



EMPLOYMENT TRIBUNALS

Claimant: C

Respondent: R

Heard: In Leeds **On:** 18 to 21 July 2022

Before:

Employment Judge JM Wade

Ms JL Hiser

Mr DW Fields

Representation

Claimant: In person

Respondent: In person

Note: A summary of the written reasons below was provided orally in an extempore Judgment delivered on 21 July 2022, the written record of which was sent to the parties on 16 August 2022. A request for written reasons was received from the claimant on 17 August 2022. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 21 July 2022 are repeated below:

JUDGMENT

- 1 The claimant's complaint of constructive unfair dismissal is well founded and succeeds.
- 2 The claimant's constructive wrongful dismissal complaint succeeds.
- 3 The claimant's Equality Act complaints are dismissed.
- 4 The respondent shall pay to the claimant a Basic Award of £9450 and a Compensatory Award of £500.00.
- 5 The recoupment regulations do not apply to the awards above.

- 6 The respondent shall further pay to the claimant £2425.92 in net damages arising from her wrongful dismissal.
- 7 The total sum payable is £12, 375.92

REASONS

Introduction, hearing and issues

1. These proceedings have a long history with ten or so previous hearings. Until her resignation in the autumn of 2019, the claimant was the lead personal assistant for the respondent's daughter, K, a vulnerable adult with learning difficulties. K is supported by a local authority care package involving 24/7 care. The Rule 50 Orders in place in this case are maintained in order to protect K.

2. Various respondents were initially named as employer/respondent, including K. The litigation has been subject to pandemic related delays. A separate public hearing found that R was the employer of C. The other respondents, all legally represented, then fell away in January 2022, leaving two litigants in person to prepare for the final hearing of merits and remedy. The findings of fact in the reserved judgment from the "employer" hearing are to be read into these reasons, save for the date on which the claimant resigned and the employment ended, which is addressed below.

Evidence

3. At a previous hearing an Employment Judge had directed that the file of evidence for this hearing would be a bundle of over 2000 pages, previously prepared by the local authority. References in these reasons to page numbers are to the electronic or manual page numbers. The claimant provided paper copies of some of that documentation for the Tribunal's use at this hearing, together with memory sticks. The Tribunal used the paper copies where available, and where not, read from the electronic file provided by the local authority, referring material to the parties to enable them to comment.

4. The claimant had provided a witness statement setting out a great deal of evidence about her role and care for K; she also referred to the extensive documentary evidence; and a very lengthy reading list indicating themes and points in her case. She also provided two character witness statements and two statements from former colleagues, one of whom still works as a personal assistant to K. She had also presented a chronology. The respondent relied on her short grounds of resistance and a short witness statement.

5. These events and litigation have no doubt been deeply painful for both the claimant and the respondent and a great deal of the claimant's evidence was by way of background, and not focussed on the allegations in her case. We make no criticism; hopefully it has been cathartic to say all that has been said and bring these proceedings to an end.

6. The claimant's chronology setting out each incident on which she relied, recognised the importance of dates, but also identified that for unrelated reasons she had difficulties with dates.

7. In fact both the claimant and the respondent were unreliable as witnesses of **when** matters occurred. The contemporaneous documents fully demonstrated that. It was unsurprising given the length of time since their interactions with each other took place. The Tribunal has tethered its findings of fact to the contemporaneous evidence; we did not consider we could make safe findings without corroboration from contemporaneous sources to pin down when the allegations occurred, and if they occurred. Having said that, many incidents alleged were broadly accepted by the respondent to have happened, but sometimes not precisely in the way described.

The issues

8. The factual issues, identified at previous hearings for this Tribunal to decide were, did the respondent:

8.1. Display aggressive outbursts towards the claimant regularly between 2017-19, as set out in her claim form, namely:

8.1.1. In May 2017, storming around over [the claimant] giving [K] the wrong money, shouting "you think you're her mum", it has to be your way". "oh yes take the easy way out";

8.1.2. In November 2017, in the presence of the claimant, dragging K to the hall, slapping her, dragging her upstairs while shouting at her;

8.1.3. In November 2018, concerning the death of K's rabbit, shouting "there you go again, your way, you think you are her mum, you are gone from here"

8.1.4. In September 2019 (said to be the last incident), shouting at the claimant: "your gone I will see any shift you do I have my daughter, your time is up, I bet you tell her we don't want her, even [sister] said you made us feel guilty if we didn't take [k] to see [] in []. We took her and she spoilt it".

8.2. Call the claimant 'Nanny McPhee' on occasions between June and November 2017;

8.3. Say to the claimant 'anything could happen to you' in July 2017 and on other occasions;

8.4. On a number of occasions, say 'anything could happen to your parents';

8.5. Between March and November 2018 say to the claimant that she was good at cleaning / cooking as she was 'old school';

8.6. In November 2018 and September 2019 suggest that the claimant could not ride a bike as she was older and not fit enough;

8.7. In June 2019 allocate particular tasks to the claimant due to her being 'older' than a new younger PA.

8.8. Contact the claimant on her days off, including in April and July 2019 and on 7 September 2019;

8.9. Fail to support the claimant in relation to conflicts with other staff members including in July 2019, 1 August 2019, 15 August 2019;

8.10. At a meeting in August 2019, shout at the claimant: 'you're gone, your time is up, I will see that any shift you ever do with my daughter will be done with me.'

- 8.11. Fail to increase the claimant's pay in September 2019 in line with other employees;
- 8.12. Tell the claimant that her role was being demoted in a meeting in early September 2019.

9. Allegations 5.2 to 5.7 were pursued as Equality Act harassment or direct discrimination because of age. All allegations were said to contribute to a breach of the implied term of trust and confidence, in response to the last of which the claimant resigned. The legal issues are well trodden territory and identified in the case management orders.

The Law

10. The relevant provisions are Sections 94, 95, 98, 119 and 123 of the Employment Rights Act 1996. Sections 40, 26, 39, 13, 123 and 135 of the Equality Act 2010. The common law principles relevant to determining constructive unfair dismissal are, in summary:

- 10.1. Every contract of employment has implied into it a term that each party will maintain the trust and confidence necessary for an employment relationship to work;
- 10.2. It is a breach of that term for a party to conduct him or herself, without reasonable and proper cause, in a way which is calculated or likely to destroy or seriously damage that trust and confidence;
- 10.3. Such a breach is a repudiatory breach, that is a sufficiently serious breach, in response to which a party is entitled to accept the breach and treat the contract as terminated, by resigning, the defaulting party's conduct demonstrating that the other party no longer considers themselves bound by the contract.
- 10.4. An employee can lose the right to treat the contract at an end if they wait too long, letting bygones be bygones, before resigning.
- 10.5. The employee must resign at least in part in response to the breach.

Findings of Fact

11. In the early part of her life, K lived with her mother, the respondent. As an adult, K's care was provided by a third-party provider, Avalon. During this time K lived with R and the claimant was part of the team of PAs employed by Avalon to provide care. The claimant's continuous employment had started on 23 May 2007.

12. From 1 September 2013 the claimant had become directly employed by the respondent to be the lead personal assistant ("Lead PA") for K, pursuant to a contract of employment, with job description, dated 1 September 2013. This was part of an arrangement for K to be funded directly for her own care. This reflected that the respondent and the claimant had operated for many years as effective partners supporting K; they were similar ages, they shared many happy and challenging times; and they were very tolerant of each other. Major decisions about K were taken by the respondent; the claimant was very supportive of K's independence.

13. Alternative accommodation had been found to enable K to move out of the family home; she had a brother and a sister. The claimant had later supported her to find really good accommodation locally and to help in decorating and organising that. K was in her late thirties at the time of these events. She was never without a carer “sleeping in” her own flat with her.

14. The Lead PA role included being K’s “go to “ person for other agencies, being on call whenever was necessary, directing other PAs, and generally acting as the most senior person with day to day care of K. The claimant would provide the payroll agency with details of the hours worked by staff, for them to calculate and pay wages. When she began in the lead PA role in 2013, the respondent agreed she would be paid at a significantly higher rate than other carers to reflect the additional responsibility.

15. By September 2019 claimant’s hourly rate was £9.50, but the “sleeps” rate was £62.64 per overnight stay. In practice the claimant slept over at least four nights at K’s home, including Saturdays and Sundays and covered shifts starting later afternoon to early mornings. On the usual rota, the only day when the claimant was not at K’s home at some point, was Friday.

16. This work gave the claimant an average gross weekly pay of £801.06 and a net weekly wage of £606.48 in September 2019¹. The hourly rate for other carers was around £8 at this time, or minimum wage.

17. K’s family would sometimes take K out or have her at their homes, or with other friends, and if this was the case, the claimant was “stood down”, but still paid.

18. The claimant was responsible for K obtaining day time work placements, and other developing activities. The claimant also owned a hairdressing salon, but did not generally work in it herself, but on occasions, K would visit the salon and help.

19. During her work with K, until November² 2017 the claimant had two caring jobs, and at one point three, including working for Mencap. She had let her own house to her brother in law, because she either slept at K’s flat, or at another service user’s accommodation. From 2018 she also slept at her parents’ house, where at some point she became a paid carer to her mother when she organised a self managed care package.

20. K was fully integrated into the lives of the respondent and the claimant and they had few secrets from each other. Against this background there were occasional conflicts. These escalated from mid 2017.

21. The respondent could be “fiery”, that is she could lash out with angry words, and at times her physical behaviour could be uncontrolled. The claimant was typically mild mannered but firm. She had clear and principled views, often in defence of K’s rights to independence. K’s other carers also considered the respondent to be volatile at times.

¹ The Tribunal considered P60 earnings and the claimant’s August 2019 pay slip (September was an unusual four weeks).

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22. Until the claimant injured her knee and began to suffer ongoing knee pain in 2017³ the claimant frequently travelled everywhere by bicycle. When that ceased, her physical fitness suffered and she became unhappy about that.

23. It is convenient to address the specific allegations broadly in chronological order.

24. Outburst 1: in May 2017, storming around over [the claimant] giving [K] the wrong money, shouting “you think you’re her mum”, it has to be your way”. “oh yes take the easy way out”.

25. On 28 May 2017 K was going out with family friends and the claimant had only given her £5 or £10 spending money; there was a disagreement about that because the respondent considered that was not enough money. She shouted at the claimant as above, and goaded her about her wanting to stand down in the face of the shouting. The claimant complained to K’s social worker/care manager.

26. Calling the claimant ‘Nanny McPhee’ on occasions between June and November 2017

27. The respondent accepted she had referred to the claimant in this way at this time, particularly on an occasion while on a forest outing, regarding the nickname as a compliment and associated with the claimant going everywhere by bike and being such a committed carer. These comments were not complained about at the time.

28. Saying to the claimant ‘anything could happen to you’ in July 2017 and on other occasions; On a number of occasions, say ‘anything could happen to your parents’;

29. These comments were made by the respondent in the context of the claimant’s mother becoming ill and the claimant becoming a carer for her. They were not comments complained about by the claimant when she and the other carers raised a grievance about the respondent’s volatile behaviour in 2017. The carers (including the claimant) did complain about the respondent shouting and being aggressive and volatile with them.

30. Outburst 2: in November 2017, in the presence of the claimant, dragging K to the hall, slapping her, dragging her upstairs while shouting at her.

31. The claimant and K were at the respondent’s house and K pushed the claimant from the sofa, in response to which the respondent behaved as alleged. This was reported by the claimant at the time, and the parties talked about it with the social worker/registered manager present; the claimant reconciled it as “a mother daughter thing” and the respondent clearly regretted the incident.

32. Outburst 3: In November 2017 [2018], concerning the death of K’s rabbit, shouting “there you go again, your way, you think you are her mum, you are gone from here”

33. The contemporaneous records established that this event happened on 7 November 2017⁴, although it was alleged as November 2018. K’s rabbit had died and

³ Medical evidence, 273

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when the respondent came to K's flat to discuss disposing of the remains, she and the claimant had fallen into dispute. The claimant wanted the rabbit disposed of properly and the respondent had made a comment about her dad saying it could go in the bin. The dispute escalated and resulted in the respondent shouting "you are gone from here", implying that the claimant's employment was at an end. As to the other words, they were "everyone thinks you are [K's] mother"(see the contemporaneous report), rather than "you think...". The claimant was very worried and reported the incident, including its impact on K who was present, and indeed reported that again other PAs were intimidated by the respondent.

34. Their complaints were such that there was a referral to the learning support psychology team and a discussion of changing the way care was provided to K, by introducing an intermediary to manage the care staff, rather than the respondent. This would remove their need to interact directly with the respondent. That was not done in 2018 or thereafter despite the social worker saying it would be explored⁵.

35. Other agency interventions from 2017 to 2019 to address the carers' very real concerns about the respondent from time to time were utterly ineffectual. The management systems were opaque and the employer responsibilities were confused, with the claimant constantly being referred back to the not for profit payroll agency. Nobody took curative action in relation to the respondent's behaviour. When that behaviour was directed at K, the claimant would not confront the respondent, describing the behaviour as "a mother/daughter thing". She recognised that K loved her mother, and vice versa, and K wanted to spend as much time with her as she could. She was loath to criticise or upset that relationship. When the respondent's behaviour "crossed a line" she did report it, whether it was directed at K, her or the other carers. The other carers' morale was also lowered by the respondent's behaviour.

36. Between March and November 2018 saying to the claimant that she was good at cleaning / cooking as she was 'old school';

37. The respondent used the phrase, "old school" to mean these tasks were done properly. The other two carers at the time were younger than the claimant, and they did not like the implied criticism from the respondent that the claimant did things better than they did. It was certainly the case that the claimant insisted that K had home cooked meals and a balanced diet, which she had adopted from the beginning of her working with K. Other carers did not have her cooking skills and would resort to ready meals or snacks for K. The claimant did not complain about these remarks to anyone at the time. She did complain to the respondent if other carers did not seek to deploy healthy eating habits for K.

38. In November 2018 and September 2019 suggesting that the claimant could not ride a bike as she was older and not fit enough;

39. The pleaded allegation (of a comment relating to the claimant's age) said: "*the most recent exchange occurred during mid-September 2019 between the claimant*

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and the [respondent's mother] when it was insinuated in an aggressive manner that the claimant was too old to ride a bike. "

40. That is said in the claimant's chronology to have been said at the same time that she alleges the respondent pushed K into her bedroom on a particular occasion. The respondent accepted that on an occasion when there had been some upset between her and the claimant, she had physically taken K to her bedroom to calm down when she became distressed at her mother leaving; as she sometimes did.

41. In the papers from the learning support team, and the duty worker's notes, it is very clear that an incident of alleged pushing or manhandling K into her bedroom, was first mentioned by the claimant on 19 August 2019. We can find safely from the context of that report that this incident (whether manhandling or properly escorting K to her bedroom) had happened before, and likely some days or weeks before 19 August 2019. The claimant was mistaken that it was mid-September of 2019.

42. The context for bike related remarks is that K had asked to have a bike; as she had asked to have a rabbit. The claimant had arranged the purchase of a bike in late 2018, but on delivery it was faulty and had to be returned. At this time the respondent had been against K having a bike, saying, who would ride it with her, and concerned that it would not get used. The claimant had not reported any concerns about these remarks at the time. The claimant believed the bike was in K's best interests and she continued to pursue it.

43. The claimant's case was the 2019 "bike" comment and the bedroom incident happened at the same time; any comment about the claimant being, "too old to ride a bike" was therefore made before 19 August 2019 also. There is also an undated text exchange (577/B538) in which R says, about a new bike for K [sic]... "OK thank u I didn't no u had ordered one I believe in all honesty it won't get used who is going to go on a bike erode [sic] with her lol x". That message was undated but sent before 7 September.

44. We find then, that the 2019 "too old to ride a bike" allegation was before 19 August 2019. The claimant's pleaded case was: "The most recent exchange occurred during mid-September 2019 between the claimant and the respondent's mother when it was insinuated in an aggressive manner that the claimant was too old to ride a bike with the respondent. The respondent's mother commented that with the claimant's leg issues she could not ride a bike, the claimant has ongoing knee issues and believed the respondent's mother was commenting on the claimant's age".

45. There is nothing about the text remark, or any earlier verbal comment on the same day as the bedroom incident, that relates to the claimant's age. She may have taken the remark personally, because her knee issues prevented her riding a bike at the time; and the "lol" may have been taken as unkind humour made at the expense of those knee issues, but these remarks and the respondent's position about the bike did not relate to the claimant's age.

46. In June 2019 allocate particular tasks to the claimant due to her being 'older' than a new younger PA.

47. In early 2019 it was known that one carer would go on maternity leave in the summer, and other had resigned, due to leave in March 2019. The resignation was, at least in part, because of the treatment and volatility of the respondent. There was therefore a need to cover that post, and indeed to cover the maternity leave.

48. A new carer started in June with a probationary period and shadow shifts with the claimant. The claimant became less impressed with that carer's performance, as time went on, although she had interviewed her and believed she started well. The claimant contacted the payroll agency about a number of matters, but on no occasion complained of age related conduct by the respondent. The respondent did seek to excuse the carer's lack of cooking skills on the basis of her age, on or before 19 August, in comparison with the claimant.

49. Contact the claimant on her days off, including in April and July 2019 and on 7 September 2019;

Fail to support the claimant in relation to conflicts with other staff members including in July 2019, 1 August 2019, 15 August 2019;

At a meeting in August 2019, shout at the claimant: 'you're gone, your time is up, I will see that any shift you ever do with my daughter will be done with me.'

Fail to increase the claimant's pay in September 2019 in line with other employees; Tell the claimant that her role was being demoted in a meeting in early September 2019.

Outburst 4 In September 2019 (said to be the last incident), shouting at the claimant: "your gone I will see any shift you do I have my daughter, your time is up, I bet you tell her we don't want her, even [sister] said you made us feel guilty if we didn't take [k] to see [] in []. We took her and she spoil it".

50. The respondent would contact the claimant if something arose in relation to K's care, when the claimant was not working, but this was generally simply part of the closeness of communication between them; and had not generally been a problem as the claimant was the "on call" person for any issue which arose in relation to K.

51. By August 2019 there had been a number of incidents affecting K's welfare, including an injury to K caused by K putting a metal item into the microwave oven, when supervised by the new carer, and the claimant had raised concerns about that. The new carer was also complaining to the respondent about the claimant saying she was texted on her days off, and that the claimant told her what to do. The respondent sought to talk to the claimant about a wide range of matters, but including the new carer. On or around 19 August that discussion escalated because the claimant was trying to explain calmly that the new carer had been texting her frequently for help, and showing those texts, not the other way around. The respondent became angry again; many hurtful words were said relating to earlier events including when the claimant had suggested K should be taken to Manchester with her family and the respondent had not planned that.

52. The claimant asked, because she felt upset in the face of that anger, if she could stand down. K was present in the flat at the time; the respondent lost her temper again, saying the claimant "was gone" and "every shift you do I will have my daughter", or words to that effect. The respondent left the flat with K, but the claimant did not leave; she was, in truth overwhelmed by the respondent's outburst and lost at the

thought of her work with K coming to an end. She remained in K's house sitting in the dark. The respondent returned later because she had forgotten milk; finding the claimant was there, and willing, it seemed, to continue her shift; she decided K could stay and did not need to be with her. This was the latest occasion when K became upset at her leaving, and the respondent pushed her to her bedroom to calm down.

53. This unfortunate day resulted in a grievance to the agency from the claimant. Age related behaviour was not alleged. A mediation meeting was arranged for 20 August, facilitated by the agency's Ms A.

54. The parties discussed with Ms A the unpleasantness that had gone on and they apologised to each other and decided to keep going, working together for the benefit of K. In that meeting the claimant had told the respondent that she had rung the new care worker's former employer, because the care worker had told her she had in fact been sacked from her previous job; the claimant established in a telephone call that she had been dismissed and that the reason was her conduct in connection with a service user. The claimant passed on that information on to the agency and the respondent out of genuine concerns for K's wellbeing.

55. Surprisingly, the local authority, the agency and the respondent all focussed on the claimant's seeking to verify the circumstances of the carer's last employment ending, considering her in the wrong for having used information provided to her by the carer to do so. They did not themselves follow up or verify whether in fact the new carer was a fit and proper person or that proper verification had taken place.

56. Instead, while the claimant continued to look after K, as she had been doing throughout, the respondent and the agency arranged a meeting for 23 September for the purpose of cautioning the claimant about her behaviour in seeking to verify the other carer. This was approached on the basis that the claimant's conduct was a disciplinary matter.

57. In the meantime, between 19 August and 23 September, the claimant had been working as normal but taking some holiday, and indeed lobbying for all carers to have a pay rise, and to have the situation clear if the respondent stood them down, for any reason. (In the past the claimant had been paid, but another carer had complained when this happened to her, it was simply a shift cancelled by the respondent without pay. The claimant was also seeking her own pay differential, as lead or senior carer, to be maintained; the other carers' pay had, to a large extent caught up, because of rises in the national minimum wage.

58. On or around 7 September, the claimant had been messaged by the new carer again, while the claimant was working looking after her parents. The claimant did not reply to that message; the respondent intervened and when the claimant explained she could not assist that new carer on that day, the gist of the respondent's reply was: "when someone needs to do you a favour - don't bother.... don't come on shift, I'll collect and have her (meaning K)"

59. This was, in effect, standing the claimant down, and seeking to remove K from the care of the claimant, because the claimant had not been able to assist the new carer in the way that she wanted. It was volatile and unjustified and the parties

engaged in text exchanges in which the respondent indicated she was “done” with the claimant’s employment.

60. Finally, in the relevant chain of events, at the meeting on 23 September the claimant was given an entirely unjustified reprimand, with the respondent’s approval. The respondent considered it not “the claimant’s place” to have undertaken any verification of the new carer. The respondent considered there should have been some more severe penalty for this behaviour – in truth she wished her dismissed over it.

61. When the claimant enquired in that meeting about her pay rising to maintain the differential, Ms A said “no”; She, Ms A, was very firm about it in that meeting with the respondent’s support; the budget was set by the local authority and therefore a pay rise would have needed work to be done through that budget.

62. Ms A also said that the claimant would not be involved in receiving carer CVs and interviewing, any more. That had always been part of her role; this was a punishment for having checked the reference of the new carer.

63. On 25 September 2019 the claimant had written out two resignation letters resigning from her post with immediate effect; a short one which she hand delivered to the respondent on Thursday 26 September, and a longer one which she provided to the agency. The longer one set out the chain of events concerning the reprimand, pay, the new carer and the behaviours of the respondent and the history of matters. She did not attend work with K again.

64. If there had been legal representation of the claimant or the respondent at previous hearings, the short resignation letter would no doubt have been discussed. As it was, the represented parties appeared to have identified to the Employment Judges a different date for the employment ending as an agreed fact, for which there was no supporting evidence before this Tribunal and we have made a different finding.

Conclusions – constructive unfair dismissal

65. The date of termination of the claimant’s employment was 26 September 2019, when the claimant hand delivered her letter to the respondent (who has been found to be the claimant’s employer).

66. As far as the constructive unfair dismissal complaint is concerned, we had to answer the question, did the respondent engage in aggressive outbursts between 2017 and 2019?

67. The short answer, as will be apparent from our findings above, is that she engaged in uncontrolled and unjustified outbursts. The 2017 incident with K, a vulnerable adult, involved K’s removal in a way which had it been undertaken by a member of staff would undoubtedly have resulted in that member of staff being subject to disciplinary and likely dismissal action by an employer. That sort of conduct with anger and without control was conduct without reasonable and proper cause. It was done not to the claimant, but in her presence and in the context of her work. Similarly the respondent’s outbursts during the other incidents with the claimant which we have found. It was likely to damage trust and confidence between the claimant and the

respondent, but the claimant did not resign over it at that time. Instead, she reported it.

68. From the summer of 2019 onwards the claimant's resilience to the respondent's conduct was diminishing. Albeit we find that the claimant's chronology is unreliable in its precise dates, many of the allegations she makes are well founded, and latterly in August sufficiently serious for her to raise another grievance.

69. The duty social work team was engaged, and the mediation meeting took place. Sadly, between that mediation meeting and the claimant's resignation a further outburst took place and it was clear that the respondent could not moderate that behaviour. As an employer, indicating to the claimant that she would remove her daughter from her care in retaliation for the claimant being unwilling or unable to assist out of hours, was conduct without reasonable and proper cause, and against the previous outbursts we have found it was likely to destroy trust and confidence. Of itself it was something in response to which the claimant was entitled to resign, because it indicated the respondent would not fulfil the claimant's contractual entitlement to work as senior or lead carer for K.

70. The respondent's response to conflict was to remove her daughter and say, "I'll keep her with me.." That is contained in a text exchange between them at the time.

71. It will also be clear that the claimant's allegations that her pay was not raised in line with other carers and she was "demoted", have succeeded in fact; she was told of this at the meeting on 23 September. She was no longer to interview or have CVs – that is, in effect a diminution of her duties and undermined her as "lead carer". Failing to maintain the differential in her pay was also without explanation; either there was a premium to be paid for her additional responsibility, or there was not. To refuse to tackle the obvious issue was may have been because of budgetary constraints, but the respondent's failure to support the claimant's claim to a differential was – in effect - an indication that the respondent no longer wished to employ her and the relationship was at an end. That, in fact, was her position at the time.

72. The removal of interviewing/CV duties for new staff was because of the claimant seeking herself to verify the new carer. That is not reasonable and proper cause to remove her duties or to not support her pay differential. She acted in good faith on legitimate concerns. In a care setting it is imperative that references are properly checked and nobody appeared to act on the information she provided, or undertake a sufficient check, that the carer had not been straightforward about her previous employment ending.

73. The reduction in duties and failure to support maintaining the pay differential was without reasonable and proper cause and it was likely, with the other conduct of the respondent, to destroy trust and confidence. The claimant resigned promptly and because of these matters. The respondent had articulated in text messages reaching the end of her tether with the claimant and that "she wanted her gone", a threat she had used a number of times. With the claimant's resignation she achieved her objective.

74. It is very sad that the parties appear before this Tribunal in circumstances such as these. It is a tribute to the parties that the arrangements to care for K worked as

well as they did for so many years, both trying to do the best for K. When tensions emerged as they perhaps were bound to do over time, the lack of accountability for the respondent rendered the arrangement unfit for purpose.

75. Stepping back and asking who really ended this employment, it was the respondent, as employer, with control over what happened with her daughter's care.

76. The claimant's constructive wrongful dismissal complaint succeeds. As to unfair dismissal, the reason for the dismissal was because of the respondent's behaviour and she had decided she no longer wanted the claimant to be employed as K's carer. These were not reasons justifying dismissal, in all the circumstances and the respondent did not act reasonably in dismissing the claimant (that is within the band of reasonable responses of a reasonable employer). The complaint of unfair dismissal is also well founded.

Direct Age Discrimination/Harassment/ Limitation

77. There are strict time limits in Tribunal proceedings. Cases only can proceed if they are brought within three months of allegations or dismissal, subject to an extension if ACAS conciliation is undertaken, and in Equality Act cases, subject also to the Tribunal fixing a different time limit in the interests of justice.

78. These allegations were presented by the claimant in two claim forms. The first, on 28 October 2019, alleged constructive unfair dismissal and did not allege Equality Act contraventions. That claim was clearly presented in time – there were also ACAS certificates naming a number of potential respondents including K (but not the respondent).

79. The second claim form, presented on 21 November 2019 alleged constructive unfair dismissal (again), age related discrimination/harassment and constructive wrongful dismissal. The constructive wrongful dismissal claim was also presented in time on our findings. The last discriminatory remark or conduct by the respondent was alleged to be mid-September 2019, but the claimant has not proven that the conduct occurred on that date.

80. On our findings the last alleged potential discriminatory remark or conduct was on or before 19 August 2022. The last allegation is therefore outside the Equality Act "normal" three month time limit. Equally significantly, the claimant has not proven facts from which we could conclude less favourable treatment because of age, or age related harassment, because the nature of the remark is unrelated to age and there was no evidence that someone younger would not have been subject to the bike related comment in comparable circumstances – a younger carer who could no longer accompany K because of a knee injury. Of itself, observing established principles that in applying the Section 26, the Tribunal must not encourage a culture of over sensitivity, a remark exculpating a younger colleague's lack of cooking skills on the basis of her age, which was also said on or before 19 August, did not violate the claimant's dignity, nor otherwise was it reasonably to be perceived as contravening Section 26. There was not therefore conduct which extended over a period ending within the three months before the claim was presented.

81. As to the other allegations, our findings barely amount to facts from which we could conclude the contraventions alleged. To do so we would need to extend time, that is permit a longer time limit for the Nanny McFee, task allocation, "old school" and "parents/you ..could die" comments. As Section 13 less favourable treatment, rather than harassment, our findings are barely sufficient to enable a finding of detriment within Section 39.

82. In deciding whether to extend time, we take into account that the Equality Act claim was presented by a solicitor and the allegations were clearly expressed, although legal representation for the claimant did not continue for much longer. The respondent was not joined as an employer respondent until a hearing on 27 January 2020, with an order sent to the parties on 5 February 2020. It was always clear that the alleged contravening conduct was hers - she could have been named from the outset. There was no ACAS conciliation certificate in respect of the respondent, and therefore no ACAS related extension of time applied.

83. In all these circumstances we consider whether we think a different time limit should apply in the interests of justice. We do not consider it is in the interests of justice apply a different time limit. The earlier allegations are very weak and there are no complaints of that nature to anybody recorded at the time, notwithstanding that the claimant made other clear complaints about the respondent and other matters. The prejudice to the claimant in the Tribunal declining to determine such complaints is, in truth, very little. The powerful complaints she makes are about other treatment by the respondent, albeit her own upset at not being able to cycle has, in our judgment, driven her feelings in perceiving unkindness looking backwards, as she has done, in that respect.

84. For these reasons, the age discrimination and harassment complaints are dismissed.

Damages – wrongful dismissal

85. As for the lost earnings arising from her dismissal, which the claimant is seeking, there are complexities about the claimant's own situation, about which we heard when she gave her evidence earlier today.

86. In particular there are aspects of her treatment or experiences much earlier on in life which she has described to us as having consequences. An example is perhaps not wishing to go out, and becoming mentally unwell, but without seeking a GP, NHS or secondary care assessment or treatment. These decisions made earlier in life to deal with matters herself by working, have had, it seems, and continue to have, consequences.

87. We have to assess damages for wrongful dismissal on the basis of the lost earnings arising from the respondent's repudiatory breach. The claimant's contract provided for her to give and receive four weeks' notice, the latter extended by the statutory minimum.

88. We find however, that financial losses beyond four weeks were caused not by the constructive dismissal, but by aspects of the claimant's own circumstances, decision making and choices. Those choices include a matter described by her as a

coping mechanism: choosing to work, in her words, “all hours God sends”. We find that, absent the dismissal, there would have come a point when that approach was unsustainable, given that she took on further hours for her mother’s care. The claimant is not without means; she has her own house, purchased with a mortgage, and had paid a deposit to buy property in Spain. Working all hours was her choice.

89. By the time of her dismissal by the respondent, her mother’s care package was in place for 46 hours per week at £8.21. Those hours were shared between the claimant and her brother, but the contemporaneous enquiries indicated that the claimant did most of those hours. We also take into account that the claimant, for her own reasons unconnected with her dismissal, declined a subsequent post offered to her which included “sleep in” shifts for another service user but with a father on site.

90. We find that in circumstances in which the care sector has had significant vacancies, deploying our industrial knowledge, throughout the period October 2019 to the date of this hearing, had the claimant applied and taken on other posts, she would have been able to continue to have further paid work at the same rate after four weeks or so of recuperation and rest. As we have found, the reduction in her earnings after four weeks, applying the contractual test, was not caused by the respondent’s wrongful dismissal of her. It was caused by her own choice to work as long hours as she did for so long, and then her understandable decision to no longer sustain that while looking after her mother, and for reasons connected with her historic personal circumstances.

91. We have assessed the wrongful dismissal damages at four weeks net pay which is a total of £2425.92.

Remedy – unfair dismissal

92. The Tribunal having heard further evidence, it is clear the claimant does not seek reinstatement or re-engagement. She also did not seek any state benefits after her dismissal. We have had to make findings about the extent to which the claimant’s dismissal has caused her financial loss. We adopt the findings above for the purposes of a compensatory award, the similar question being, in section 123 of the Employment Rights Act 1996, what loss was sustained by the claimant in consequence of the dismissal **in so far as that loss is attributable to action taken by the employer?** We also have to consider a Basic Award, equivalent to statutory redundancy pay.

93. A point raised by the claimant is that the respondent caused her psychiatric ill health such that she has been unable to obtain further work since her dismissal (other than the hours caring for her mother). The medical evidence in this case is very limited. There is no diagnosis by a recognised psychiatrist or GP or other clinician. There is a reference to the claimant undertaking counselling, the claimant having self-referred herself to a private counsellor, but in light of the claimant’s complex and far earlier history to which we refer above, there is insufficient material to suggest the actions of the respondent caused any deterioration (rather, for example, than the claimant’s lack of respite from work) or other matters affecting her, including her family situation.

94. Our findings as to gross and net weekly pay are above. They are not identical to the claimant’s Schedule of Loss figures, but we are satisfied we have calculated them on the basis of evidence and correctly.

95. There is a statutory cap on the sum to be awarded for a week's pay, for dismissals between from April 2019 to April 2020. That was £525 per week and that comes to be multiplied by the claimant's length of service, which on our findings is 12 years. Her age was such that the weekly pay is multiplied by 1.5. Her basic award is therefore **£9450**.

96. The compensatory award that we therefore award is **£500**, which is the amount that the Tribunal generally awards for the loss of a post which has accrued unfair dismissal rights, typically referred to as a sum for the loss of statutory rights.

97. There was also a claim in the Schedule of Loss for an uplift to the compensation on the basis that the ACAS Code was not complied with in the handling of the claimant's grievance, submitted to the agency in her longer resignation letter.

98. As to that, we do not find that the respondent acted unreasonably in the handling of that grievance, for the simple reason that she was the subject of it and not responsible for its handling. The way in which this employment was organised was such that others addressed that grievance; and others are responsible for the latterly unsatisfactory way in which the management of carers for K was organised, as illustrated by this case. It would therefore be unjust, even if there were departures from the ACAS code (and the claimant has not proven particular unreasonable departures) for that to found additional compensation payable by the respondent. She was advised and led entirely by the broking agency.

99. In summary then, the total compensation is **£12375.92** broken down in the way we have described. That decision in the short Judgment will be signed today and will come to the parties within the next week or two. If you would like the written reasons for these decisions then you can request them copying in the other side on any communication that you send to the Tribunal.

100. That concludes these proceedings. We thank you for the way in which the hearing has been conducted because, although it has been difficult for both sides neither having any representation, we have been able to conclude it in a proportionate time frame and through a fair hearing.

Employment Judge JM Wade

Date 23 September 2022