Case Number: 2601609/2022

EMPLOYMENT TRIBUNALS

Claimant: Mrs Lee-Shields

R**espondent**: Exquisite Displays Limited

Heard at: Leicester

On: 15, 16 & 17 January 2024

Before: Employment Judge Clark (sitting alone)

Representation

Claimant: Mr Gordon of Counsel.

Respondent: Mr Anastasiades, Solicitor.

JUDGMENT

1) The claim of unpaid holiday pay **fails and is dismissed**.

2) The claim of unfair dismissal **succeeds**. The respondent is liable to pay compensation to the claimant in the sum of **£24,725.35.**

3) The recoupment provisions apply:-

   a) The monetary award is £24,725.35
   b) The amount of the prescribed element is £21,979.58
   c) The dates of the period to which the prescribed element is attributable is 10 March 2022 to 17 January 2024.
   d) The amount by which a exceeds b is £2,745.77

REASONS

1 Introduction

1.1 This is a claim for compensation for unfair dismissal and holiday pay. The claim of breach of contract related only to the implied term of trust and confidence and will stand and fall with the claim of unfair dismissal. The schedule of loss appeared to suggest there was a stand-alone claim of breach of contract relating to contractual notice which Mr Gordon agreed was not before the tribunal. Other claims presented with the original claim have been dismissed on withdrawal at an earlier stage.

1.2 Despite its apparent simplicity in fact and law, the case has generated some difficult questions and this decision has regrettably, but necessarily, taken longer than I would have liked to get to the point of promulgation for which I apologise to the parties.

2 RULE 50 ORDERS

2.1 In January 2023, an application was made under rule 50 of the 2013 rules to anonymise the identity of the claimant's great grandson whose circumstances are material to this claim. Coincidentally, that came before me on papers. I granted the order on the terms sought and for the reasons given at the time. No cypher was subsequently suggested by the claimant as directed. I will refer to the child as X so far as it is necessary to do so.

2.2 In the reasons for that order, I questioned whether the order would be sufficient to protect X's convention rights but noted that any wider derogation from open justice may result in a different outcome to the balancing exercise. That observation did not prompt any further application. Consequently, when this matter was revisited at the start of the hearing and did prompt renewed consideration, the submissions were limited and spontaneous. For the claimant, Mr Gordon sought wider anonymisation of the claimant to avoid identification of X. For the respondent, Mr Anastasiades objected on the basis that open justice outweighed the need for the claimant to be anonymised. The submissions were made without supporting evidence, still less cogent evidence, of any effect on X's convention rights which would necessitate any further derogation. I declined to make any order at the time as although the hearing was in public, all were content that those in attendance were connected with the case an knew of all the characters. A simple judgment on the public register would not have left a public record disclosing matters concerning X. However, as this judgment has had to be reserved and the reasons necessarily published, I have had to revisit the balance between protecting the convention rights of X and the primacy of open justice. The latter weighs particularly heavily in the balance. The original application was limited to X. My observations had not prompted any wider application to be made in advance with evidence. In considering rule 50, I remind myself that it is easy to slip into a mindset that focuses on the subject of the order, to

the exclusion of the wider public interest in open justice. In this case, I am not satisfied that there is evidence before me that would justify why it is now necessary to extend any derogation to the principle of open justice to anonymise any other characters in this case. For that reason the original anonymisation order will remain in the terms made.

3 Preliminary matters

3.1 This case touches on proceedings in the Family Court. The bundle contains a report prepared for those proceedings and for which there is no permission for it to be used for other purposes. The claimant has disclosed it and sought to rely on it. All parties and the Tribunal had read it by the time the issue was raised. Mr Gordon made an application for it to be removed on becoming aware there was no permission for it to be used. There was no objection from the respondent and consequently no need for me to consider any restrictions relating to hearing confidential information. In any event, the points it gave rise to were peripheral to the issues and could be maintained to the extent that was necessary independent of this report. The bundle necessarily omits pages 98-118.

4 Issues

4.1 The case was subject to an earlier preliminary hearing for case management which identified the claims and issues. I clarified our collective understanding at the start of the case.

4.2 The claimant says her resignation was in response to a repudiatory breach of contract by the respondent breaching the implied term of trust and confidence. The central allegations can be grouped into three phases. They are:-

a) Angry and threatening comments during a meeting in July 2021 meeting, essentially requiring the claimant to choose between being a carer and a full-time employee.

b) Comments during February and early March 2022, essentially suggesting that the claimant should give X a good slap or that X just needed a good slap.

c) The comments on 10 March 2022, essentially asking where X's father was in all this and, again, that X should be given a good slap.

4.3 All but the comment referring to X's father is denied as a fact. The respondent also denies anything occurring in the workplace amounts to a repudiatory breach and, in any event, it says the reason for the claimant's resignation were external factors. It advances an alternative positive reason relating to her plans for the future care of X which forms the basis of an assertion that her resignation was planned and contrived. There is no alternative pleading of fairness of any dismissal.

4.4 The hearing dealt with all issues including remedy.

5 Evidence

5.1 For the claimant I heard from Mrs Lee-Shields herself. For the respondent I heard from the respondent's two directors, Mr Kevin Bennet and Ms Maxine Carvey and another employee, Mr Gerard West.

5.2 All witnesses gave evidence on oath or affirmation and were questioned.

5.3 I received an agreed bundle running to approximately 200 pages.

5.4 Both advocates made oral closing submissions.

6 Facts

6.1 It is not the tribunal's function to resolve each and every last dispute of fact between the parties but to make such findings of fact as are necessary to determine the claims and put them in their proper context. On that basis, and on the balance of probability, I make the following findings of fact.

6.2 The background is not in dispute, or at least not contentious. I find:-

a) The respondent is a private limited company. It manufactures display products for the retail jewellery sector.

b) The claimant was known to Maxine Carvey through a mutual previous employer and came to work for the respondent on 10 March 2003. Her role was that of a coverer. That entails making and covering the jewellery displays. She had 19 years' service at the time the employment ended.

c) There is no dispute she was good at her job. Indeed, she was often referred to in evidence as the best coverer.

d) The two directors have operated the business for a number of years. It has always been a very small employer. Occasionally, family members would be engaged but, at the material time, there were only 3 other employees. Many small businesses describe their team as being like a family. All witnesses referred to this employer in those terms.

e) Employment matters were dealt with informally. Meetings happened informally and were not recorded. The employment relationship was eventually evidenced in writing in a contract prepared in 2017. The claimant is entitled to paid annual leave. Neither party has evidenced the status of the claimant's leave entitlement, how much had been taken or the effect of termination part way through a leave year. Similarly, neither party addressed the pension position. The claimant was contractually and, in any event, statutorily entitled to be enrolled in a pension scheme but the pay slips showed no pension deductions from either employer or employee. It is unnecessary to determine whether the employer failed to enrol the claimant or that she opted out. Either way, there is no pension loss.

f) The margins for the business are tight. They are said to be around 19%. The work comes from a range of clients ranging from one-off small orders

through its online shop to large and repeat orders from national jewellery chains.

g) Most of the work is conducted in the respondent's small workshop factory. That includes an office, a covering room and a woodworking room. I find it is small enough for individuals to be aware of what is happening elsewhere in the factory in most circumstances even if they are not in close proximity to it.

h) Some of the covering work done by the claimant was capable of being completed at home. I find such homework had to be prepared in the factory to enable this. This homework was paid at a kind of piece rate per item completed, albeit the claimant was employed on a rate of pay for her time when attending the workplace. The piece work was paid at a rate equating to roughly 150% of normal pay earned in the equivalent period of time. I find the respondent also had to arrange time and resource for the necessary preparatory stages to be completed in the workshop before the pieces could be finished at home.

i) I find the staff and directors did talk about their personal lives and, in any event, after the many years that they were all known to each other they had become aware of each other's personal lives. Indeed, the Claimant had for some time held a close friendship with Ms Carvey's late father who, for a time, had also worked for the business. That relationship is said to be relevant to this case and I return to it below.

j) Mr Bennet explained his labour and workforce planning as being based on the need for certainty in what and when his staff were able to do. If a member of staff was absent, that meant there was limited scope for their work to be picked up by the remaining workforce. Ultimately it meant orders would not be fulfilled on time. I can readily understand how that arose when met with unplanned absences such as sickness. However, Mr Bennet described the same frustrations in the context of planned absences, such as for annual leave. Similarly, he described seeking a "commitment" from his staff in agreeing to do homework and generally in their commitment to be at work before a decision was taken to accept a big order.

k) I find homework is not compulsory in a contractual sense, but this sense of commitment to do it brought it closer to an expectation.

l) The parties both regarded the employment as terminating with immediate effect on 10 March 2022. There are some difficulties with that which I will deal with as they arise in the chronology below but, for present purposes, that is the date both parties put before the tribunal and it does not alter the path of the case.

6.3 The claimant has a large family. She has previously found herself dealing with circumstances amongst the younger generations of her family which has returned her to the role of parent to small children. On that previous occasion, she managed that alongside what was then part-time work for the respondent. For a number of

years since then the claimant has been working full time. In May of 2021, she once again stepped in to become a carer, this time for X. At the time, X was around 4 years old. X was initially placed with her by social services on an informal, supervised basis. X started school in September on a part time basis and after an initial reduced induction period of around two weeks. In December 2021, the claimant was granted kinship foster carer status. From the start of 2022, X's emotional and mental health deteriorated substantially and manifested in violent behaviour at school. I find dealing with all of the background placed great strain on the claimant personally and emotionally and she was under a lot of stress and pressure and anxiety. I find she was juggling a lot of things and having to manage not only her own life, but the social services involvement, the contact issues for X, the criminal proceedings involving another member of her family on top of the day-to-day care for a young child. Responding to the events from February 2022 placed demands on her which had some marginal effect on her timekeeping at work but required occasional time out. I am told that X has settled subsequently. By May 2022, the claimant was granted a special guardianship order for X and X has settled into a routine. By then, her employment with the respondent had come to an end.

6.4 I find the respondent became aware of the situation with X very early on. No issues were identified or raised by either party. Both parties describe the respondent's approach to the claimant's circumstances as being particularly supportive. Some adjustments were put in place to support her. They included permitting her to join remote meetings with social services using the office for privacy and making her time up.

6.5 In July 2021, the claimant sought a meeting with the two directors. The purpose was to give notice of what she could foresee was on the horizon and the implications that might have for her time at work. That included X starting school, the implications of the school induction with shortened days, and taking time out for the Crown Court trial which was then expected to take place in August 2021.

6.6 During that meeting, the claimant alleges that Mr Bennet was angry with her and issued an ultimatum that she had to choose between being a child carer or doing her job and that if this were to happen again then she was to find another job and that she was instantly threatened with dismissal. I do not accept that happened or that the claimant was threatened with dismissal. Indeed, the claimant resiled from the latter assertion in the course of her oral evidence. I do accept that the issue of how the claimant would cope was discussed, but it was neither an ultimatum nor a threat of dismissal. I find that Mr Bennet did suggest that the claimant would struggle with the full-time job and being a full-time carer for X. The context of the discussion was that of exploring what adjustments could be made. I find Mr Bennet was thinking both of the claimant's circumstances but mainly his need to plan his available labour to get work out and wanting to put in place something of a permanent change. In that context I find the claimant was told that some of the changes would mean the respondent would struggle to meet its contracts. I do accept that, whilst sympathetic to the claimant's circumstances, it is more likely than not that Mr Bennet was frustrated by the added uncertainty he would have to manage in planning his output. The claimant undoubtedly felt that frustration which,

in turn, led her to reflect on this meeting at a later date in a more critical way than was true at the time.

6.7 I find as a result, adjustments were later made to the claimant's start and finish times so that she delayed her start to 8:20 to allow time to do the morning school run, and left early at 4:20 to be able to collect X from the afterschool care. I find the claimant completed additional home work. Performing homework was mutually beneficial. The claimant maintained her earnings and the respondent maintained some of its output albeit I find this was not without additional burdens to the respondent, particularly when it was done as a response to the claimant being unable to attend work as opposed to part of that week's planned output. Firstly, the work to be done at home was not necessarily the work needed for the current order that the factory was then working on. That would have benefits when that order came into production but it also put pressure on the delivery times for the current contract being worked on. Secondly, the work had to be prepared in the factory which necessarily diverted other staff to get it to a stage where it could be completed at home. Additionally, during some of the claimant's absences, the respondent arranged for the work and materials to be dropped off and collected. I find that put added burden on the respondent compared to the claimant performing the work in the workplace, but it was prepared to make that effort to maintain its output.

6.8 I find the surrounding circumstances of that meeting in July had led the directors to form the view that the care arrangements were only temporary until X returned to the care of his father. They understood that would obviously not happen during his imprisonment, and they had also formed a view that it could not happen whilst he was released on licence. However, they had concluded that the timescale for that might be 6 – 9 months. I find they formed this view based on what the claimant had said about the family situation, albeit I do not believe she put it in those terms directly. I can quite easily imagine anyone in her position having a hope or desire that X's father should care for X in the future but, at that time, so many aspects of her family situation would have been too uncertain to express much more than longer term hopes and aspirations. I therefore find the conclusions drawn by the directors did not come from explicit statements by the claimant. They were erroneous assumptions drawn from the surrounding situation and the directors piecing together their own beliefs in what might happen.

6.9 I find the claimant requested a form of hybrid annual leave booking for her attendance at the Crown Court case whereby she would take it if she was called, but not if she was not. That did not suit Mr Bennet's need for certainty in planning the workload and output but they all seem to have proceeded on that basis as I find another employee was denied an annual leave request which coincided with this period because of the risk they would both be off at the same time. In the event, the trial was postponed.

6.10 I find the claimant worked a three-day week during the weeks of the shortened school induction.

6.11 I find the claimant did not make any complaint about the matters that are now alleged about the meeting in July 2021. Indeed, her oral evidence confirmed the employer's response over this time was supportive. Both parties tackled the lack of complaint by reference to whether a grievance should have been raised. It is correct that the written contract makes reference to a grievance procedure. It is also correct that this has been poorly drafted and, in fact, there is no procedure to be found behind the contractual term. The most that could be said was that there was an informal verbal process based on what is often labelled an "open door" policy. I need say no more than that. The fact remains, however, that there was no complaint raised by the claimant at the time.

6.12 However, the claimant did suggest she had made notes of this meeting in an A5 notebook. The note in question says: -

> ***Monday July***
>
> ***Maxine came in at 8.00 asked to speak to her and Kev and some point in the day***
>
> ***Kev called me in the office at ~~1:00-ish~~ just before dinner ended at 1.***
>
> ***I said that I got a rough patch coming up end of August in about 6 weeks time.***
>
> ***[X] was starting school only two hours a day for two weeks and didn't know if I could get care I said if I could I would be in at just after 11 till 4:30 they said that was no good then I had to say that the trial was starting on the 6th September till the 10th didn't know if or when I would be called in Kev said I need to choose between [X] carer or my job he said if it happens again I need to look for another job so I just said OK and got on with my work.***

6.13 The note does not give a date. It is not shared with the respondent. The claimant was asked to produce the original to the hearing. She was unable to do so as the pages had been torn out of the book. She could not recall when she tore them out or why. She did produce the two torn pages (there is a further note of another meeting later in the chronology which I will return to). I was not convinced that these were written at the time the entry refers to. I find the outcome of that July meeting was not particularly problematic to the claimant at the time for her to have considered it necessary to record the comments. That is so even though I find there was some concern expressed about whether she would cope with both roles and also concern over workforce planning. On balance, she must have understood that at the time in the context I have found it. This note is, on balance, a later recollection of the events, and viewed through the prism of those later events.

6.14 Other adjustments were suggested by the respondent at various times. I find that in the course of trying to find mutually workable changes, the respondent did suggest that the claimant might change to home working only, allowing her to devote her attention to X when needed. The claimant is critical of this as she was concerned that the respondent would not be able to guarantee a stable income. As far as it might have been a potential solution, however, the suggestion seems to have been a reasonable one to explore and tends to show the respondent was trying to accommodate her and maintain its production.

6.15 I also find as the demands increased from social services, the respondent was accommodating in permitting time out of work for the claimant to use an upstairs private room to join telephone discussions with social services. Again, this seemed to be mutually beneficial as less time was needed away from work and the claimant was not out of pocket. Nevertheless, it clearly was an increasing source of frustration.

6.16 The parties' relationship remained on what appeared good and close relations through 2021. At Christmas, Ms Carvey bought X a present. The claimant and Ms Carvey exchanged text messages signing off with an "x".

6.17 X was subject to a special educational needs statement. From January 2022, X began displaying extreme emotional outbursts whilst at school manifesting in violence towards staff and other pupils and was clearly struggling emotionally. On 14 February 2022 the claimant has a further meeting with her directors. It is the second of the two events that she says prompted her to make a record in a note book. It too is on a page that has been torn out of the book. It is imprecisely dated suggesting it was not written on or close to the date. The entry reads: -

> ***(Feb 14th ish)***
>
> ***When X started with behaviour problems due to his mental stress with his been through asked to speak to Kevin Maxine in the office. Informed them X was going through a rough patch at school which they were aware of with school ring. Spoke about it with them we spoke a flexi time but didn't with no solution just to see how it goes.***

6.18 I find the claimant described X as being naughty or misbehaving in her discussions with the directors and others and must have done for others to attribute that behaviour to X at all. I accept that she did not describe X's behaviour by reference to mental health. I am unable to accept the claimant's account that reference was made to "give him a good slap" in the course of that meeting on 14 February. The fact that the claimant has recorded the significant aspects of this meeting, albeit sometime after the event, begs the question why comments along the lines of "give him a good slap" were not recorded here. On balance, that is because they were not said in this meeting. Ms Carvey's written statement would suggest that there was a discussion about how the school were dealing with X and that a reference was made to how teachers used to discipline children in the past. That could have been a basis for the claimant misunderstanding or mis-recalling comments but, in oral evidence, Ms Carvey's recollection of that discussion was some time ago, long before these events.

6.19 The frequency and intensity of the claimant's care responsibilities increased substantially in the first part of 2022 and, with it, the extent to which her work was affected. There were regular calls from school or social services. Those would take the claimant away from her work either temporarily, or she would leave early or would arrive late. I have seen evidence of the amount of home work being conducted instead of in the factory, and records of irregular attendance between 18 February and 8 March 2022 when the claimant's hours were adjusted due to matters relating to X and it is in response to those moments of crisis, or her simply sharing

the difficulties she was facing with X, that it is alleged the comments were made about X which she found hurtful and distasteful.

6.20 Bearing in mind the close, family-like, relationship between the parties, I have concluded that it is more likely than less likely that in some of these moments, Ms Carvey did make comments to the claimant along the lines of “she should give X a good slap” or that “X was just a naughty child” or that “X just needs a good slap”. There was a head-on conflict on this and other points. I have explained further below the factors in the evidence that have led me to reach that conclusion as the evidence has not pointed all one way and there are reasons for caution on both sides.

6.21 On two occasions the respondent had to adjust its output to accommodate the claimant not attending work for extended periods. She took a week off to look after X when X had chicken pox and took time off when she had Covid. In both cases, work was performed at home. That will necessarily have disrupted the respondent and frustrated Mr Bennet. The respondent refused the claimant’s request to retrospectively convert period of absence to annual leave which in turn provoked a short temper in the claimant saying “don’t pay me for the extra payments I don’t care.” Again, the closeness of the relationship meant both felt able to say things that might not arise in less familiar working relationships.

6.22 In what would become the last few weeks of employment there were further comments along the lines of X being naughty and just needing a slap. I find in one conversation between the claimant and Maxine Carvey the claimant shared how she had had a difficult day the previous day and the reply was “to slap him”. The claimant had been referring to another grandchild but realised the response had been belief she was referring to X. Similarly, Mr Bennet referred to “give him a good slap” which would sort him out and that “it never did any harm to my kids”.

6.23 I accept that although made in the context of this over familiar relationship, and not intended as literal directions or even references to true experiences, the claimant was increasingly concerned about references to physical violence in context of X’s life experiences. I find she either ignored the comment or replied in a matter-of-fact way that she would not slap a child. I find the claimant did not call out the comment beyond that, but I accept that it would have been clear the comments were received as inappropriate comments, as she would later recall in the post-employment grievance. I find this led her to retract a little from the workplace conversations, becoming reticent to share any issues she faced with X in anticipation of comment she might receive.

6.24 On Thursday 10 March 2022, matters came to a head. Neither party’s evidence provides a particularly consistent or complete picture, but within the areas of dispute, both agree certain things happened and certain things were said. My findings eek to reconcile the accounts to identify what was said when, on the balance of probabilities.

6.25 The claimant had attended work late. I find Mr Bennet was frustrated as he felt they were already behind with an order. On her arrival he snapped at the claimant to

"stop chatting and concentrate on your work". The scope for the tensions between them to escalate out of insignificant events then increased further as the claimant was asked to do a particular task but replied that she could not do it. Around lunchtime the school telephoned the claimant. Matters had deteriorated for X at school prompting a decision on a period of exclusion and she was asked to collect X. A few days earlier, her other son Matthew had been approved to collect X from school so the claimant went to the locker area to call him to ask him to collect. In fact, she was able to speak to him and the fact he collected X that lunch time is confirmed in the documents by the school records. The claimant returned to her work area and explained to Mr Bennet that it had been the school calling and they had asked her to collect X from school. I find this must have triggered his frustration as there was no opportunity for her to explain what arrangements had been made before he responded with "Where's his fucking dad in all this?" This comment is accepted. I find it is consistent with both the frustration I find he was feeling with the claimant's circumstances and coupled with the belief he had formed that X's father should be taking a parental role by around that time.

6.26 I find the claimant was very upset by this comment and shouted back "I don't know why you keep going on about his dad" and went outside to compose herself. I find her colleague, Tina Ardely, was a witness to the exchange and followed her to comfort her. Mr Bennet volunteered in oral evidence the exchange was heated, so much that he said he also walked away to allow things to cool. Unfortunately, it did not have the desired effect. After a short time I find the claimant was prepared to compose herself and then return to work. I find she returned to the workplace. I find Mr Bennet must have assumed she was now about to collect X and is alleged to say "just give him a good slap" at which point the emotions overtook her and she shouted back at him "don't you think he's been through enough?". Again, there is no dispute that the claimant did say these words but it is suggested that this was in response to Mr Bennet asking where's his fucking dad. On balance, it does not naturally flow from that question in a way that it does naturally flow in response to comments suggesting he should be given a good slap. I prefer the claimant's account of the exchange.

6.27 Although the claimant had made arrangements to collect X, and was intending to work out her shift that afternoon, I find Mr Bennet then said words to the effect of "I've been lenient with you", referring to the support that she had been given. The exchange prompted the claimant to say "you obviously don't want me here" which is consistent with Maxine Carvey evidence. At that point the claimant did leave the workplace.

6.28 On Friday 11 March the claimant did not attend work. I find both she and Mr Bennet were content to let Friday pass as a date to cool off. I find both expected to be able to resume their relationship but, unfortunately, both expected the other to make some steps towards reconciliation. As nothing happened, over the weekend the claimant considered her position. She attended work on Monday 14 March. Neither party has particularly addressed the detail of what happened, but it is clear that the claimant had decided her employment was over as she attended returning

unfinished homework and materials and presented a claim for outstanding piecework payments.

6.29 On 17 March 2022 the claimant formally resigned in writing. She set out the reasons which are consistent with the case before me. She referred to her termination date as being the previous Thursday, 10 March 2022.

6.30 On 30 May 2022, the claimant put a grievance in writing to the respondent. I have no doubt this was done on advice for the purpose of mitigating any claim for reduction of damages for not doing so during employment. I am equally clear that there was no opportunity to resolve matters in any form of grievance complaint whilst employed. The grievance was not answered as a grievance. Instead, the claimant received a letter from the respondent's solicitor threatening the possibility of legal proceedings against her for being overheard by a third party in a local pub discussion how she was forced out of her employment with the respondent.

Evaluating the evidence

6.31 There are head on conflicts of evidence on key disputed events. The allegations against Mr Bennet and Ms Carvey are fiercely denied. In reaching my findings of fact set out above, I have had to look to the surrounding matters and weigh the likelihoods both ways. That process has been complicated by the fact there are reasons why the evidence of each party is to be subject to scrutiny.

6.32 For the claimant's case, her evidence at times moved in the course of oral evidence and ended up diluting the written evidence prepared with the assistance of solicitors. She described the process as 'putting it into legal terms", but the reality was the written account had exaggerated the facts. To her credit, she was quick to resile from certain words used to describe events, frequencies or even the fact of certain events. Whilst that led me to exercise some caution about her written evidence, I nonetheless found her to be frank in her oral evidence. She was quick to point out the differences and I placed greater weight on that, than the written statement prepared for her. For example, I necessarily rejected her account that she had challenged comments on every occasion. It appeared her lawyers may have had greater input to the construction of her evidence in chief that should be the case.

6.33 Similarly, I was cautious about the notes of the meetings she has latterly produced because of the circumstances in which they were written and disclosed. Having said that, the existence of the notes did not advance her case. The disparities also caused me to reflect on the accuracy of her other evidence. For example, the frequency of the allegation of "needing a good slap" reduced from daily in the written accounts to occasionally in the oral evidence. On the other hand, this is an unusual allegation to make and requires the claimant to have wholly fabricated her case. I have considered if the allegation is so extreme as to be unlikely but it is possible to imagine this type of comment being said in the circumstances that presented at the times, especially if the full history of X's past neglect was not known and if the relationship was such that a flippant, if misplaced, comment might have been felt would not be received as a literal suggestion. It could even be said in an attempt to diminish the seriousness of X's emotional situation, to suggest it was not

abnormal for that age. The difficulty I have in this case, however, is that the conduct is denied meaning there is no middle ground to provide the context beyond the obvious.

6.34 For the respondent's case, Mrs Carvey gave evidence of her recollection of a past conversation to the effect that years ago, teachers would physically punish children. I had understood this to suggest the claimant may have misinterpreted the conversations but the timing of this conversation did not fit the timing of the allegations, and so again, takes me out of the realms of a party misinterpreting the comment.

6.35 Mr Anastasiades characterised the case as having a feeling of "Jekyll and Hide", asking rhetorically why would Mrs Carvey change from being caring and supportive to making hurtful comments about X. It is a forceful observation in the face of what does appear to have been a range of supportive adjustments for the claimant but, of course, if the comments were simply misplaced comments the effect they had may not have been intended.

6.36 As with the claimant, I was also concerned with aspects of the respondent's oral evidence. Firstly, the allegation that on 10 March 2022 Mr Bennet had said "where's his fucking father in all this" was admitted in the terms alleged, but in the witness statement it was sanitised as "I remember speaking to Maxine about this, pointing out the fact that [X's] father was now out of prison and perfectly capable of picking his son up from school". This led to concern about what else had been sanitised or reframed.

6.37 Central to the respondent's defence is an allegation of dishonesty in how the claimant kept her plans from them. They were said to be long-term care plans and giving up work and whether her other son could collect X from school. These did not stand up to scrutiny. I was unable to find any evidence that the claimant had lied to the respondent about her caring obligations. Rather, I found the directors appear to have made assumptions. Matthew's approval as a person who could collect X from school had been agreed only a matter of days before he was called upon to do so.

6.38 The respondent had also forcefully advanced a character trait of dishonesty based on financial gain. It sought to support that by advancing allegations that the claimant had financially abused Ms Carvey's father in or around 2017. These were serious and extreme allegations which I am told have become the subject of a referral to the police, but only after this claim was presented. The allegations are put in sauch serious terms that they beg the obvious question why was it that Ms Carvey content to continue the claimant's employment if there was any truth, or even any reasonable belief, in it. Instead, not only did it continue but the relationship between Ms Carvey and the claimant continued in just the same close, friendly abasis as it ever had. I did not accept that it was possible to separate out the personal relationship and the working relationship so that the latter could be maintained in the way it was, whilst the former was entirely shattered. This seriously undermined credibility. For completeness I reject the allegation as a fact. There is nothing before

me to support a conclusion that the claimant was abusing Ms Carvey's father's frailty and generosity to access his finances.

6.39 The respondent also pleaded that the claimant had retained company property in the form of a notebook used to record hours and homework. I could not understand how that accusation engaged with the case. I did not find the claimant to have kept the respondent's property.

6.40 The respondent argued the reason for resignation was contrived to become a full-time carer for X as she knew she would be better off. I found that wholly meritless. In fact, the claimant's financial position is not better, the claimant is still receiving less than she would, had she been at work. This case was in part based on the fact she was granted a special guardianship order in May 2022. This is after the employment ended. It is based on another assumption by Mr Bennet that she must have applied for it before her employment ended. Even if correct, I do not accept it leads to a conclusion she was planning to leave employment or that she had been secretive in any way. The most significant difference in the change of status appears to be that it would put the foster caring arrangements on a more formal footing, meaning the claimant would be able to receive X's child allowance directly and there was a reduced level of social services supervision.

6.41 The gold standard of evidence where there is a dispute of fact is independent witnesses. There were other employees of the respondent who witnessed the alleged events. The evidence of the one colleague called, Mr West, added next to nothing to the case. He said he worked in the wood-work room would not have been present to see or hear all exchanges. He said that there were never any conversations between staff about personal matters, only work conversations, even at a Christmas lunch. I did not accept his evidence which was in contrast to all other witnesses.

6.42 Only one of the 5 people working in the factory has not been called. That is Tina Ardley who was present on the day the claimant left, and over the previous months. The claimant did not call her because she was identified t a preliminary hearing as being called as aa witness for the respondent. I am told she did prepare a witness statement but did not want to sign it and attend as she was anxious about attending the hearing as she sees the claimant at bingo. Whilst it is true that the claimant could have applied for a witness attendance order after statements were recently exchanged and it became apparent to her solicitors that she was not being called by the respondent, it is understandable why the advice may have been not to compel her to attend. On the other hand, the respondent was not only in a position to request her attendance within their employment relationship but apparently had a draft witness statement from her. Of all the competing factors in how I should assess the competing evidence before me, I am left with significant concern about why the respondent has not chosen to call the person who was arguably the nearest to an independent witness to the events.

6.43 The net result of these various considerations on the nature and quality of the evidence is that the claimant's evidence has been preferred, particularly in respect of

the events of 10 March 2022. Those events gave a basis for accepting there was a "just needs a good slap" type comment on that date which, in turn, made it more likely than not that something similar was said on previous occasions as alleged. Nevertheless, that is not without question. Whilst I have accepted earlier comments were made, I have concluded they were less frequent than alleged. Whilst the context of the meeting of 21 July 2022 was focused on delivering work commitments and some question was posed about the extent to which the claimant would be able to cope with both, this is not characterised as an angry ultimatum to choose.

7 Law

7.1 It is axiomatic that in order to claim unfair dismissal, the claimant must have been dismissed. In this context, section 95(1)(c) of the Employment Rights Act 1996 ("the Act") provides the statutory definition of dismissal: -

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

7.2 I remind myself of the essential authorities on "constructive" dismissal generally. They start with **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761** on the application of common law principles of repudiatory breach of contract, acceptance and causation as they arise within the context of contracts of employment. The definition of the implied term of trust and confidence set out in **Mahmud v BCCI [1997] UKHL 23** that: -

> ***"an employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage trust and confidence'.***

7.3 Assessing whether that term has been breached is an objective test. (**Leeds Dental Team Limited v Rose [2014] ICR 94**).

7.4 The case is put on a "last straw" basis. That requires consideration of **London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493** and that the necessary contribution of a "last straw" event not needing to be a breach in itself but adding something of substance to the character of the overall state of affairs, being more than utterly trivial; It also requires consideration of **Kaur v Leeds Teaching hospital [2018] EWCA Civ 978** in particular to the five step approach to take in last straw cases.

7.5 As to causation, it is not necessary that the contractual breach is the only reason for the resignation or even that it is the principal reason for the employee's resignation. It is sufficient that the repudiatory breach played a part in the dismissal (**Nottinghamshire County Council V Meikle [2004] EWCA Civ 859 [IRLR] 703)**

7.6 If there has been a breach of contract, the employee has a choice to make between accepting the repudiatory conduct or affirming the continuation of the contract. (**WE Cox Toner (international) Ltd v Crook [1981] IRLR 443**). In other words, the right to claim he has been dismissed will be lost where the breach is waived, or more precisely in this context, the continuation of the contract is affirmed. This may arise explicitly. It may arise by implication, often through the effluxion of time. In that sense the passage of time does not, in itself, provide the answer. What is important is what has happened during that time. (**Chindove v William Morrison Supermarkets PLC UKEAT 0201/13**).

7.7 If a resignation amounts in law to a dismissal, that is not the end of the claim. The provisions of section 98 of the Act then engage. It is then potentially open to the respondent to prove the reason, or if more than one the principal reason, for dismissal and that that reason is a potentially fair reason. In this case the respondent does not assert a potentially fair reason.

8 Discussion and Conclusions on Liability

8.1 I can deal with the holiday claim briefly. The claimant has not shown that there is any leave entitlement outstanding at the date of termination. The claim for outstanding accrued annual leave therefore fails.

8.2 As to dismissal, the first point to reference is the date of termination. The parties have agreed in their pleaded cases that the resignation took effect on 10 March 2022. I note it is not until 17 March 2022 that the resignation is unambiguously communicated the respondent. Technically, a resignation cannot be back dated but a later communication may be evidence from which what otherwise would be the inference to be drawn from the conduct of the parties can be reinforced. The parties have proceeded on the basis resignation is on 10 March. I do not intend to interfere with that as nothing turns on the exact date.

8.3 This case is put as a last straw case meaning it is to be analysed in accordance with **Kaur**. That means considering the last straw event first, whether it is a breach in its own right and, if not, whether it adds to the totality of the conduct alleged sufficiently for it to amount to a breach.

8.4 The last straw event concerns the comments by Mr Bennet on 10 March 2022. I have found that there was a heated exchange. Specifically, the conduct of the employer was: -

a) Challenging the claimant about the need to leave work in a confrontational manner, and doing so before the claimant had explained that she had made arrangements for the collection of X from school.

b) Demonstrating the employer's frustration about the claimant's caring responsibilities by use of the words "where's his fucking dad in all this?"

c) Further indicating the frustration with her caring responsibilities and the effect on work by reference to previously "having been lenient with you".

d) Targeting X personally by use of words to the effect of needing a good slap.

8.5 There are two principal issues in deciding whether this amounts to a breach of the implied term of trust and confidence as defined by **Mahmud**. They are whether they pass the threshold and whether there was reasonable and proper cause for the conduct.

8.6 The difficulty that exists with reasonable and proper cause, is that the comments have largely been denied. The accepted comment of "where's his fucking dad in all this?" has been explained on the basis that Mr Bennet was frustrated because the claimant had repeatedly taken time off to collect X when other arrangements could have been made. I do not accept that explanation amounts to reasonable and proper cause. In fact, it rather supports the claimant's impression of the context of the comments and whether they evince, objectively, an intention not to be bound by the contract. In addition, the explanation was not made out on the facts, the alternative arrangements that did apply on 10 March had not been in place for more than a couple of days. Any earlier incident of time off had not been linked in evidence to any alternatives that existed. Indeed, the arrangements with Matthew seem to me to be exactly because there were no alternatives in place. That, in turn, further supports the claimant's perception that her employer was frustrated with the arrangements it had put in place for her and she was additionally anxious about what that pressure meant for her employment. The defence further supports my conclusion that Mr Bennet was frustrated with the claimant.

8.7 The other conduct found was denied. As a result, there is no basis advanced on why it was done with reasonable and proper cause.

8.8 The remaining question is whether conduct passes the threshold in **Mahmud**. As always, context is everything. These individuals are known to each other extremely well. They have spent nearly 20 years working alongside each other and their personal lives are intertwined with their working lives. I have therefore given careful consideration to whether this conduct can pass the threshold in such a context.

8.9 I am satisfied that the context of the relationship and the pressure of running small business of this nature is such that I can conclude that this conduct was not calculated to destroy or seriously damage trust and confidence. I have no doubt that Mr Bennet did not intend that result. The threshold test, however, does not require only that the employer has that end purpose in mind at the time of the conduct. It is sufficient if the conduct is likely to destroy or seriously damage trust and confidence. That means that if the conduct which is found to have happened is no more than likely to seriously damage trust and confidence, it is enough to meet the test. In this case, the conduct has two elements. One is the aggressive criticism of the claimant and her family, the other is the demonstration of the employer's frustration with her caring commitments, despite being in circumstances where she had made alternative arrangements, leading to her riposte that "you obviously don't want me here ". I am not entirely comfortable with the outcome of this analysis in such a

heated exchange between parties who are extremely well known to each other over a number of years, but I cannot articulate why that conduct cannot be said to be likely to seriously damage trust and confidence. As such it must meet the test in **Mahmud** and amount to a breach of the implied term of trust and confidence.

8.10 In accordance with **Kaur**, that conclusion is reached on the analysis of the final straw in isolation. The comments earlier in March and late February only serve to add to that and, to the extent that it does not meet the Mahmud test as a breach on its own, is sufficient to add to the totality in a way envisaged by **Omilaju** to amount to conduct likely to serious damage trust and confidence.

8.11 In respect of those earlier comments, I have concluded that comments were said on more than one occasion in late February early March. This is less frequently than the claimant suggested but the conclusion that a similar comment was made on 10 March makes it more likely than not that it was said on other occasions.

8.12 For completeness, the first in time allegation is that of an aggressive ultimatum to choose between work and caring said to occur on 21 July 2021. I am not satisfied the conduct occurred as alleged or that what did occur could be said to be conduct likely to seriously damage trust and confidence. This matter adds little to the later events other than it clearly does put in context the frustration of the employer in having to accommodate the claimant's newly acquired caring responsibilities. That in itself could form the basis for reasonable and proper cause in the substance of what adjustments are made to the claimant's hours and duties, but I do not consider it is capable of extending to the comments made, however much they might be expressions of that frustration overspilling.

8.13 I then turn to affirmation. There is no case advanced that the time between 10 and 17 March was sufficient to affirm the contract. Even if 17th was treated as the date of termination, there had been no performance of the contract during that period. The earlier comments from late February 2022 may have been followed by unambiguous performance of the contract such that, in isolation m they may have been waived and the contract affirmed. However, the nature of the analysis as a last straw constructive dismissal means that does not arise. Similarly, in its not necessary to analyse the earlier matter in July 2021 in isolation but had that been made out as a breach, and stood as the only breach, I cannot see that the performance of the adjusted contract for the subsequent 8 months would have been anything other than an unambiguous affirmation of the contract.

8.14 The final limb of section 95(1)(c) is whether the conduct found to have breached the contract was a material part of the reason why the claimant resigned. In other words, if the reason for resignation was wholly unconnected with the conduct then the resignation does not turn into a dismissal in law. This has been challenged by the respondent on the basis that the resignation was planned by the claimant in order to devote her time as a carer for X and be better off in doing so. That challenge did not stand up. However, even if it had had some merit, it would not necessarily have displaced the fact that the conduct on 10 March 2022 was so clearly the trigger for the resignation that I am bound to conclude it was a material

reason for it. As it happens, I am satisfied it was the entire reason for it, but even if there had been ulterior reasons prompting the claimant's actions, there is nothing to displace the breach as being a material part of the reason.

8.15 As a result, the resignation amounts to a dismissal in law. Technically, there is no claim relating to the mere fact of dismissal itself, the claim rests on this being an unfair dismissal. However, as the burden rests with the respondent to advance a potentially fair reason for dismissal, and none has been advanced, it follows that the dismissal was also unfair in accordance with section 98(1) of the Employment Rights Act 1996.

9 REMEDY

9.1 The claimant claims compensation only. She was in receipt of qualifying state benefits after termination for which the recoupment provisions apply.

9.2 She has adopted a schedule of loss claiming a total of £72,902.95, albeit she accepted the effect of the statutory cap reduced this to £24,725.35. Beyond adopting it, the claimant understandably explained she has little understanding of what it contains and how it was calculated.

9.3 The respondent has not produced a counter schedule. Both advocates were content with the basic arithmetic and methodology adopted by the claimant. The focus of the respondent's challenge to compensation has been in three related areas: -

a) the claimant failing to mitigate her losses in that there is no reason why she could not have found new employment other than her desire to be a full-time carer for X, especially after obtaining additional caring allowances arising from the special guardianship order. There was no reason why she could not have undertaken some part time work at least and she has not produced any evidence of any attempt to find work so all losses claimed should be disallowed.

b) That she has contributed to her dismissal by 100% by acting impulsively on the last date when tempers flared and that If she had spoken about how she felt there would have been an alternative outcome.

c) That the claimant was in any event planning to leave employment once she obtained guardianship of X and there should be an adjustment under "Polkey"/section 123(1) of the 1996 Act to reflect the fact her losses would have then stopped.

9.4 In addition to those challenges raised by the respondent, I invited both advocates to address me on certain elements of the schedule of loss and identify any issues then arising. The first matter identified was that the schedule sought a claim for breach of contractual notice. Not only did Mr Gordon accept there was no claim, but it would have been based on a misconception of the effect of section 95(1)(c) which deems a resignation to be a dismissal but only for the purpose of part X of the 1996 Act dealing with unfair dismissal. In any event, the same losses are

claimed for the same period in respect of the unfair dismissal and that duplicated sum of £4773.24 must therefore come out. Secondly, the schedule includes a claim for outstanding holiday pay which has failed. The small sum claimed of £318.24 comes out. Thirdly, there is a claim for pension loss but no evidence was adduced concerning this save for the payslips that show the claimant was not in a pension scheme to which her employer contributed. The sum of £741.76 should also come out.

9.5 I then turn to mitigation of loss. The claimant gave evidence on her losses claimed including her post employment situation and attempts to find alternative employment and was questioned. I find the following facts: -

a) The claimant does not have private means of transport. She is reliant on public transport. She lives in a rural area and her work for the respondent was a short bus ride away of a couple of miles.

b) The claimant has remained the primary carer for X. She is able to arrange some pre-school and after-school provision and childminding during the school holidays.

c) The child-care responsibilities create a significant barrier to finding suitable alternative employment when coupled with her reliance on public transport. Even the proximity of the previous employment with the respondent had meant her start and finish times had had to be altered.

d) The claimant's past employment record over the previous 20 plus years means she may be limited to manual employment relying on her craft skills which is not in high demand. She may also be more likely to be viewed by prospective employers as lacking in some current workplace experience.

e) I accept the claimant's evidence that she attended regular appointments with the Job Centre after her employment ended and that there were some opportunities available to her. However, I find she was not able to take up the potential employment as she was unable to get to and from the employment in time for school by public transport.

f) I find she was open to any type of work she could perform and did not unreasonably limit her search by reference to the pay or the duties.

g) It was not unreasonable in her particular personal circumstances to limit her search for work to roles she could perform during the times that X would be in school or otherwise in pre-school/afterschool childcare.

h) I accept the claimant is not better off financially since leaving the respondent's employment as a result of receiving financial support or benefits in respect of the care of X. I find the claimant was not intending to leave her employment upon the special guardianship order being made. It follows I reject the respondent's contention this was a plan before her resignation.

i) I do, however, find that the care of X was increasingly the claimant's priority and that the prospects of a change to what was the full time

employment would have been real possibility. Ms Carvey's own evidence of the likely future for the claimant continuing her child-care responsibilities ruled out the prospect that the employer would have terminated her employment but that she could see changes to part time working, similar to what the claimant had had when she last stepped in to perform caring responsibilities.

9.6 The respondent did not adduce any mitigation evidence to illustrate the type of employment opportunities that were available and accessible to the claimant. A contention that a claimant has failed to mitigate their loss has to be established in evidence. That may be evidence of the local economy or job market or specific opportunities that might have been suitable to the claimant's skills and personal circumstances. There is an extensive period claimed of financial loss of nearly 2 years plus a further year of future loss. Even having regard to the personal circumstances of the claimant as a carer and someone that relies on public transport, that period demands scrutiny. However, there is only so much scrutiny that the tribunal can apply where the underlying issue is whether the claimant has mitigated her losses. The burden rests with the respondent to demonstrate a failure to mitigate. Its pursuit of the mitigation point has been limited to questions in cross examination. There is nothing improper in that and it can sometimes reveal matters which are appropriate to take into account. However, in this case the claimant answered the questions put to her explaining a reasonable basis for her decisions and actions. For that reason, I do not consider I can make any reasoned assessment of the prospect of suitable alternative employment having arisen after the instant employment ended.

9.7 The respondent's second point was that an adjustment should be made under section 123(6) of the 1996 Act to reflect the conduct of the claimant contributing to the dismissal. This provision requires me to reduce the amount of compensatory award by a proportion which is just and equitable having regard to any finding that the dismissal was caused by the claimant. There is a similar related provision in section 122(2) of the 1996 Act which permits a reduction to the basic award. The tests are similar, but s.122 does not require a causal connection, although in practice the same outcome is usually reached for both provisions. As to what conduct can amount to contributory conduct, the case of **Nelson v BBC (No. 2) [1980] ICR 110** which requires the conduct to be identified, for it to be in the nature of culpable conduct and that it played a part in the dismissal.

9.8 The concept is usually applied in conduct cases but there is no limitation in law. The important part is to consider whether the conduct itself was culpable and, for compensatory loss, whether it contributed to the dismissal. In this case I cannot reach that conclusion. The analysis is complicated by the fact this is a constructive dismissal case. Whilst it may still engage, it seems to me any such conduct would need to be seen in the context of why an employer then behaved in a way to breach the implied term of trust and confidence in response to which the claimant then resigns. The conduct in this case is focused on the events of 10 March 2022 and what is described as the claimant's impulsive response to the employer's comments and conduct. The difficulty I have is that the conduct alleged arises in the course of her accepting the repudiatory breach and leaving. Whilst I do not say there could not

be any relevant conduct at that stage as a matter of law, it is difficult to grasp why the acceptance of a repudiatory breach, in whatever manner, should then lead to a reduction of compensation. It is true that my findings recognised that for a day or two, both parties laboured under a belief that this would blow over and the relationship resume, but that seems to me to be a different creature to contributory fault. As a result, I am unable to make any reduction under this head either.

9.9 The final challenge is that the claimant would have left in any event once the special guardianship order was made in May 2022. I can rule out the prospect that she would have been dismissed beyond the negligible, as that was not the respondent's view of the likely path had she not resigned. The assertion that the claimant was contriving to set up a situation so she could resign and become a full-time carer for X is not supported by the evidence. The claimant has denied that and the financial benefits that are paid as a result of caring for X do not make up the shortfall. I am satisfied that the claimant would have continued working for the respondent. However, there is a real prospect that the claimant would have sought to reduce her working commitment which I have to take into account in the assessment under section 123(1). A precise assessment is impossible. This is a broad-brush assessment. The priority of X's care coupled with some additional financial support leads me to conclude that a reduction to around 50% part time working was a very real probability. However, the nature of the work was such that some of it could be accommodated through piecework done at home. Indeed, the respondent had positively floated that idea at an earlier stage of discussions. The respondent's need for quality output and previous efforts to facilitate homeworking is a factor that points to this needing to be factored in also. Changes were not likely to happen until the practical consequences of the special guardianship order came into effect, which was likely to be broadly around June 2022. From then, it seems to me the losses should reflect a 50% chance of a reduction to 50% part time working. The effect of that would be to reduce the losses to £25,111.97. (£38185.92 - £4773.24 = £33,412.68 x 50%= £16,706.34. Adding back the £4773.24 for the period of full time working. Plus future loss of £16,258.80 x 50% = £8353.17 plus £500).

9.10 Even after making the adjustments I am able to, the total losses originally claimed of £55,685.88 reduce to £42,010,20 which still exceeds the statutory cap. Counsel for the claimant has properly raised the point that the benefits should not be deducted but should stand subject to the recoupment regulations and be adjusted by the secretary of state. I agree. The total award is therefore £24,725.35. The prescribed period is 10 March 2022 to 17 January 2024. The prescribed amount is £21,979.58 (£16,706.34 + £500+£4773.24). Only the balance is payable until the secretary of state has determined recoupment.

Employment Judge R Clark

Date: 10 April 2024

JUDGMENT SENT TO THE PARTIES ON

....12 April 2024.....

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FOR THE TRIBUNAL OFFICE