in carrying out more than the basic computer/office tasks. I do not find however, that the claimant raised any grievance or complaint about the lack of training but probably found learning these news computer skills quite stressful.

15 January 2019:

48. The claimant complains that although her normal hours of work were 8am to 5pm, on 15 January 2019, there was no work for her to do and Shaun Lawrence told her that she should leave at 4pm and she was then not paid for the time she would otherwise have worked from 4pm to 5pm.
49. The claimant has not produced any evidence including pay slips, to establish the underpayment.
50. In cross examination Shaun Lawrence denied that this had happened.
51. On balance, given the lack of supporting evidence, I do not find that the claimant has established on a balance of probabilities, that this incident took place.

24 January 2019

52. The claimant in evidence in chief alleges that she was told by Shaun Lawrence to go home on this occasion again at 4pm but that she stayed as there were jobs she needed to complete but was told she would not be paid for the hour she worked past 4 pm. She alleges that she spoke to ACAS on this occasion who informed her that she should be paid. The claimant alleges that one hours pay was not paid and that she was entitled to it because those were her agreed normal hours of work.
53. In cross examination, Shaun Lawrence alleged that she would be allowed to leave work if their father needed her assistance and she would be paid for that, he denied this incident had taken place.
54. The claimant has not produced any evidence including pay slips, to establish the underpayment.

55. On balance, given the lack of supporting evidence, I do not find that the claimant had established on a balance of probabilities, that this incident happened.

28 February 2019:

56. The claimant had not produced the alleged letter which had been left on her desk with a new rota or any other documents to evidence the change of rota or any documents evidencing the cancellation of her holiday. On balance, given the lack of supporting evidence, I do not find that the claimant has established on a balance of probabilities, that she was made to change her days of work during March to May 2019.
57. The claimant did not produce any of the alleged text messages from Shaun Lawrence changing her hours of work for the following day. Mr Shaun Lawrence in cross examination accepted that there was a change to her hours for a temporary period but only to help the claimant undertake training on the computer at a time during the day when it was quieter in the office and further, that she did not object to this. The claimant's evidence is that she was told about the change of hours, and not asked for her agreement. The claimant complains however, that after 4:30pm, there was no one in the office to assist her if she had a problem with the computer. The claimant does not allege however that she complained about this and made anyone aware that she was having difficulties at the time. I find therefore on balance, that she was a temporary change of hours, and that the respondent did not obtain her express agreement to this change. However, I find that this was arranged by the respondent because it was considered that it would be helpful to the claimant and she did not express an objection to it, although in practice she did not find it as helpful as was intended, because there was a lack of personnel to support her after 4:30pm.
58. Ms Susan Lawrence denies that she had given the claimant "*a good talking to*" about being slow using the computer. The claimant could not recall dates and she does not allege that she raised any complaint at the time. However, the claimant appears to accept that she had some difficulties learning to use the computer. It is therefore I consider more likely than not, that some comment was made about her speed or proficiency with the computer but the claimant did not detail what exactly was said and I do not therefore find, that what was said was either insulting or offensive or otherwise conduct which was inappropriate.

12 March 2019

59. The claimant complains about having to work 4pm to 6pm when using up a remaining 7 hours at the end of the holiday year, when in the previous 3 years she had been allowed to work 8 to 10am and that she had been told that no holidays would be allowed in March or prior to a bank holiday or the week of a bank holiday.
60. Susan Lawrence under cross examination denied these allegations and had no recollection of the claimant asking her about holiday and that the respondent tries to come to an agreement with all staff over leave. She also asserts that the claimant was treated the same as all staff and that there was never really any staff off during a bank holiday week because when there is a bank holiday it is difficult to get orders out and the staff work together to make sure they get them out. She could not recall the claimant ever asking her for time off when it was a bank holiday. The claimant informed me that she had could not provide any specific dates which she could put to Susan Lawrence.

61. I find on a balance of probabilities, that the claimant was along with other staff, required to work bank holidays and that the claimant did not complain about this at the time.
62. The claimant had not produced any supporting documents and has not established on a balance of probabilities, that she was not allowed to work 8am to 10am to use her holidays.

23 and 24 March 2019

63. The claimant gave evidence that a change of hours was imposed on her however, she does not allege that she voiced any protest or refused to work the hours and she worked them. Mr Shaun Lawrence under cross examination, gave evidence that they had spoken about the changes and they were not imposed.
64. I find on balance that the claimant may not have expressly agreed to the changes, but that she did not refuse or voice any protest and worked the new hours.
65. It may very well be that as a family member there was more of an expectation on the claimant to be accommodating and I find on balance, that she was but felt perhaps taken somewhat advantage of but did not express that at the relevant time.

26 March 2019

66. The claimant complains that she refused to come into work on 26 March 2019, when she was due to work and was told by Shaun Lawrence that she was not allowed to work her delivery run the following day, was not paid for the day she was prevented from working and therefore lost those hours.
67. Shaun Lawrence in cross examination denied that this had taken place and alleges that on occasions when she could not work because their father was ill or otherwise needed her assistance, she was paid but he would have to send someone out to cover her deliveries. He referred to the claimant being “*very good*” to their father and looking after him more than Shaun Lawrence or their two sisters and that the claimant’s attention to their father freed him up to run his business and their two sisters to work.
68. The claimant did not produce any bank statements or payslips to evidence the allegation that she was not paid for 3 days that particular week.
69. Given the lack of any supporting evidence, the conflict in the oral evidence and absence of any reason to draw an inference adverse to the respondent, I do not find that the claimant had established on a balance of probabilities, that this happened.

26 March 2019

70. The claimant complains that Ashley Lawrence accused her son of deliberately failing the MOT on one of the Respondent’s vans. This accusation was put to Ashley Lawrence who in cross examination denied that he had spoken to her son or the claimant about it.
71. Given the lack of any supporting evidence, the conflict in the oral evidence and absence of any reason to draw an inference adverse to the respondent, I do not find that the claimant had established on a balance of probabilities, that this incident

happened.

3 June 2019

72. The claimant gave evidence that Susan and Shaun Lawrence were constantly commenting that the other driver, Malcolm Emberton was better than she was, and was said in front of customers and staff which left her feeling belittled and humiliated. She recalled one specific occasion on 3 June 2019 but did not identify who the customer was. The claimant went on to mention another incident but could not recall the date and alleged that in front of a customer Susan Lawrence had asked about another customer and the claimant had replied that she had not yet rung them back, and that she asked her why not and the claimant had said it was on her to do list and that it was not important because she always got the jobs done.
73. Susan and Shaun Lawrence in cross examination denied making any comments as alleged in front of customers.
74. On balance, taking into account the conflicting evidence, and the lack of supporting detail to the allegation, I do not find that the claimant has established on a balance of probabilities, that these events happened. However, the once incident that she did provide more detail about, I do not consider on the face of it to amount to unreasonable conduct by Susan Lawrence, although the tone is obviously important, the claimant's objection appeared to be principally that it was said in the presence of a customer.

13 June 2019

75. The claimant complains that she would receive text messages as late as 10pm about items missing on the van and that there were not enough spares on the van and she was blamed for this although the fault was with the warehouse.
76. This allegation was only put by the claimant to Ashley Lawrence in cross examination who denied texts were sent.
77. The claimant had not produced the alleged texts.
78. I find on a balance of probabilities, that the claimant has not established that these events took place.

18 July 2019

79. The claimant complains that a letter was left on her desk telling her that she had to work on Sunday 21 July 2019, which was not one of her usual days of work. The claimant never put this allegation in cross examination and did not produce the alleged letter.
80. I find on a balance of probabilities, that the claimant has not established that this incident took place.

21 August 2019

81. The claimant alleges that she was told that she had to work on a day off and there was no consultation. She did work that day and gave evidence that she always changed her commitments to accommodate a request by the respondent to work but that she was unhappy about being 'told' to work. She also complains that she

was told no annual leave was allowed that week but that other staff were absent on annual leave.

82. The claimant in response to questions I asked her, clarified that she was 'asked' to work on a Thursday which she had booked off as leave and told she had to work it by Susan Lawrence, she called Acas and who told her she did not have to work but she did work, she changed her plans to accommodate the respondent.
83. The issue about being told to work was not put by the claimant to Susan Lawrence, in any event, the claimant does not allege that she refused to work or that she raised any objection at the time. The evidence of Ms Lawrence is that the claimant was treated the same as other staff regarding annual leave. The claimant has not identified which staff it is alleged were able to take leave when she was not. In the absence of any evidence to support the claimant's allegation that she was treated differently as alleged, the claimant has not on a balance of probabilities, established that she was treated differently as alleged.

27 August 2019

84. The claimant in response to questions I asked, clarified that she was 'told off' by Shaun Lawrence for not calling customers and asking them properly what they wanted, she believes she was doing her job properly and found these comments hurtful and upsetting. The allegation about being 'told off' and what it was alleged was said, was not put to Shaun Lawrence in cross examination.
85. She also complains that the respondent fitted cameras in the warehouse and Shaun Lawrence remarked that he did not know if drivers were taking things "*but we have cameras do if you are , you're being watched* ", the claimant complains that she felt like as if she was being accused of stealing.
86. This allegation was put to Ashley Lawrence but not Shaun Lawrence. Ashley Lawrence, confirmed that cameras had been installed but not to watch their drivers rather that there are 20 or 30 deliveries per day on site and not all of them are for the respondent and the respondent installed the cameras to check that stock was being stolen and that staff were told before they were installed.
87. There were no witnesses to the alleged comment and no complaint raised at the time by the claimant.
88. I find on a balance of probabilities, that the claimant has not established that the comments were made and I accept that the cameras were installed to prevent theft from other external delivery drivers.

27 August 2019.

89. The claimant's evidence is that she was required to work during a bank holiday and that Shaun Lawrence then took her Thursday work off her later that week and gave it to another driver at the last minute. She spoke to Acas and to Shaun Lawrence and he refused to pay. The claimant did not put this allegation to Shaun Lawrence, she chose to put this allegation instead to Susan Lawrence in cross examination who denied any knowledge of it but gave evidence that bank holidays are a difficult time for the respondent as they have to cram all the work and deliveries into 4 days but denied any discussion with the claimant about this leave.
90. On balance, I find that the evidence does not support the claimant's allegation that

this incident took place.

13 September 2019

91. The claimant alleges that Susan Lawrence contacted the claimant while she was on annual leave and said they needed her to cover for a driver who had requested leave at the last minute on 19 September 2019, she refused and a letter was put through her door signed by Susan Lawrence stating that she will work when she is needed. The claimant gave no further details of what was in the letter and did not have the letter to disclose
92. Ms Susan Lawrence denied in cross examination that this incident had happened and that she had sent a letter.
93. On balance, I find that the evidence does not support the claimant's allegation that this incident took place.

15 October 2019

94. The claimant's evidence is that she had rearranged a hospital appointment twice because of work and was contacted on 15 October 2019 and told she would have to work on Wednesday 13 November, a non-working day but on this occasion because she had a medical appointment, she refused. Susan Lawrence denied any knowledge about a hospital appointment under cross examination, and her evidence is that she would have given time off to attend such an appointment.
95. The claimant complains that when she refused to cancel her appointment, a letter was then put through her letterbox which she alleges in her evidence in chief; said; "I have to sign an agreement that is will work my days off when they say".
96. A copy of the letter was disclosed [B1 76] and the claimant confirmed that this was the letter she was referring to. It is dated 15 October 2019. It is signed by Shaun and Susan Lawrence but not by the claimant; it reads;

*"We have already discussed with you and verbally agreed that three weeks' notice will be given from the business end when requesting that you **be available for work** as well as there being three weeks' notice from you to us for any time you would like off, and we thought it best going forward to make this agreement official in writing and signed by all parties involved to avoid any potential disagreements in the future and ensure that these terms are followed as best as we can .*

*The **three weeks' notice for any time you need off is very important** to us as a small business, as we have limited number of staff available to us and we need an acceptable amount of time to make arrangements for replacement staff members to be in , especially on any busy days. **Conversely , it is only fair that we also give you three weeks' notice for any time that we would require you to come in that isn't a part of your standard hours, to give you time to reschedule any of your own plans...**"*

97. The claimant's evidence is that she had commitments on the days she did not work, including on Wednesdays when she collected her grandchild from school. The claimant is 59 years of age as at June 2019 and she did not want to have to work on her days off.
98. The claimant sought advice from Acas and she informed the respondent that she

was not prepared to sign the letter and continued to work 3 days per week. She then alleges that she asked to speak to Shaun and Susan Lawrence on 22 October 2019 and told them that if she had no plans then she would work her days off to help but if she had plans then she would not and refused therefore to sign the letter and agree to its terms.

99. The evidence of Susan Lawrence under cross examination was that either she or Shaun Lawrence would have discussed these changes with the claimant and handed the letter to her. She denied putting it through the claimant's letter box. The claimant also objected to being contacted while on annual leave. Susan Lawrence denied contacting her while on leave whether by text or telephone. The claimant did not produce any text messages she had received or provide details of any dates when she was contacted while on leave.
100. I find on the evidence that there had on the 15 October 2019 been a request by the respondent that the claimant work on non-working days when required with notice. The claimant's evidence about the date and the request to work on a day off, is consistent with the decision to issue this letter however she has not produced evidence of the hospital appointment. The 'nasty' reaction is the sending of the letter.
101. The letter however is not, I find, objectively 'nasty' in its tone, it is attempting to introduce a flexibility into the claimant's working week, which I accept on her evidence, she did not want. The letter was not signed by the claimant but she does not allege that there was an incident after this when this new arrangement was forced on her. It is also the claimant's case that she refused to work on the date she had the hospital appointment and did not do so.
102. The claimant complains of difference in treatment, but does not provide details of other employees and what the working arrangements were between them and the respondent and how accommodating or not, they were in practice. I do not find that the evidence supports a finding of a difference in treatment.

Incident 20: 11 November 2019

103. The claimant complains that Susan Lawrence spoke to her in a sharp and nasty way and accused her of being slow with her work: "*you should have done this by now*" and "*hurry up and get this done*". The claimant alleged that; "*I always caught up with my work*" which indicated that at some stage she may have been behind. The claimant alleges that on one occasion, Ms Tromans had 'stuck up' for her, but she did not clarify what was said by Ms Tromans.
104. The claimant describes feeling belittled and humiliated. Under cross examination Susan Lawrence denied the allegation stating;

"I classed her as my friend and sister in law – she is still my friend"
105. The claimant was unable to identify the dates it is alleged these events took place and the allegations were vague. It was put to Susan Lawrence that on one occasion a customer was present and Susan Lawrence asked the claimant why she had not telephoned a customer back and that the claimant had told her that it was on her list. She could not recall the date and did not identify the customer who was present or who she was meant to have called and Susan Lawrence denied the allegation.
106. On balance, I find that the evidence does not support the claimant's allegation that

this incident took place.

12 November 2019

107. The claimant complains that again Susan Lawrence spoke to her in a 'nasty' manner and accused her of not being quick enough in her work. Susan Lawrence denies the allegation. The claimant in her evidence in chief accepts that she got a little behind in her work and made a "*few tiny mistakes*". The claimant does not allege she raised a complaint at the time about how she had been spoken to.
108. Given the lack of any supporting evidence, the conflict in the oral evidence and absence of any reason to draw an inference adverse to the respondent, I do not find that the claimant had established on a balance of probabilities, that this incident took place.

27 March 2020

109. It is not in dispute that the claimant was placed on 'furlough' from March to end of July 2020. The claimant complains that while she was on furlough and the respondent was taking advantage of the government furlough scheme to continue to pay her, she was asked by Ashley Lawrence to come into work to do some painting [B171]. In cross examination Ashley Lawrence accepted that he had asked this and indeed his text message to her confirms this. His evidence was the claimant had done most of the painting of the showroom which his grandfather had built and he thought she would like to do some painting and understood that she could 'volunteer' to help while on furlough. The text message however does not refer to this as unpaid work and neither does he allege it was intended to be unpaid.
110. It is also not alleged that Mr Ashley Lawrence made this request of any other employee.
111. Mr Lawrence does not allege that he acted outside the knowledge of the directors of the business. Shaun and Susan Lawrence did not give evidence that they were unaware of the request made by Ashley Lawrence or that otherwise he had been acting outside his authority.

Incident 23 : 27 September 2020

112. The incident on 26 September is described by the claimant as the 'last straw'.
113. The claimant's father had died 3 weeks prior to this. The claimant had cared for him for some time and was an executor of his will.
114. It is not in dispute that the claimant drove past her late father's bungalow on 27 September 2020 and saw two vans on the drive, those vans were driven by Shaun and Ashley Lawrence. The claimant went into the garden where she found Shaun and Ashley Lawrence along with Susan Lawrence and her young grand-daughter, Ashley's Lawrence's daughter.
115. The claimant alleges that she asked in a 'nice' manner what was happening and was told that Ashley Lawrence was taking some garden ornaments and that she had said that because the estate was going through probate everything should be left, in response to which Shaun Lawrence became angry and swore at her.
116. The claimant I accept was concerned that Shaun and Ashley Lawrence were there

with vans to remove property. Although I accept that Shaun Lawrence had been told by his sister, Angela that he could attend the property, he had not spoken to the claimant. He did not seek to explain when giving his evidence, why in circumstances where the claimant had been her father's main carer and was an executor of his will, he did not, out of respect at least for her sensitivities, let her know he was going to remove things from the property. He did not and the claimant I accept was surprised, upset and concerned that he was not only there with his son without her knowledge but there with two vans.

117. The claimant within her claim form in the narrative attached with it, states that during this incident at her father's home, she was told;

"don't bother coming to work, you've done". Tribunal stress

118. Those words were recorded by Employment Judge Hutchinson in the record of the case management hearing on 8 February 2022 [B1 45]

119. When asking her to clarify the alleged acts for the purposes of defining the issues at the start of the hearing, the claimant asserted that she had been told; *"not to go into work, as you're done and they are fed up with me"*. Tribunal stress.

120. Under cross examination the claimant's evidence was that all those words were said, that she was told not to bother coming into work, that they were fed up of her and *"you're done"*. She also alleged that Shaun Lawrence swore at her and had said to her that she could never stand up for herself and that she always had to fetch someone to help her. The claimant had telephoned her sisters to come to her late father's bungalow.

121. The claimant complains in her evidence in chief that she then telephoned in sick the next time she was due to work and a fitness to work certificate was issued by her GP on 18 October 2020. She was then absent for 2 weeks.

122. In its response to the claim, the respondent states;

"on the day of [sic] question there was four members of family there myself and 3 sisters at Shaun Lawrence's parent's house one being Susan Clark.

An argument developed between myself and Susan Clark in regards to some garden items of the property belonging to our father who had passed away. The argument had nothing to do with work. It was personal"

123. In his written statement [B1 50] Mr Shaun Lawrence states;

*"on the afternoon Sunday, 27 September argument developed between myself and Susan Clark over something has [sic] trivial as garden ornaments, a lot of shouting developed **between us both** resulting in S Clark sending for our two sisters. At no point was work mentioned by either of those only arguing over property [sic] silly issues regarding our father's property"*

124. Mr Shaun Lawrence goes on to refer later to Ms Clark failing to come into work *"after the argument"*.

125. In Sue Lawrence's witness statement [B1 52] she also refers to an 'argument' and to this being between; *"my husband (Shaun Lawrence) and Susan Clark..."*

126. Ms Susan Lawrence, accepts that the argument was the reason why the claimant left the respondent's employment because in her evidence in chief she states; "*I still say if the argument hadn't taken place that day at my father-in-law's property S Clark would have carried on working for Arden coffee sales Ltd*"
127. The witness statements of Shaun and Susan Lawrence fail to set out what they allege was exactly said and by whom.
128. However, despite what Shaun Lawrence has clearly stated in his own witness statement about the argument being between him and the claimant, when I asked Shaun Lawrence during cross examination whether he accepted that there was an argument, his evidence was different;
- "not necessarily, there was a **fallout with Ashley** - who came to collect lots of ornaments in the garden"* .
129. He went on to allege that the claimant had arrived at the property and said; "*what are you doing*", to which his son Ashley Lawrence had said that he was;
- "moving a chimney as Angela had given **permission to take it**". Tribunal stress*
130. Mr Shaun Lawrence went on to give evidence that; "*any sharpness was between those two*". By which he was referring to Ashley Lawrence and the claimant.
131. Mr Shaun Lawrence gave evidence that they were intending to take at least one item, namely a chimney in the garden;
- "I have my own keys for the bungalow, I let myself onto the land, gave permission for my kids to take it, we needed it clearing, the next job was the conservatory but we did not get that far"*
132. Mr Shaun Lawrence denied saying to the claimant '*don't come into work*' or that she was '*done*'.
133. The description by Susan Lawrence of what happened on 27 September was as follows, under cross-examination;
- "That afternoon Ashley and my husband parked on my father-in-law's drive, the claimant had apparently come to get diesel and saw the vans on the drive. She came marching down the garden, saw me and Darcy [granddaughter] and said "what on earth you doing here". I said "Ashley and Shaun around the corner". She was livid, telling Ashley he had no right to come as her son had not. He was only looking at the ornaments. Angela had said we could go and have a look. I think she [the claimant] saw the vans and thought we were loading items. Ashley was looking at one item, a chimney, Angela the sister had agreed. I was sat on the swing seat and my granddaughter said why is auntie Susan so mad. Angela told me to move Darcy so she was not listening to the claimant **shouting at Ashley and my husband**".*
- Tribunal stress
134. Susan Lawrence gave evidence that Angela had said that; "*in hindsight she should not have said have a look - we had no intention of taking anything*"
135. Ms Susan Lawrence gave evidence under cross examination that she had never

left the premises and that her husband had never said that the claimant 'was done' and 'not to bother coming into work'. The joint statement prepared I am told by Susan and Shaun Lawrence states however as follows [B66];

*"Mrs Clark states she was told in the deceased [sic] garden by Mr Shaun Lawrence 'not come into work, As [sic] they were fed up of me.' These are two conflicting stories of events. Again to which **there are no witnesses except for Mr Ashley Lawrence.**" Tribunal stress*

136. The above clearly implies that Ms Susan Lawrence did **not** witness what was said, and that the only persons who did were Shaun and Ashley Lawrence. This is not consistent with her evidence under cross examination when she gave evidence that Shaun Lawrence had not said the words complained of by the claimant. I therefore asked Susan Lawrence to clarify her position in terms of what she had heard, to which she gave evidence that;

" maybe I had gone to see Darcy – she was 6 years old – she was crying "

137. Susan Lawrence went on to explain that her granddaughter had been upset but that she had not left the premises because she was unable to do so but she had taken her granddaughter to sit in a van and accepted that she may not have been privy therefore to everything that had been said but that Ashley Lawrence had "definitely been".

138. Further, Susan Lawrence gave evidence which directly contradicted the evidence of Mr Shaun Lawrence about what had occurred on 27 September. Although Shaun Lawrence had stated that was not necessarily describe what had been said between himself and Ms Clark as an argument and further that any "sharpness" was not between him and the claimant but between the claimant and Ashley Lawrence, Susan Lawrence gave evidence that;

*"Susan Clark, Shaun and Ashley were **all shouting**. I told **them** to pipe down because of the neighbours" ; and*

" all shouting but Susan very angry"

Tribunal stress

139. Susan Lawrence confirmed that the reference to "all" of them shouting included Shaun Lawrence, only then to go on to assert that they were "not falling out - it was a disagreement" and actually she had meant that they were raising their voices rather than shouting but went on to state that;

"emotions were running very high- it was only the week before we had buried my father-in-law - it was too early for the claimant "

140. Despite Susan Lawrence stating that she and her husband kept work and family matters separate and that she was and remains a friend of the claimant, she confirmed that following this incident on 27 September, she never got in touch with the claimant. She gave evidence that the reason why she had not got in touch with the claimant was; "probably because of the **argument** between **yourself and Shaun** - he was my husband and Susan brother - I was like a piggy in the middle". Tribunal stress

141. The evidence in chief of Ashley Lawrence is that he and his parents were;

“...just there outside the house looking at the views and talking about old times.”

142. Under cross examination Ashley Lawrence gave evidence that he had been told by Angela that he could go up to the bungalow and have a look at; *“what I fancy”* and that he been invited by Angela to take home at some point, things he felt useful and that he had; *“found a few items we may suggest we put our names on them - if we wanted to take them”* but that when the claimant turned up and asked what they were doing *“we said we had right we have been invited up, we are just looking at the views”*. However, in response to a question I asked about their purpose in attending the property, he clarified that it was to; *“To view items in the garden.”*
143. His evidence was that things became *“heated from the offset”* by the claimant and that their voices were raised because her voice was raised. He confirmed that Mr Shaun Lawrence had also raised his voice.
144. Ashley Lawrence also accepted under cross examination that he had not contacted the claimant while she was off work from 27 September either, considering it;
- “ best not to contact her because of the **heated debate in the garden**”*. Tribunal stress
145. The evidence under cross examination, of Shaun Lawrence is I find an attempt to downplay his involvement in the argument that ensued. Shaun Lawrence even goes so far as to say that he would not necessarily describe it as an argument however, this is at odds with how he describes it in his own evidence in chief and is not consistent with how the situation is described both by his wife and Ashley Lawrence.
146. Susan Lawrence in her evidence, asserts that they were at the property for no reason other than to **look** at the garden ornament. I am not persuaded that this is a truthful account of their intended purpose in going to the property. It is directly inconsistent with the evidence of Shaun Lawrence.
147. There were I find, reasonable grounds in the circumstances, for the claimant, to believe/suspect that Shaun and Ashley Lawrence had driven to the property with their vans to do more than simply admire the view from the garden.
148. The situation I find became heated and unpleasant. The claimant described under cross examination, the shock she felt at what had been said to her and being frightened to go back to work after what had been said to her on 27 September 2020. The claimant’s evidence is consistent with the fit notes she sent in 2 days later, claiming work related stress.
149. It is not in dispute that neither Shaun Lawrence or Susan Lawrence contacted the claimant after the incident on the 27 September 2020 before she resigned. Shaun Lawrence under cross examination gave evidence that although he had not contacted her in a work context, he had seen her during this period when they were sorting things out at their parent’s house and he had asked how she was feeling and that he was; *“expecting you [the claimant] to turn up for work **or work your notice**”* Tribunal stress.
150. The claimant put it to Mr Shaun Lawrence that she had only seen him once at their parent’s house, which he did not accept however, Mr Lawrence had not mentioned having contact with the claimant while she was absent on sick leave in his witness statement and this had never been put to her during cross examination. I find on

balance of probabilities, that they did have contact but only one occasion but in any event, Shaun Lawrence does not allege that he mentioned anything to her about returning to work or seeking to resolve the bad feeling over what had happened on the 27 September.

151. The claimant's evidence is that she had called the respondent on the 29 September and spoke with Ashley Lawrence and told him that she had been told not to come in to work. Counsel did not challenge this evidence but merely questioned why she had not asked for something "*firmer*" in writing from the respondent about not wanting her to return to work.
152. The claimant's evidence that she was later contacted by Matthew Lawrence on 19 October 2020, after her fit note had run out. What she alleges was said, was not challenged in cross examination. Mathew Lawrence did not give sworn evidence but his witness statement alleges that he was not aware that the claimant's stress was caused by the argument with his father. He does not allege and nor does Shaun Lawrence assert, that Matthew Lawrence was acting on his father's instructions in contacting the claimant. The claimant's evidence is that she explained that she had another fit note but claims that she too frightened to return after what had happened.
153. I accept that the failure by Shaun or Susan Lawrence to make contact with her after the events of the 27 September 2020, made her anxious about how she would be treated on a return to work and that it would have added to the belief that what they had said on the 27 September about not wanting her back at work, they had meant.
154. If the argument had nothing to do with work as alleged by the respondent, given that the claimant was absent with work related stress, it is difficult to understand why the claimant's own brother or indeed her sister in law, who professed to have remained her friend, did not make any contact with her during her absence.
155. With respect to the argument on the 27 September, the evidence in the response to the claim and the evidence Shaun Lawrence gave in his evidence in chief was not consistent with his oral evidence under cross examination. It was also not consistent in material respects with the evidence that was given by Mr Ashley Lawrence or indeed by his wife Susan Lawrence. I formed the distinct view on listening to their evidence, that all three were not giving a full and honest account of what had taken place on 27 September, but collectively were attempting to present the claimant in the worst possible light and certainly Mr Shaun Lawrence in particular, was attempting in his evidence under cross examination, to minimise his direct involvement in the argument that took place.
156. The inconsistencies in the evidence of the respondent's three witnesses gave me cause for concern regarding their reliability and indeed, their credibility with respect to the events of the 27 September. I had no such concern with the claimant's evidence.
157. Ms Susan Lawrence went on in her evidence in chief to describe the claimant and Shaun Lawrence as having very stubborn natures; "*which clashed in and out of work*". Shaun Lawrence in response to a question I asked, clarified that he did not agree with what his wife had said and that they had a "*wonderful time*" until September. Susan Lawrence in cross examination, expressed her view that her husband and the claimant were not close and that it was the claimant's father who had suggested that the claimant take over the work he had been doing for the respondent.

158. After working for the respondent since 2007, Mr Shaun Lawrence did not seek to explain in his evidence, why he had expected the claimant to either return to work or to resign and 'work her notice'. He does not allege that he enquired of the claimant when he had seen her outside of work, whether she was coming back or ask about the reason for her absence, given that the certificate was for work related stress. He also does not allege that he made any effort to discuss with her what had happened on the 27 September 2020 and reassure her that she was wanted back at work. The fact that Shaun Lawrence was operating with the expectation that she may resign rather than return to work and had not sought to discuss this with her and the evidence of Susan Lawrence about his relationship with the claimant, I find on a balance of probabilities, that it is the case that Shaun Lawrence did not want the claimant to continue working for his business. A finding I take into consideration when determining the likelihood of what had been said to the claimant on the 27 September during that heated discussion.
159. The statement of Matthew Lawrence, although I attach less weight to it, includes the following observations;
- "Arden Coffee is a family business. Working alongside your family and those you live with a times can be testing..." And;*
- I had a private meeting with Mrs Clark and Susan Lawrence in which I tried to resolve some of the issues **as it was obvious the family issues were leading into the working environment** and my dad was clearly struggling with his mental health" Tribunal stress*
160. I find on the balance of probabilities, that emotions were running high during the discussion on the 27 September, and the claimant, Shaun and Ashley Lawrence were all shouting. The discussion became heated and unpleasant, so unpleasant that afterwards although the claimant was absent sick with work-related stress/anxiety, her sister-in-law, Susan Lawrence, did not contact her to enquire about her well-being so soon after the death of her father
161. Taking into account the evidence from the respondent witnesses which I find to be unreliable and the behaviour of Shaun and Susan Lawrence after the 27 September, I prefer the claimant's account of what was said to her. I find that she was told by "*not to go into work, as you're done*" and that they were fed up with her.
162. Although the argument on the 27 September 2020, had taken place outside of the physical workplace and outside working hours, Shaun Lawrence owned the business with his wife and it became a work related matter when as her boss, he introduced work and her employment, into the discussion with the claimant.

Resignation

163. The claimant described seeing an advert the respondent had placed on Instagram for a driver and that same day, the 20 October 2020 she submitted her resignation
164. The respondent alleges that the advert was placed in September and it was for a driver to replace not the claimant, but Malcolm Emberton.
165. The claimant did not produce the advertisement or a screen shot of it. I find that the claimant has failed to establish on a balance of probabilities that the advertisement was placed in October rather than September or that the intention was to find a

replacement for her. There is no dispute that Mr Emberton has left the respondent's employment in July and the claimant does not allege that the advertisement was for two drivers. I do not find that the advertisement was for a replacement for her position and nor that it was reasonable for her to believe that it was. However, the claimant's clear evidence is that after 27 September she did not believe the respondent wanted her to continue working for them and she feared returning to the workplace and that was the trigger behind her decision to resign.

166. She served 1 months notice but used some holiday which meant that she never returned to the workplace.

Legal Principles

167. The starting point in terms of the applicable legal principles is the statutory provision which allows for a 'constructive dismissal' situation, which is section 95(1)(c) of the Employment Rights Act 1996 (ERA);

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

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(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.

Tribunal's own stress

168. The amount of notice that must be given by either party to terminate the contract of employment may be found in its express or implied terms and in the absence of an express contractual term as to notice, a court or Tribunal may be prepared to imply a term at common law that reasonable notice be given.

169. The leading case on constructive unfair dismissals, is the Court of Appeal ruling in **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA**, where the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. Lord Denning MR put it as follows:

'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'

170. In order to claim constructive dismissal, the employee must establish three things:

(1) there was a **fundamental breach** of contract on the part of the employer

(2) the employer's breach **caused** the employee to resign

(3) the employee **did not delay too long** before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

171. Individual acts by an employer may not individually constitute fundamental breaches of a contractual term however they may have the cumulative effect of undermining trust and confidence, entitling an employee to resign and claim constructive dismissal following a 'last straw' incident, even though the last straw by itself does not amount to a breach of contract: **Lewis v Motorworld Garages Ltd 1986 ICR 157, CA.**

172. Whether the breach is fundamental is essentially a question of fact and degree and a key consideration for the tribunal is the *effect* that the breach has on the employee.

173. It makes no difference that the employer did not intend to end the contract: **Bliss v South East Thames Regional Health Authority 1987 ICR 700, CA.**

174. The circumstances that induced the employer to act in breach of contract are irrelevant to the issue of whether a fundamental breach has occurred: **Wadham Stringer Commercials (London) Ltd v Brown 1983 IRLR 46, EAT.**

"Having introduced what we might call that contractual approach, it seems to us to follow that, in considering whether or not there is a constructive dismissal, one has to approach the matter on a contractual basis throughout. If there is a fundamental breach of contract then, as a matter of contract law, the employee is entitled to accept that repudiation. Neither the circumstances inducing the fundamental breach by the employer, nor the circumstances which lead the employee to accept such repudiation, are relevant as a matter of contract law.

175. The EAT confirmed that the test of whether there was a repudiatory breach of contract remains an *objective* one: **Leeds Dental Team Ltd v Rose 2014 ICR 94, EAT.**

Implied term of mutual trust and confidence

176. The House of Lords in **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL** confirmed that the duty is that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

177. It is an important feature of the implied term that any breach of it will be regarded as repudiating the contract of employment: **Morrow v Safeway Stores plc 2002 IRLR 9, EAT** and in **Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666, EAT** Mr Justice Browne-Wilkinson held that;

'[a]ny breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract'.

178. There are two questions to be asked when determining whether the term has been breached: was there 'reasonable and proper cause' for the conduct? If not, was the conduct 'calculated or likely to destroy or seriously damage trust and confidence'?

Reasonable and proper cause

179. The burden of proving the absence of reasonable and proper cause lies on the party seeking to rely on such absence: ***RDF Media Group plc and anor v Clements 2008 IRLR 207, QBD.***

Conduct must have been ‘calculated or likely to seriously damage or destroy trust and confidence’.

180. The second requirement for establishing a breach of the implied term as expressed is that the conduct must have been ‘calculated or likely to seriously damage or destroy trust and confidence’. A breach of this fundamental term will not occur simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely that view is held.
181. The legal test entails looking at the circumstances *objectively*, from the perspective of a reasonable person in the claimant’s position: ***Tullett Prebon plc and ors v BGC Brokers LP and ors 2011 IRLR 420, CA.***
182. The issue is not whether the employer *intended* its conduct to destroy trust and confidence, it is whether the effect of the conduct is to damage trust and confidence, that is sufficient to constitute a repudiatory breach of contract.
183. The test for breach of the implied term of mutual trust and confidence includes fault on the part of the contract-breaker and incorporates a threshold of seriousness by requiring the conduct at issue to be such as to seriously damage the employment relationship irrespective of any intention specifically to do so and if the threshold is met, the contract is repudiated automatically. There is no need for a separate test of repudiation. ***Morrow v Safeway Stores plc 2002 IRLR 9, EAT***
184. An employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably. ***Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA:*** the question of whether the employer’s conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.
185. ***Bournemouth University Higher Education Corporation v Buckland:*** a repudiatory breach of contract cannot be cured unilaterally by the party in default.
186. In ***Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL,*** the House of Lords held that, as part of the duty not to undermine trust and confidence, employers owe their employees an implied obligation not to carry out their business in a ‘corrupt or dishonest manner’. In agreeing to work for the employer, the innocent employees could not be taken to have agreed to work in furtherance of a dishonest business, and this applied to all employees, from a cleaner to a senior executive. Matters in that case had reached a stage where it was not just one or two individuals acting dishonestly, but the bank itself could be identified as corrupt. On discovering the true situation, the employees would have been entitled to resign and claim constructive dismissal.

Resignation

187. An employee must accept the breach and terminate the contract by resigning, either with or without notice.

Causation

188. An employee will be regarded as having accepted the employer's repudiation only if his or her resignation has been caused by the breach of contract in issue therefore if the employee would have left anyway irrespective of the conduct, for another reason, then causation is not established.
189. There may be other reasons but the issue is whether the employer's repudiatory breach was an *effective cause* of the resignation even if not 'the' effective cause: **Wright v North Ayrshire Council 2014 ICR 77, EAT.**
190. It is not necessary for an employee, to inform the employer immediately of the reasons for her resignation to establish causation: **Weathersfield Ltd t/a Van and Truck Rentals v Sargent 1999 ICR 425,**

Affirmation

191. If the employee waits too long after the employer's breach of contract before resigning, she may be taken to have affirmed the contract.
192. Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA,** ruled that the employee '*must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged ..*'
193. **Post Office v Roberts 1980 IRLR 347, EAT,** The EAT held that the 'real point of time' at which the employee had to make a decision did not arrive until the full facts became clear and attempts to solve the problem had failed which was after a delay of six week.

'Last straw'

194. **Lewis v Motorworld Garages Ltd 1986 ICR 157, CA.** The Court of Appeal in that case stressed that it is immaterial that one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach and that the employee did not treat the breach as such by resigning.
195. **Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA,** which held that, if the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct.
196. The Court of Appeal in Kaur proceeded to offer guidance to tribunals:
"55...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, for the reason given at the end of para. 45 above.)*

(5) *Did the employee resign in response (or partly in response) to that breach ? None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy."*

Mitigation

197. Once dismissed, an employee is under a general duty to try to reduce her losses by taking reasonable steps to find another job.
198. The burden of proof lies on the employer to show that the employee failed to mitigate loss. If the employer fails to show that the employee ought reasonably to have taken certain mitigating steps, then the normal measure of damages will apply: ***London and South of England Building Society v Stone 1983 1 WLR 1242, CA.***

The Coronavirus Job Retention Scheme

199. The IDS Employment Law Handbook sets out the rules The Coronavirus Job Retention Scheme in the 'Wages' section, as follows:

*"In order to address the economic impact of the **COVID-19** pandemic in the UK, the Government implemented the Coronavirus Job Retention Scheme (CJRS) between March 2020 and 30 September 2021. The CJRS went through various iterations during that period, but at its heart it was always a scheme whereby employers claimed a grant from the Government to cover a proportion of the wages of all workers on their PAYE payroll who had been 'furloughed' (i.e. put on a leave of absence) in response to the **COVID-19** pandemic. The CJRS had legislative backing in S.76 of the Coronavirus Act 2020, which confers on HM Revenue and Customs 'such functions as the Treasury may direct in relation to coronavirus or coronavirus disease', and the details of the scheme have been set out in a series of 'Treasury directions', available on the Government information website, www.gov.uk.*

In brief outline, the history of the scheme is as follows:

March to June 2020 –

*under the original scheme, the Government paid 80 per cent of wages for hours not worked by furloughed workers, up to £2,500 per month, as well as employer national insurance contributions (NICs) and pension contributions. There was a minimum furlough period of 21 calendar days. Workers could be furloughed multiple times, but each separate instance had to be for a minimum period of three consecutive weeks. **It was a condition of the CJRS at that time that the worker did no work for the employer at all;** the scheme did not cover those whose hours had merely been reduced. The scheme in this form closed to new entrants from 30 June.." Tribunal stress*

200. **The Health Protection (Coronavirus Restrictions) (England) Regulations 2020** came into force on 26 March 2020. The Restrictions on movement were set out in regulation 6:

6.—(1) *During the emergency period, no person may leave the place where they are living without reasonable excuse.*

(2) *For the purposes of paragraph (1), a reasonable excuse includes the need—*

(a) *to obtain basic necessities, including food and medical supplies for those in the same household (including any pets or animals in the household) or for vulnerable persons and supplies for the essential upkeep, maintenance and functioning of the household, or the household of a vulnerable person, or to obtain money, including from any business listed in Part 3 of Schedule 2;*

(b) *to take exercise either alone or with other members of their household;*

(c) *to seek medical assistance, including to access any of the services referred to in paragraph 37 or 38 of Schedule 2;*

(d) *to provide care or assistance, including relevant personal care within the meaning of paragraph 7(3B) of Schedule 4 to the Safeguarding of Vulnerable Groups Act 2006(1), to a vulnerable person, or to provide emergency assistance;*

(e) *to donate blood;*

(f) *to travel for the purposes of work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living;*

...

201. The provision on the sanctions for infringement were set out in regulation 9:

Offences and penalties

9.—(1) *A person who—*

(a) *without reasonable excuse contravenes a requirement in regulation 4, 5, 7 or 8, or*

(b) *contravenes a requirement in regulation 6, commits an offence.*

Compensation under S.38 Employment Act 2002

202. Section 38 Employment Act 2002 provides that a tribunal **must** award compensation to a worker where, on a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5 which includes a claim of unfair dismissal, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under S.1 ERA — Ss.38(1)–(3);

(1) *This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.*

(2) *If in the case of proceedings to which this section applies—*

(a) *the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and*

(b) ***when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act***

1996 or (in the case of a claim by an worker) under section 41B or 41C of that Act,

the tribunal **must**, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

(6) The amount of a week's pay of an a worker shall—

(a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c. 18), and

(b) not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).

Submissions

203. I made it clear before the parties presented their submissions, that submissions were to address matters of both liability and remedy and invited them to address me on section 38 EA 2002, should I find for the claimant.
204. Both parties delivered oral submissions. I directed the claimant to the test as set out in *Western Excavating* and allowed her some time after the respondent's submissions to consider those and respond before delivering her own.

Respondent's submissions

205. Mr Williams made very brief submissions. He did not address whether the alleged acts, if I found them to have taken place, would amount objectively to conduct which undermined trust and confidence. He did not address whether if only the incident of the 27 September 2020 took place, that alone could amount to a repudiatory breach.
206. Mr Williams made no submissions whatsoever on remedy.
207. Mr Williams had not cross examined the claimant on her claimed losses nor on her attempts to mitigate. Further, Mr Williams did not seek to challenge the sums set out in the schedule of loss.
208. Mr William's even though expressly invited to do so, did not address what remedy should be awarded under section 38 EA 2002 in the event of a finding that the respondent was in breach of section 1 (1) or 4 (1) of the ERA at the time proceedings were begun and did not seek to argue any exceptional circumstances pursuant to section 38 (5).

209. I shall deal briefly with the key part of the submissions, I have considered them however in full; Mr Williams submitted that the case was a factual and not a legal one and it was ' simply' a matter of which witnesses I believed.
210. It is submitted that I should take into account that the claimant confirmed that she had not raised any complaints and her allegations are mere assertions. It is submitted that the claimant has unusually resigned with notice, had waited just over 3 weeks before doing so after 27 September 2020 and that it was not a constructive unfair dismissal but "*simply a falling out by the parties*" and that she had affirmed the contract.

Claimant's submissions

211. The claimant also made very brief oral submissions. She submitted that she had been mentally abused and could not take any more, hence why she resigned. That she felt after 27 September incident, that as she had not been contacted, she did not have a job any longer and she gave 4 weeks' notice because she was paid monthly and believed that this was how much notice she was required to give.

Conclusions

212. For the reasons I have set out in my findings, aside from the events of the 27 March 2020 and 27 September 2020, either the alleged incidents did not take place or if they did, they do not amount to acts which either individually or combined with others alleged acts, it would be objectively reasonable (taking into account their effect) to consider that they breach trust and confidence.
213. I turn now however to whether the claimant's claim of constructive unfair dismissal is well founded or not, based on the events/acts of the 27 March 2020 and 27 September 2020..

Implied duty of mutual trust and confidence

27 March 2020 : request to provide services during furlough

Reasonable and proper cause

214. It is not in dispute that the claimant was placed on 'furlough' from March to end of July 2020.
215. Under The Coronavirus Job Retention Scheme Government Scheme (Furlough Scheme) employees on furlough were not able to carry out work for their employer and by 27 March 2020, (pre the introduction of the flexible furlough scheme in July 2020), the lockdown measures were in place. The claimant may have been exposed to a potential fine for breaching the lock down restrictions if she was travelling and this was not required for ' work'. If this was work, then the respondent would have been in breach of The Furlough Scheme Coronavirus if she carried out work for them while on furlough.
216. I am not persuaded that Ashley Lawrence was unaware of the restrictions at the time when he asked the claimant whether she would come in to work to do some painting. There was a significant amount of readily accessible information available on the operation of the Furlough Scheme at the time. If in doubt, Ashley Lawrence could, but does not assert that he did, take steps to check that his understanding was correct, whether perhaps by calling Acas or taking some legal advice. He also

does not seek to assure the claimant in his text to her, that this request was compliant with the Furlough Scheme rules. He also did not insist on her carrying out this work when she refused.

217. It is not alleged that Ashley Lawrence made this request of any other employee and I consider that this is likely to be because he felt that it was 'safer' to make this request of the claimant who was a member of the family as well as an employee. I also take into account that he also does not allege in his witness statement, that his understanding at the time was that employees could volunteer to do work for their employer while on furlough.
218. By enquiring whether the claimant was prepared to come in and carry out some work, I conclude that the respondent was attempting to involve the claimant in an unlawful practice. It is not submitted by the respondent that it had reasonable and proper cause for doing so outside of the alleged misunderstanding that it was in accordance with the Furlough Scheme, which I do not accept as credible.

Conduct must have been 'calculated or likely to seriously damage or destroy trust and confidence'.

219. To ask an employee to be potentially complicit in a breach of the law is a serious matter and may of itself give rise to a significant breach of the implied duty of mutual trust and confidence.
220. In the circumstances of this case however, I do not conclude that the effect of the request was such that of itself, it gave rise to a repudiatory breach. No pressure was applied to the claimant. In terms of the effect of the act, the claimant declined to do the work and the respondent did not subject her to any adverse treatment. Although I accept she was discomforted about being asked to go into work, that was more about her having to travel during lockdown than about a breach of the Furlough Scheme by her employer.
221. The claimant then returned to work on flexible furlough from end of July 2020. She was only back at work less than 2 months before the incident on 27 September 2020.

27 September 2020

Reasonable and proper cause

222. The respondent does not seek to argue that the comments which I find were said by Shaun Lawrence on the 27 September 2020, were said in the heat of the moment and that in the circumstances, it was not reasonable for the claimant to have understood that the respondent did not want her to return to work.
223. Mr Williams does not submit that objectively it would not be reasonable for the claimant to have taken those comments as amounting to a breach of trust and confidence. The respondent's position is simply that the alleged comments were not made and in any event, it was a private not work related dispute.
224. Nonetheless, I have considered whether, looking at all the circumstances *objectively*, from the perspective of a reasonable person in the claimant's position, the *effect* of the conduct was to damage trust and confidence.
225. Mr Shaun Lawrence did not retract the comment about the claimant being 'done'

and told not to come into work. Further, both he and his co- director then failed to make any contact with the claimant when she was absent with work related stress, reinforcing the intention behind the comments he had made on the 27 September 2020.

226. The reason for the comments which were made to the claimant, was not for a reason which could be said to be serious or reached after a careful and thorough process of consideration. Mr Shaun Lawrence was at pains in his evidence to stress that the argument was over something which was 'trivial'.
227. As her employer, Shaun Lawrence introduced the issue of her continued employment into the argument. When he made the comment about her being 'done' and not to bother coming into work, he was acting not as her brother, but in the position of her employer

Conduct must have been 'calculated or likely to seriously damage or destroy trust and confidence'.

228. The breach could not be cured but in any event, the respondent took no steps to try and make amends and retract what had been said.
229. The claimant was upset by what had been said to her and fearful that she would not be welcome back at work.
230. I conclude that applying the guidance in *Kaur*, that the most recent act, namely the comments on the 27 September, was of itself a repudiatory act.
231. Mrs Susan Lawrence herself gave evidence that in terms of how seriously the claimant viewed what had happened on 27 September, she believed that but for what happened, she was of the opinion that the claimant would not have resigned.
232. The claimant gave evidence about how hurt she was by what had been said to her and I accept that objectively it was reasonable for the comments to have had that effect, combined with the angry tone in which they had been delivered. Regardless of the alleged earlier acts of which she complains, the comments on the 27 September I conclude, gave rise to a repudiation of the contract, breaching the implied term of trust and confidence which is 'inevitably' fundamental :*Morrow v Safeway Stores plc 2002 IRLR 9, EAT.*
233. Further, I conclude that in any event, the combined effect of the 27 March 2020 incident, and the respondent's conduct on the 27 September 2020, amount to a breach of trust and confidence.

Resignation

234. The respondent does not seek to argue that there was an ulterior reason for the claimant's resignation, that she would have resigned anyway.
235. The claimant I conclude, resigned because of what had happened but had waited for some sign of possible retraction or apology, but it was not forthcoming.
236. The claimant left and did not secure new employment immediately. She had worked for the respondent for a significant period of time, and secured new work at significantly lower rate of pay.

237. I conclude that the comments which were said to her on 27 September was an effective cause of her decision to resign.

Affirmation

238. The claimant did not resign immediately however, given the pressures place on employees in this sort of situation, it is necessary to look very carefully at the facts before deciding whether there really has been an affirmation.
239. I have considered that the claimant had worked for this family business for a considerable period and that she was without alternative employment. I also take into account that she was so upset by what had happened and went off sick with work related stress.
240. Mere delay by itself does not constitute an affirmation of the contract but if the delay has gone on for too long it could be persuasive evidence of an affirmation. However, I have also taken into account that the claimant had I find, been hoping for some sign from her brother that he did not mean what he had said about her being 'done'. I take into account that her sister-in-law and fellow director, did not contact her because she felt like 'piggy in the middle' between what infer from her evidence, she, considered to be an ongoing dispute between her brother and the claimant.
241. This case presents quite an unusual set of circumstances, involving a family business which the claimant's own parents had helped to establish and which she had been involved with for a significant number of years. I consider that by waiting to see for 3 weeks, whether there was any sign of contrition or otherwise that Shaun Lawrence had not meant what he had said to her, during which she was absent with work related stress, the delay did not amount in the circumstances to affirmation: ***Post Office v Roberts 1980 IRLR 347, EAT***
242. It was not argued by the respondent that the claimant affirmed by giving 1 months' notice or by using outstanding holiday during the notice period to avoid a return to the workplace. The act of giving notice cannot by itself constitute affirmation. I conclude that in the circumstances, when she gave the notice (which she understood she was required to give), that her actions did not amount to affirmation of the contract or a waiver of the breach.
243. **I therefore conclude that the claim of constructive unfair dismissal is well founded and succeeds.**

Statement of Particulars: section 38 ERA

244. I have made a finding that the claimant was not provided with a statement of particulars either within two months after her employment started (the applicable time limit which applied before 6 April 2020) and further did not provide a statement of change after her job changed, setting out the title of the job the claimant was to carry out pursuant to section 1 (4)(f) ERA.
245. **The respondent was therefore in breach of section 1 (1) and (2) and section 4 (1) ERA at the time these proceedings were begun.**

Remedy

246. The claimant submitted a schedule of loss setting out her claim for compensation and confirmed that she did not want reinstatement or re-engagement. In response

to a question from the tribunal about her claimed losses, the claimant under oath, confirmed that she had secured new employment with a bakery earning the sums as set out in her schedule of loss and that she remains in that employment still.

247. The claimant had produced a list of jobs she had applied for from shop assistant to housekeeping assistant and a copy of her payslips with Henstocks Bakery [p.75] confirming her weekly pay of £89.10. She had also disclosed details of universal credit payments. The claimant confirmed in answer to a question from me, that she is seeking repayment of the contributions the respondent had made into a stakeholder pension.
248. Mr Shaun Lawrence in his evidence in chief gave evidence that the claimant had 'downgraded' her role since leaving the respondent because she could use computers and could therefore have applied for an office role.
249. That the claimant could have sought an office role and better paid employment was not however put to the claimant in cross examination and no evidence was produced of vacancies for other potentially suitable roles. However, as set out in the findings, I find that the claimant was not confident in using computers and required ongoing support and required things to be explained to her in quite simple terms.
250. Mr Williams did not put any questions to the claimant during cross examination about the compensation she is seeking. There was no cross examination about her attempt to mitigate her losses. The compensation she is claiming therefore was not challenged by Mr Williams in cross examination.
251. The claimant did not confirm her gross weekly pay and therefore I have calculated as accurately as I can, the gross pay from the net pay figures she provided. Neither party produced payslips from her employment with the respondent.
252. The recoupment provisions apply.
253. The claimant is awarded the following sums based on the undisputed evidence produced by the claimant as to her losses:

Compensatory Award

254. The claimant worked 9 hours per day, 3 days per week for which she earned £9 per day [B1 76].
255. Period **1 : 18 November 2020 to 31 January 2021** : the claimant's undisputed evidence is that she was out of work and in receipt of no salary during this period and she is to be compensated accordingly.
256. The claimant I conclude suffered net loss of earnings of 10.57 weeks x £235.24 net per week = **£2,486.82 net**
257. **Period 2: From 1 February 2021 to 30 April 2021**: the claimant was only in receipt of universal credit and her losses for that 12 week period are: 12.57 weeks x £235.24 net per week = **£2,957.30 net**. lost wages. (The secretary of State will deduct from that sum any relevant benefits paid during that period)
258. **Period 3: 1 May 2021 to 31 July 2021** : the claimant started new employment and receiving universal credit: 13 weeks x £235.24 net per week = **£3, 058.12 net** lost

wages less wages earned. (The secretary of State will deduct from that sum any relevant benefits paid during that period)

259. **Period 4: 1 August 2021 to date of tribunal/26 May 2022:** 42.57 weeks @£235.24 net per week =£10,014.50 – income earned £3,742.20 = **£6,272.30 net**
260. The sub total is **£14,774.54** net.
261. The claimant has not claimed losses beyond the date of the hearing.
262. In addition the claimant claims and I award, the sum claimed for pension loss of £7.29 per week x same period of loss claimed (18 November 2020 to 25 May 2022): It is 553 days or 18 months 7 days : from the start date to the end date, but not including the end date: **£539.46**
263. Loss of statutory rights: the claimant is entitled to be compensated for the loss of statutory rights and given her length of service, I determine that **£500** would be a sum which it is just and equitable to award.
264. Failure to provide particulars, the award is 2 weeks pay : **£486**
265. **The total compensatory award is therefore: £16,300** (before recoupment provisions will apply)

The cap on the compensatory award

266. Pursuant to section 124 ERA, The statutory cap as at the effective date of termination was £88,519 or 52 weeks pay, whichever is the lower. The sum equivalent to 52 weeks gross pay which the claimant had earned while employed by the respondent, is : **£12,636** (i.e. £9 per hour x 9 hours x 3 days x 52 weeks)
267. The sum awarded for the compensatory element is therefore capped at **£12,636**.

Basic Award

268. The claimant is entitled to a basic award to reflect the years she was employed by the respondent **£4,738.50** (13 years service based on £243 gross per week)

The Recoupment Provisions.

269. In cases of unfair dismissal, the Employment Protection (Recoupment of Benefits) Regulations 1996 SI 1996/2349 ('the Recoupment Regulations') apply.
270. If as a result of being dismissed, the claimant becomes entitled to unemployment benefits, the value of these payments will **not** be taken into account by the employment tribunal in calculating the claimant's net loss. Instead, the Secretary of State may, under the Regulations, recoup the value of those payments from the employer, which deducts it from the amount that is paid to the employee.
271. Included in the award which the tribunal has ordered the respondent to pay to the claimant there is a sum of £12,136 in respect of her pay from the day she was dismissed until the day of the hearing (less wages earned from new employment but without taking into account the universal credit received and subject to the overall statutory cap).
272. The way the Government gets its money back for the benefits it has paid is through

the Recoupment Regulations. The respondent must retain that part of the award which relates to the claimant's loss of earning up to the hearing, this is called the Prescribed Element , until the respondent receives from the Department for Work and Pensions a Notice.

273. The Notice will either require the respondent to pay all, or part, of the Prescribed Element to the Department, or tell the respondent that it does not require any payment. When the respondent receives the Notice the respondent must pay to the Department for Work and Pensions the sum specified in the Notice and the balance should be paid to Claimant.
274. The rest of the award over and above the Prescribed Element, which amounts to £5,238.50 net is due to be paid to the claimant straight away.

Compensation section 38 EA 2002

275. I have find that the respondent was in breach of section 1 and 4 ERA . I have however taken into account the fact that the respondent is a family business and there was an informality in the working arrangements .
276. In an unfair dismissal claim, any section 38 increase is applied to the compensatory award before the application of the statutory maximum (in this case the cap is a year's salary). In the circumstances, I conclude that it would be just and equitable to award 2 weeks pay, I do not conclude that the omission was deliberate but as a consequence of how the business had grown and the informality because of the family connection between the claimant and the directors. The claimant does not complain that she had asked for particulars which had been refused.

Summary

277. The respondent is therefore ordered to pay;
- a. Basic Award: £4,738. 50 net
 - b. Loss of earnings date of dismissal to 26 May 2022 : £11,650 net [Prescribed Element to be paid once a Notice has been issued by the Secretary of State]
 - c. Loss of statutory rights: £500
 - d. Section 38 uplift: £486

Employment Judge R Broughton

22 July 2022

CASE NO: 2600454/2021

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE