



EMPLOYMENT TRIBUNAL

Claimant: Melanie Harrison

Respondent: C W Garden Marquees Ltd

HELD AT: Birmingham (CVP)

ON: 30, 31 May 2024
19, 20 June 2024

BEFORE: Employment Judge Kelly

REPRESENTATION:

Claimant: Ms Rosa Thomas (counsel)

Respondent: Mr Paul Clarke

DECISION

1. Upon the tribunal concluding that the claimant has been unfairly dismissed, the respondent must pay to the claimant the total sum of £20,968.62.

REASONS

A. KEY BACKGROUND AND PARTIES' POSITIONS

1. This is a claim for constructive unfair dismissal. The claimant was employed as an administrative assistant. The Respondent is a small family run business that hires out marquees.
2. The claimant had been employed by the respondent since 29 September 2009. She resigned on 30 August 2023.
3. The issues in this case appear to have arisen following a discussion between Ms Molly Watts and the claimant as to timekeeping issues concerning other members of staff and there being an apparent difference of view between the claimant and Ms Watts as to how such issues ought to be handled.

4. The claimant says that the reason for her resignation is the conduct of her employer, which is said to have amounted to a breach of the implied term of mutual trust and confidence. She lists various issues upon which she relies at paragraph 4 of her Particulars of Claim, which include the following:
- a. That on or about 2 August 2023, Mrs Judith Watts (“Mrs Watts”), a director of the claimant, spoke to her on the telephone and used abusive language and adopted an intimidating attitude towards her. During the conversations, Mrs Watts is alleged to have said words to the effect of “*if you don’t like it you know where the fucking door is*”, referring to a disagreement with her daughter, Ms Watts, believed to be about timekeeping issues and the approach to addressing those.
 - b. On or about 3 August 2023, the claimant says she was summonsed to a meeting with Mrs Watts, to discuss poor timekeeping of other staff members. The claimant says she was questioned about why she had not brought poor staff timekeeping issues to the attention of the directors.
 - c. On 8 August 2023, the claimant was certified unfit to work, on the basis of stress. On 9 August 2023, Mrs Watts attended at the claimant’s home unannounced. Mrs Watts was said to have had a threatening and intimidating attitude. The claimant says that at this attendance, Mrs Watts:
 - i. told the claimant that she should hand in her four-week notice period;
 - ii. that her statutory sick pay would be curtailed;
 - iii. that if she refused to resign, proceedings would be issued against the claimant to recover monies wrongly said to have been taken by her (this being a reference to monies said to have been taken by the claimant which were not truly reflective of the hours she worked); and
 - iv. provided a letter addressed to the claimant indicating that an investigation was to be carried out into unauthorised payments said to have been made to the claimant.
 - d. On 9 August 2023, the claimant says she discovered that she had been locked out of access to the Respondent’s computer systems, despite not having been suspended or dismissed.
 - e. On 11 August 2023, the claimant’s husband attended at the respondent’s premises to collect the claimant’s coffee machine, and it is alleged that Mrs Watts deliberately dropped the coffee machine, thus causing damage to it and used abusive language towards the claimant’s husband.
 - f. On or around 21 August 2023, the claimant received a letter from the respondent indicating that the investigation had been completed, it was a short letter with no details arising from the investigation.
 - g. On 21 August 2023, the claimant raised a grievance, citing the way in which she was spoken to by Mrs Watts, and requested a reply by 25 August 2023.

- h. On 22 August 2023, the respondent invited the claimant to a disciplinary hearing, despite her being certified unfit for work.
 - i. On 22 August 2023, the claimant reminded the respondent she was on sick leave, that she had raised a grievance about Mrs Watts and thus would prefer her not to chair the disciplinary meeting and she complained she had not been given sufficient information about the wrongdoing she was alleged to be responsible for.
 - j. It is said other staff were paid wages on time, in July/August 2023, but that she was not, this being, it was said, Mrs Watts making good on her threat not to pay monies to the claimant.
5. By reason of the above, the claimant says she resigned on 30 August 2023 and that as a result, she was constructively dismissed, and that such dismissal was unfair.
6. In response to the above, it is the respondent's position that:
- a. It had cause for concern about timekeeping of staff (this is not in dispute), and that such concern extended, from 8 August 2023, to the claimant.
 - b. The only meeting of note to take place was on 2 August 2023 but that it was between Mr Colin Watts ("Mr Watts"), a director, and Mrs Watts and another employee, Shane Tranter, but that Mr Watts then spoke with the claimant.
 - c. Between 3 August 2023 and 8 August 2023, the claimant arrived at work unusually early, which she had not previously done in all the time she had worked for the respondent, and that this was the period of time in which Ms Watts was investigating staff timekeeping issues.
 - d. On 8 August 2023, Mrs Watts asked Miss Watts to return home with the staff wages folder, which the claimant spotted Ms Watts with at around 3pm that day.
 - e. As to the events of 9 August 2023:
 - i. Mrs Watts did visit the claimant unannounced at home;
 - ii. That the reason it was unannounced is because the claimant had said somebody would need to collect the keys from her;
 - iii. Mrs Watts did hand to the claimant a letter regarding an investigation into monies taken by the claimant;
 - iv. Mrs Watts denied being intimidating or threatening towards the claimant and denies demanding the claimant's notice be given.
 - f. On 11 August 2023, the claimant's husband attended at the respondent's offices unannounced, saying he was there to collect the coffee machine, and that he was intimidating and threatening in his approach;

- g. The letter of 21 August 2023 was sent to the claimant, regarding the conclusion of the investigation and which set out an invitation to a disciplinary hearing.
- h. That there was an administrative error with the claimant's pay in August 2023, and that the error was rectified with the claimant being paid her wages at the end of September 2023.

7. In addition to the above, on 16 August 2023, Shane Tranter attended at the claimant's home to collect the work laptop at the claimant's request. The claimant requested Mr Tranter to sign a document to record the collection of the machine, which he duly signed.

B. THE ISSUES FOR DETERMINATION

(a) Overview

- 8. The overriding issue for determination is whether the claimant was constructively dismissed, which requires a determination of a number of disputed factual issues which lead up to the resignation on 30 August 2023.
- 9. There is no dispute between the parties as to the relevant legal approach I must take. In essence, this is:
 - a. Did the matters complained of take place as alleged by the claimant;
 - b. Do these amount to a breach of the implied term of mutual trust and respect; and
 - c. Did the claimant resign by reason of the breach of the said implied term.
- 10. If there is a breach of the implied term of mutual trust and respect, this will be considered repudiatory in nature, such that if the claimant resigned because of it, then she will have been constructively dismissed.

(b) What is the implied term of mutual trust and confidence?

- 11. In *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)* 1997 ICLR 606, HL, the House of Lords held that there was a term implied into an employment contract that neither party will, (a) without reasonable and proper cause, (b) conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
- 12. For there to be a breach of the implied term, therefore, there needs to be an assessment of both the conduct in question and the reason for it.
- 13. There is no dispute between the parties that if there is found to be a breach of the implied term of mutual trust and confidence, this will be repudiatory in nature (*Morrow v Safeway Stores* [2002] IRLR 9).
- 14. A party behaving unreasonably will not, by itself, be enough – the reference to damage is to one of “serious” damage (*BG plc v O'Brien* [2001] IRLR 496).

(c) What amounts to a breach of the implied term?

15. What amounts to a breach of the implied term is fact sensitive. Certain types of conduct have been held to amount to a breach of the implied term. By way of example:
- a. the threat of a significant pay cut (or the making of a significant pay cut) (*Industrial Rubber Products v Gillon* [1977] IRLR 389, *Mostyn v S & P Casuals Ltd* UKEAT/0158/17);
 - b. withholding of contractual sick pay (*Singh v Metroline West Ltd* [2022] EAT 80);
and
 - c. making unnecessary contact during a period of sick leave where the employee was off due to stress and anxiety and such contact was likely to increase that stress and anxiety (*Lindsay v HBOS Plc* ETS/4103007/2022 - a first instance Scottish case); making contact with an employee on sick leave when it should reasonably have been known that doing so would cause an otherwise very ill employee to become increasingly ill, who was unable to deal with the issues raised and which were not serious and not in need of being dealt with at that time (*Private Medical Intermediaries v Hodgkinson & Others* UKEAT/0134/15/LA).
16. The subjective intention of the parties in terms of intending a breach of contract is irrelevant, it is an objective assessment of the conduct in question that is key (*Western Excavating v Sharp* [1978] QB 761). When considering whether there has been a breach of the implied term, it is not appropriate to consider a range of reasonable responses for the conduct in question, this is relevant only to the question of fairness of the dismissal in the context of an unfair dismissal claim (*Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121).
17. When assessing whether there has been “*serious damage*”, it is appropriate to consider the effect on the innocent party.

(d) Acceptance of the breach

18. The acceptance of a repudiatory breach must be unequivocally communicated to the other party. So, here, the claimant resigned on 30 August 2023, and in order to succeed, therefore, she needs to demonstrate that she resigned by reason of the breach of the implied term – there is no dispute about whether the notice of 30 August 2023 was given by the claimant and received by the respondent.

(e) The last straw

19. It was put on behalf of the claimant that the series of events leading up to the 30 August 2023 resignation invoked the last straw doctrine, such that if I were not satisfied that any one issue itself amounted to a breach of the implied term, then taking them together, I ought to be so satisfied. Essentially, it is said, that the final act of not responding to her

observations, to which I turn below, in the disciplinary and grievance processes, amounted to the final straw, entitling her to resign and claim she was constructively dismissed.

(f) Waiver and/or affirmation

20. The parties confirmed that there were no issues of waiver or affirmation relied upon by either of them in this case.

C. PRELIMINARY ISSUES

(a) Application to adduce evidence from Jonathan Rudge

21. At the start of the first day, Mr Clarke made an application to rely upon a letter from Mr Jonathan Rudge, of ELM Computer Solutions Ltd, as being his evidence as to what he had found on the work computer system once recovered from the claimant.
22. Mr Clarke explained that Mr Rudge had only just been able to provide this letter because, only days before the final hearing, he had managed to secure access to the work laptop as it was password protected and the respondent did not have the password. I understand this was because the password had not been provided by the claimant who had otherwise been using the laptop prior to her resignation.
23. Ms Thomas did not object, and I therefore permitted the letter of 28 May 2024 to stand as Mr Rudge's evidence upon which he was subsequently cross examined by Ms Thomas.

(b) Application to amend to plead wrongdoing by the claimant by reason of the content of Mr Rudge's report

24. Mr Rudge gave evidence about a large number of files being deleted, it was said likely by the claimant, on the laptop on 7 August 2024.
25. During his closing submissions, Mr Clarke sought permission to amend his grounds of resistance following a query I had made as to what case it was that the respondent was advancing as to whether it was being argued that a prior repudiatory breach by the claimant might somehow affect the right of the claimant to accept a later repudiatory breach by the respondent.
26. Mr Clarke thought a prior repudiatory breach might affect the ability of the claimant to accept any later repudiatory breach committed by the respondent. Although he was unable to refer to any authority on the point, he nonetheless wished to seek to preserve his client's position to argue the point and thus sought to amend the pleading to address this issue. No draft text of an amendment was provided.
27. Ms Thomas opposed the unspecified amendment, saying it was not fair to permit it now, because this is not the case run to date and that the claimant would have instructed her own expert to scrutinise what was said by Mr Rudge.

28. Ms Thomas told me that the absence of any objection for Mr Rudge to give evidence was premised on the case as pleaded, because she took the view it in all reality added nothing to the pleaded case, and at best, went to background context as to the relationship between the parties. At best, she said, it went to whether the parties might have done the things they were said to have done in the pleadings.
29. I informed the parties that I declined to grant that application to amend. I refused that application for the following reasons:
- a. There was no explanation given in evidence by anybody as to why there has been such a delay circumventing the laptop protection, such as why the relevant software could not have been used much sooner to secure access, such that there would be advance notice given of a potential change of direction in the arguments concerning repudiatory breaches;
 - b. The application was made on the basis that it provided background facts to assess the pleaded issues, not to support new issues and such was not raised by Mr Clarke at the outset of the trial;
 - c. There has been no articulation of principles, by reference to authority or otherwise, by Mr Clarke to support the position that, if there was a repudiatory breach by the employee, it would somehow affect the ability of the Respondent to accept any repudiatory breach by the employer; and
 - d. Even if the legal position was as I enquired, this would be such a serious issue for the claimant, in circumstances where had she have known it was a point taken against her, and given that she contests what is said by Mr Rudge, that she did not have an opportunity to adduce her own expert evidence on the point, or at the very least, input into the terms of instruction of the expert, to review the laptop, and question the expert with proper preparation and perhaps with the benefit of other experts in the background if nothing else.

D. THE EVIDENCE

30. I heard evidence from the following individuals:

Claimant

- a. Mrs Melanie Harrison (the claimant)
- b. Mr Kenneth Harrison (the claimant's husband)
- c. Codie Turner (Mrs Harrison's sister); and
- d. William Jones (a former employee of the Respondent).

Respondent

- e. Jonathan Rudge (IT expert);
- f. Molly Watts (director of the respondent);

- g. Judith Watts (director of the respondent); and
- h. Colin Watts (director of the respondent).

31. I have had to make an assessment of the credibility of the witnesses and where I have done so, I have considered the way in which they delivered their evidence before me, the evidence given and how that evidence fits in with the documents that I have seen and the material factual matrix as the parties have accepted, or as I have found it to be.
32. Where I make findings of fact based on disputed positions, I do so on the balance of probability, as to what I consider more likely than not to have been the position. Before turning to the evidence given, and the issues in the case, I make some observations on the witnesses themselves.

The claimant - Mrs Harrison

33. The claimant gave clear answers for the most part when questioned. There were, however, some answers to questions that I felt were guarded, or unsatisfactory, but on the whole, I considered her evidence to be reliable.
34. I discuss the evidence from Mrs Harrison below.

Mr Harrison

35. Mr Harrison's responses were fairly short and for the most part for to the point. He did not volunteer much by way of the evidence given from the questions asked.
36. The real relevance of Mr Harrison's evidence related to his attendance at the respondent's premises on 11 August 2023 at 2.14pm. Mr Harrison covertly recorded the meeting on his mobile telephone, because, he said, he wanted to ensure his safety and that of the others in the premises, whom he believed would be female and on their own. There is a transcript at page 77 of the bundle, but I have additionally listened to the audio recording.
37. In evidence from Molly Watts, she noted that it was her that spoke the first part of the transcription, but then Judith Watts took over. This is consistent with what I believe I hear in the audio.
38. Mrs Watts and Ms Watts gave evidence that Mr Harrison came across as aggressive and threatening. Mrs Watts said he "*walked right up to her face*", and it was suggested this was done to goad her into a response from her, knowing of course, that he could not be seen, but that her reaction would be recorded.
39. Such was the concern from that visit, that Ms Watts's evidence was that a bell and security camera were then installed. An invoice appears in the bundle at page 127, dated 16 October 2023, which follows a quotation which has not been provided, but the timeframe is consistent with this installation being the result of Mr Harrison's visit.

40. The audio records a cordial Mrs Watts, at the point of understanding what it was he attended for, but then switched suddenly to an assertive Mrs Watts, almost for no apparent reason, in which she can be heard telling Mr Harrison to *“get the fuck out of my unit”*, to which Mr Harrison laughs, with Mrs Watts then saying *“don’t be a fucking prick”*. Mr Harrison then says *“Right O”* and says he will wait outside, whilst walking away whistling. Then almost a minute later, Mrs Watts appears outside with the coffee machine, which can be heard smashing on the ground, with Mrs Watts then saying *“That’s yours to go – your fucking welcome”*.
41. I find it difficult to accept Mr Harrison’s evidence that he was not intimidating or aggressive at that attendance at the respondent’s premises on 11 August 2023 and I do not do so. I believe that Mr Harrison was looking for some response from the claimant’s staff, which was to be recorded, and used in these proceedings. Mrs Watts is, as I note below, an individual capable of quickly losing her temper and being overly direct, a fact I believe Mr Harrison was well aware of, and his initial approach to the unit was abrupt in my judgment, and I prefer the evidence of Mrs Watts and Ms Watts as to what happened on 11 August 2023, and I conclude that Mr Harrison had indeed attended and been aggressive by getting unacceptably close to Mrs Watts looking for a reaction. He got that reaction. I should add, however, that I do find that Mrs Watts did drop the coffee machine, and that she did so intentionally in response to the provocation from Mr Harrison.

Mr William Jones

42. Mr Jones is a former employee of the respondent. In short, he accepted the respondent has been good to him, supportive over his employment. He told me that on or around 20 August 2023, he went into the respondent’s premises to collect keys and was met by Mrs Watts, who he said, was *“shouting and using foul language accruing him of eaves dropping and passing these details to Menie Harrison”*.
43. Mrs Watts did not deny that she had something to say about Mr Jones listening in, she said she was with Ms Watts in a HR meeting and that the discussion was about Mr Jones and that she did not shout.
44. Further, he told me that he had an incident with Mrs Watts where she alleged that he was not fit to breath the same air as her, which she flatly denies.
45. Mr Jones told me that he resigned from the respondent on the same day, 20 September 2023 as a result of the way he was treated by Mrs Watts.
46. In my judgment, Mr Jones was an honest witness doing his best to assist the tribunal. I have no hesitation in accepting his evidence in preference to that from Mrs Watts.

Codie Jones

47. Codie Jones (“Ms Jones”) is the claimant’s sister.

48. She told me about how on 8 August, she received a call from her sister, where she told her she was not coping well, but which was interrupted by a call from Mr Colin Watts. Ms Williams told me that she met with Mrs Harrison that same day, and that Mrs Harrison was in an emotionally difficult state.
49. Mrs Jones told me that Mrs Harrison had explained to her about seeing somebody die having received CPR, that she had a family bereavement, and that she had an incident in work. She was told by the claimant about how Ms Watts had returned to work, and that she no longer felt that anything was good enough, with things needing to be double checked by Ms Watts.
50. She told me that Mrs Harrison had explained that she saw Ms Watts with the wages folder on her desk which she tried to cover up when Mrs Harrison walked in to the office and that there was a discussion about timekeeping and gave some detail about that.
51. Mrs Harrison was said to have told Ms Jones that her conversation with Ms Watts had been misreported back to Colin and Mrs Watts. She told me that Mrs Harrison had mentioned an awful telephone conversation with Judith Watts the week before. Although she does not explicitly say so, this would appear to be to the conversation Mrs Harrison says took place on 2 August 2023.
52. I recognise, and indeed, Mr Clarke put it to Ms Jones, that she was just here to give evidence to support her sister. Her answers were, however, candid and credible, she fairly recognised, for example, that Mrs Harrison may have felt under threat from Ms Watts having recently returned to her post in the company, and who was perhaps was trying to move into the claimant's role to some extent.
53. I accept the evidence from Ms Jones.

Jonathan Rudge

54. Mr Rudge gave evidence to say that he had been instructed to access the laptop computer used by the claimant. In short, his evidence was that on 7 August 2023, whoever had access to the laptop (i.e. the claimant), had deleted a significant number of files, exceeding 10,000, from it.
55. The files were, however, still in the recycle bin, such that they could easily be recovered.
56. The claimant says she was an active employee on 7 August 2023, and that she would have no reason whatsoever to delete the files on the computer.
57. It was put to Mr Rudge in cross examination that the files deleted were all on the OneDrive, a cloud storage system, whereby users from other locations could access the same files. Mr Rudge said that a lot of the files deleted were deleted from OneDrive, but that others, locally stored, on the desktop, documents and pictures folder were all deleted too. It was pointed out to Mr Rudge that, on the screenshots provided, the files deleted locally were several years ago. Mr Rudge said that files were deleted from the desktop

and documents folders, but he did not say when, and only those dates from the screenshots were accessible to Mr Rudge in giving evidence; he explained he did not realise that he should have been taking pictures at the time, nor did he appreciate what he had got involved with and that he would end up giving this evidence when he was doing his initial work on the laptop.

58. The laptop computer was in the claimant's possession on 7 August 2023. It was only handed back to the respondent, via Shane Warner, on 16 August 2023.
59. On the respondent's case, it had suspicions about the claimant prior to 7 August 2023, as Ms Watts noted that she had concerns from 2 August 2023 about the claimant's timekeeping activities. Indeed, on 8 August 2023, Mrs Watts asked Ms Watts to bring the wages folder home to review, but to do so in a way that would not alter the claimant. It may well have been the case that the respondent was concerned as to what the claimant has access too, and steps were then taken to remove the files to which she has access. It may well have been an accidental, or indeed, a deliberate, deletion by somebody using a shared OneDrive folder other than the claimant.
60. Ultimately, I conclude that I accept Mr Rudge's evidence insofar as it goes, which it is recognised that a large number of files on the device were deleted from it. To the extent that Mr Rudge implies that it was likely to have been a local user that deleted the files, he did not provide evidence on how deleting files from a connected user's account would impact on those files being in the recycle bin of a local user that did not own the shared folder.
61. I am not satisfied that, on balance, it can properly be concluded on the strength of Mr Rudge's evidence as presented to me, that the source of any deletion of the OneDrive folder was from the local machine. Furthermore, insofar as local files were deleted, which can only be deleted locally, the only examples of these on the screenshots provided were from a long time ago, and Mr Rudge was unable to identify examples of files deleted locally from 7 August 2023.
62. I am not persuaded on the evidence before me that I should conclude that the claimant deleted the files from the OneDrive. This is because of the potential to delete from a remote location, and that there was insufficient evidence put before me to address those technical aspects of that approach, this being a primary source of challenge from Ms Thomas which I did not consider Mr Rudge to have sufficiently addressed.

Judith Watts

63. Mrs Watts explained that she was not an office worker, she did not work in that environment, although she was at the unit itself regularly. I can accept this, she is not suited to working with paperwork it seems, she got into an awful mess with the bundles and her witness statement whilst giving evidence.

64. Mrs Watts was distant from the daily office work side of matters, that I readily accept, as the claimant says she virtually never saw her, and Mrs Watts says she rarely attends in the office.
65. Mrs Watts disagreed with aspects of the evidence given by the claimant, such as what was said on 9 August 2023 when she attended the claimant's home, but I noted that text messages sent at the time, such as about delivering back the keys to the respondent's premises, appeared to contradict the evidence from Mrs Watts about being prepared to delivery the keys back, whereas Mrs Watt's evidence was that the claimant required they be collected from her.
66. I was not especially persuaded by the cogency of Mrs Watts evidence and where there is competing evidence, I have generally preferred that from other witnesses, save in respect of the incident on 11 August 2023, in respect of which, Mrs Watts evidence is supported by that of her daughter, and I have had the benefit of other documentation which supports what has been said and an audio recording to consider.
67. I deal as appropriate with the specifics of the evidence given by Ms Watts in the discussion section below.

E. FACTUAL ISSUES

68. The source of the difficulties between the parties is not disputed, at least in the sense that they arise from the initial enquiry of the claimant from Ms Watts in relation to timekeeping issues.
69. In essence, Ms Watts made an observation that there had been some irregularities in timekeeping from some of the marquee staff, this being the initial focus of her concern. The claimant says that this discussion took place on 1 or 2 August 2023, she was unsure which day, and Ms Watts suggested to her that the marquee workers be given a warning, although Ms Watts denies that a warning was suggested to be given. The claimant says that she was not in favour of pursuing timekeeping issues and that she made this clear to Ms Watts. What is undisputed, however, is that timekeeping issues were raised about the marquee staff by Ms Watts at the start of August 2023.
70. Ultimately, I do not need to decide what was discussed specifically between Ms Watts and the claimant, it being sufficient that Ms Watts did raise timekeeping issues, and the claimant was not in favour of them being pursued.
71. Ms Watt's evidence is that she had suspicions about the claimant's own timekeeping, by reason of her not being supportive of any further pursuit of the timekeeping issues with the marquee staff. I accept Ms Watts's evidence that she thought that it was odd that the claimant did not think it appropriate to pursue the timekeeping issues and that she then had a suspicion about the claimant. I do not conclude it was reasonable to reach these conclusions, necessarily, because the extent of the evidence before Ms Watts that led to her conclusions was not in evidence, but in short, I am satisfied that she believed that timekeeping issues needed to be investigated further and, as director of the business, she

was entitled to carry out such investigations (frankly, whether she had justifiable cause or to do so or not).

72. The claimant says that the next day, Mrs Watts spoke to her in a rude and surprising way, by saying *"You were off with [Ms Watts]"* and *"well you didn't speak to her all afternoon"* and *"your opinion does not count, [Ms Watts] will be running the business and if you don't like you know where the fucking door is"*. Mrs Watts denied saying these things.
73. It is recognised that, in the period 2 to 8 August 2023, the claimant attended work early, such it was said by the respondent, being entirely out of character for her, such having not been done in the previous 14 years of the claimant's employment.
74. Clearly, something had changed, to cause the claimant to attend early. The claimant noted that she had had an exchange with Mrs Watts and did not want to exacerbate the situation; she attended early, she explained that her early attendance was addressed by requirements re her children at school. Ms Watts, in her cross examination, accepted that prior to 2022, she would not know about the claimant's timekeeping at the offices, and whether she usually attended early or not, and so perhaps, to suggest she never attended early at all, was a statement that was limited in terms of her own direct knowledge up to 2022. The respondent implied that the real reason for the early attendance was something to do with timekeeping records in the office having gone missing, notably, the claimant's records from the previous timekeeping system that they had in place.
75. There was no dispute that the respondent had upgraded its timekeeping procedures, with manual clocking in cards being replaced by biometric system in 2019. Ms Watts noted that the claimant had stopped clocking in and out after COVID, she did not know why this might be. The claimant says that she did not need to clock in and out, using the new system, following COVID, she said, by reason of an agreement with Mr Watts. She did not say what the agreement was specifically in relation to clocking in, but she did refer to an agreement with Mr Watts about working from home. I infer that her intention was that the two issues, cessation of clocking in, and working from home, were linked.
76. The claimant did not dispute Ms Watt's evidence that she had stopped clocking in and out post COVID. Ms Watts explained that she could only locate biometric timecard entries for the claimant prior to lockdown (i.e. from 2019 to lockdown) and that the historic clocking in cards for the claimant had gone astray and she could not explain why. Timekeeping/payroll issues had historically fell within claimant's job role.
77. The whole timekeeping issue was relevant to the claimant because it was said that the claimant left early, at 3pm (or thereabouts) most days, and that she was contracted to work until 4.30pm on Tuesdays to Fridays. The claimant said, however, that she had reached an agreement with Mr Watts, in or around March 2020, but prior to the COVID lockdown, that she would work from home Tuesdays to Fridays, leaving at 3pm each of those days, with no specific hours being stipulated. She says this came about in a discussion about childcare and whether working the hours that she did was worthwhile. Mr Watts denies reaching any agreement permitting the claimant to work from home save during COVID.

78. I find it difficult to accept that Mr Watts would come to an agreement for the claimant to not clock in using a biometric system implemented in 2019, not especially long before the agreement to abandon it was said to have been reached by the claimant, although the position concerning working from home is more difficult.
79. Mr Watts and Mrs Watts explained they were never in the offices in the afternoon, although for my part, I find it difficult to understand why, if the claimant regularly left early at 3pm as alleged, without authorisation, this had not been identified prior to August 2023, when it must have been going on for many months. Mr Watts' explanation that he simply signed things and trusted the claimant is credible to an extent, given the claimant's longstanding service, but I struggle with why in the significant time period this way said to apply, Mr Watts, Mrs Watts (and latterly, Ms Watts) had not checked the time entry systems and identified that the claimant was not clocking in and that she was leaving early.
80. Taking all of this together, in my judgment, the reason for the early attendance by the claimant in the period 2 to 8 August 2023, was the desire to avoid antagonising the situation with Ms Watts and/or Mrs Watts, following the terse exchange the previous day with Mrs Watts, which I find did indeed take place, per the claimant's evidence. I further find that there was an agreement between Mr Watts and the claimant permitting her to work from home four days a week as per her evidence. There is no good evidence to suggest that the claimant removed her own historic timekeeping cards, and I do not accede the inference the respondent impliedly invites me to draw by reason of the cards having gone missing that the claimant had removed them with a view to hiding previous unauthorised early finishes by her.
81. On 8 August 2024, the claimant went off work on sick leave.
82. The claimant says the exchange with Mrs Watts left her stressed. She attended work as usual on 8 August 2023, having asked for a meeting that day, having told him she had attended the doctors and the situation at work was making her ill. On 8 August 2023, she called Mr Watts' mobile and Mrs Watts answered and the claimant explained she had been signed off work.
83. On 9 August 2023, a text was sent to the claimant from Mr Watts' number. It asked for the keys back to the unit. The claimant promptly replied saying she would deliver them. There is an issue over whether, in the call on 8 August 2023, Mrs Watts asked for the keys and the claimant said that somebody would have to come over and collect them, and hence, this was Mrs Watts' justification for attending later that day to collect the keys. Mrs Watts is alleged to have said, during her attendance, words to the effect that the claimant should hand in her notice, and that she would not be paid sick pay much longer. Mrs Watts denies saying these things.
84. I find that these statements were made as the claimant says. I do not accept Mrs Watts' evidence that she was told somebody would need to collect the keys, this is inconsistent

with the message sent by the claimant that same day, in which she noted she would drop them back.

85. The one part of the attendance on 9 August 2023 that is undisputed, is that a letter was given to the claimant, which was an invitation to an investigation. There was little detail in that letter, it stated:

"... It has come to our attend (sic) that a number of overtime payments have been made that have given us cause for concern. I am therefore writing to inform you that the organisation has decide (sic) to carry out an investigation into the following:

- *Unauthorised payments made to yourself via payroll*

...

During this time, we will be interviewing relevant parties, examining documents, and considering the next steps. We may also invite you to an investigatory meeting where you will have the opportunity to explain your version of events ..."

86. On 11 August 2023, there was an attendance at the respondent's offices, by Mr Harrison, which I have addressed above.

87. On 21 August 2023, the claimant wrote to Mr Watts raising a grievance. The letter complained about:

- a. Being subjected to abusive language from Mrs Watts;
- b. A lack of impartiality in the investigation, by reason of being locked out of the respondent's computer system and the unit keys being demanded be returned; and
- c. A fictitious investigation being mounted to discipline the claimant by reason of a disagreement between her and Ms Watts on the issue of timekeeping.

88. That same day, on 21 August 2023, Lindsey Brown, HR Advisor to the respondent, emailed to say that a letter needed to be sent to the claimant to advise on the outcome of the investigation. It noted that this was *"Following [Ms Brown's] conversation with [Mrs Watts] last week..."*. It made clear that the letter should *"...tell the story of what you have found out, so that [the claimant] has the opportunity to respond and/or provide any mitigation"*.

89. The respondent's letter is at page 88 of the bundle; it was sent out on 22 August 2023. It stated:

"Further to my letter informing you of an investigation into Unauthorised payments made to yourself via payroll, it has been decided that the matter should proceed to a formal disciplinary meeting.

You are therefore invited to a disciplinary meeting at 10am on Thursday 24th August at our offices. This will be chaired by Judy Watts and Lindsey Brown ...

The purpose of the meeting will be to discuss the allegations of misconduct made against you....

Please find enclosed a copy of the investigation report ...”

90. The investigation report stated, insofar as relevant:

“An investigation is being carried out into the following:

Unauthorised payments made to Melanie Harrison to herself via payroll.

In order to carry out this investigation, I have looked into the following documents and systems:

- *Wage slips*
- *Emails between Kendal and Wadley accountants and Melanie Harrison...*

Evidence

During the course of the investigation, it has been established that the following payments have been made

2023 – 2017 – Unauthorized payments have been made and an investigation is still being carried out further into these dates and more dated prior to the year 2017...”

91. In response, the claimant wrote a letter dated 22 August 2023, which noted that she was still on sick leave, she had raised a grievance against Mrs Watts and suggested that Mrs Watts should not hear the disciplinary; the claimant noted too, that she did not believe she had been given sufficient information about the allegation against her.

92. Ms Thomas was critical of the way in which the disciplinary process was handled and rightly so. There is nowhere near adequate information within the letter convening the disciplinary to enable the claimant to properly prepare for, and respond to, any allegations of misconduct. Indeed, it was not even the case that the report raised alleged misconduct in unauthorised payments in a six-year period but went on to suggest that the enquiries being made went further back still before 2017. This means, as Ms Thomas rightly noted, that the claimant potentially had to consider what the position had been since 2009 in respect of every payment ever made to her, which would have been an impossible task.

93. This was grossly inadequate. There could be no fair or reasonable process by reason of the absence of any real detail being provided to the claimant. It is no answer for the respondent to suggest, as it does, that the claimant would have known what she did wrong. I have no doubt that had the claimant have been dismissed by reason of this process at the intended disciplinary hearing, she would have been found to have been unfairly dismissed, if for no reason other than procedural unfairness in the disciplinary process.

94. The claimant received no response to her letter of 22 August 2023.

95. On Saturday 26 August 2023, the claimant emailed Mr Watts, asking when her “...*salary, sick pay and payslip will be ready*”. The claimant’s contract required payment of wages to be made by the 25th day of each calendar month, and the evidence was that monies were usually paid on the 21st of each month. Having not received payment, therefore, by 26 August 2024, the claimant understandably chased.
96. Again, the claimant received no reply to her email.
97. On 30 August 2023, the claimant emailed and posted a letter to the respondent in which she included her resignation, stating that she believed she had been constructively and unfairly dismissed. In reaching that conclusion, she cited the following:
- a. That she had been subjected to abusive language and intimidating conduct by Mrs Watts;
 - b. That the keys she had in her possession had been demanded to be returned, prior to her being suspended or dismissed;
 - c. She had been locked out of the computer systems of the respondent, again, without having been suspended and, she said, without any details of specific allegations made against her;
 - d. A fictitious investigation being mounted against her to discipline her, simply because she was of a difference of opinion with Ms Watts (and Mrs Watts) regarding timekeeping;
 - e. The damage caused to her coffee machine;
 - f. The absence of payment having been made for her salary/SSP due between 17 July and 18 August 2023; and
 - g. The absence of any engagement with the claimant’s intended disciplinary procedure.
98. Ms Watts told me that she had struggled with payroll for the claimant, because it was the claimant that used to do it for everybody liaising as necessary with the accountants. Ms Watts did not deny that other members of staff had been paid, but said she had difficulties with the calculation of pay for the claimant, as there were issues of SSP and holiday pay that needed to be part of the calculation and that she did not know what she was doing. I accept that explanation given by Ms Watts, and I note that there was indeed an attempt to pay the claimant, because a cheque was sent to her, albeit for the wrong amount it seems, and the claimant herself references a cheque dated 18 August 2023 in the sum of £900.
99. Further, email correspondence between the respondent and Ms Harrison in late September refers to the need for the accountants to revert with details about the wages, to correct the incorrect payment made in the August pay-run. The payroll could be

expected to have been processed by the 25th of the month, but that did not happen vis-à-vis the claimant.

100. The claimant herself appears to have identified, in her letter to the respondent dated 2 October 2023, what monies were payable to her, in some detail. Subsequent correspondence between Ms Watts and the accountant reveals that there was a check made against what the claimant had suggested was due, and that enquiries were still being made and some parts of the claimant's breakdown were agreed, others disputed. Whether specific items were right or wrong is not strictly relevant for present purposes, because I accept that there were genuine queries raised by the respondent as to the correct sums payable to the claimant.
101. I do not believe that there was any attempt to deprive the claimant of the monies due to her, rather, that payroll responsibilities shifted from the claimant to Ms Watts, and Ms Watts was, in all reality, not prepared for that responsibility that came with it, and she admitted as much in the cross examination of her.
102. I am mindful of the fact that the respondent is a small, family run business, and that the claimant had, for many years, been dealing with the payroll function. Upon her absence from the business, the task fell to Ms Watts,
103. I do not consider that the errors and delays with payroll in this case amount to a repudiatory breach of contract. There was a reasonable excuse for the difficulties with the claimant's pay, and there was an attempt to pay her some monies by the cheque of 18 August 2023, albeit it transpired, an incorrect sum.
104. I do not accept, as was suggested in cross examination, that there was anything malicious about the respondent's approach in payroll issues.

F. IS THERE A CONSTRUCTIVE UNFAIR DISMISSAL?

105. I then turn to apply the facts as I have found them to determine whether there is a breach of the implied term.
106. In submissions, Ms Thomas relied upon:
 - a. the absence of payment by the 25th day of the month (as per the employment contract) as being a fundamental breach of an express term, although the case was put in the way that this is an important incident which was a factor that would be considered a breach of the implied term;
 - b. the last straw doctrine, in that a series of actions taken together amount to a repudiatory breach, and the issues highlighted to me were:
 - i. the aggressive behaviour of Mrs Watts on 1 or 2 August 2023 (I have found this did happen, and took place on 1 August 2023);

- ii. the attendance at the claimant's home on 9 August 2023, and the demand that notice should be given during that visit (I have found that this did happen, as alleged);
 - iii. the destruction of the coffee machine by Mrs Watts (I have found that she was responsible for damaging the machine, but that she was provoked into doing so); and
 - iv. that the investigation:
 - (a) has no reasonable basis for being commenced (I have found that there was a reasonable basis for it); and
 - (b) was carried out in an unfair manner (I have found that it was unfair).
107. I remind myself that for there to be a breach of the implied term, there must be two things: (a) the absence of reasonable and proper cause, for (b) conduct which is calculated to, or likely to destroy or seriously damage, the relationship of trust and confidence.
108. I am not satisfied that the failure to make payment by the 25th of the month was, of itself, sufficient to amount to a breach of the implied term. The failure to pay the correct sum was due to the errors in payroll, caused by the claimant's unexpected absence, and this had always been her primary role. Ms Watts was out of her depth and unable to properly deal with payroll issues that arose for the claimant. I am satisfied that there was a reasonable and proper reason for the failure to make a payment to the claimant by the 25th of August 2023. A payment did arrive by 30th August 2023, but it was incorrect, which I have found was due to inadequacies by Ms Watts and her lack of experience on payroll, but that was not unreasonable, given that this was not in fact her usual role, as payroll was dealt with by the claimant.
109. As to the last straw doctrine, the claimant says that the series of events mentioned above, where I have found in the claimant's favour, together should be taken to amount to a breach of the implied term. I agree.
110. I have no doubt that a director of the employer who tells a longstanding member of staff such as I have found, as set out at paragraph 4(a) and 4(c) above - speaking discourteously, rudely, to them, demands their resignation, threatens to cease sick pay, and then pursues an investigatory process and disciplinary process that does not address concerns raised by the employee to provide sufficient information to understand the nature of the allegations being made, all taken together, does indeed amount to a breach of the implied term.
111. There is no potentially fair reason for the dismissal – none was suggested to me, none appears on the updated grounds of resistance, and I find that none exists.

112. Whilst I am satisfied that the initial investigation letter was put together without fuller detail at that stage was entirely reasonable, and proper, the advice letter in the bundle from Lindsey Brown (the respondent's HR advisor) dated 21 August 2023, did advise that detail of the findings of the investigation should be included in the disciplinary letter – yet, they were not. However, that same email contained a letter, which was not included in a pre-approval and post-approval status in the bundle. What is clear, however, is that Ms Brown was working with Ms Watts on the content of the disciplinary letter, and that Ms Brown had made it clear that the findings of the investigation should be detailed in the letter and yet, they were not. I do not know why this might be.
113. Therefore, the inadequacies in the disciplinary process, whilst I do not consider them repudiatory in nature in and of themselves, would no doubt have added the difficulties experienced by the claimant in trying to defend a claim, no real detail of which had been provided to her. The claimant would be entirely justified in believing she might not have had a fair disciplinary process. There is no reasonable reason for having not provided proper details of the allegations being made against her, for example, the dates she was said to have finished early, the sums claimed in the payroll for that period, in response to which, no doubt, the claimant would have set out the fact she believed she had an agreement with Mr Watts, at which that aspect could have been more fully explored.
114. The events to which I have referred, even the 11 August 2023 incident with the coffee machine, can properly be said to have caused a breakdown in the relationship between the parties.
115. The respondent's position is that the claimant did not resign by reason of any breach of the implied term, but rather, but she was being investigated for timekeeping issues and would have been found out – that she was guilty of misconduct and would have been dismissed. In light of the factual findings I have made, I consider it more likely than not that the claimant resigned by reason of the series of events from 1 August 2023 to which I have referred above, in view of the fact she felt she would not receive a fair outcome of the disciplinary process and that the "fix was in".
116. The claimant's claim for constructive unfair dismissal therefore succeeds.

G. REMEDY

117. The claimant prepared a schedule of loss at page 42 of the bundle. In submissions, Mr Clarke indicated he took issue with the following aspects should I conclude, as I now have, that the claimant was subject to a constructive unfair dismissal:
- a. That the claimant took a job that was appropriate for mitigation purposes, and that she could have secured a job at the same rate of pay as the respondents paid;
 - b. The 25% uplift on damages, it was said this should not apply, or should be reduced; and

- c. That the maximum compensatory period that should be permitted is 12 weeks pay (the difference in the pay between the sum paid by the respondent and that paid by the new employer).
118. No issue was taken with the basic award, which I am content should be awarded at the figure of £8,680.50 as sought. Damages recognising the wrongful dismissal aspect can be included within the compensatory award – it at £532.96 per week for 12 weeks and equates to £6,395.52 and is a sum I shall award.
119. The claimant did not give evidence, whether in her witness statement or under cross examination, as to the circumstances of finding a new job, the relevant hourly rate, and the potential inability to find work of an alternative value. However, it was suggested by Ms Thomas, that I should infer that there was no alternative role for the claimant of the same kind as that undertaken at the respondent for the salary paid by the respondent.
120. The respondent paid a salary of £34,840 at the date of dismissal. The claimant secured alternative employment from 12 September 2023, albeit at a lesser annual rate of £24,690. Mr Clarke did not take issue with the weekly sums paid or the annual equivalent so I proceed on the basis of those amounts.
121. I cannot realistically infer simply because the claimant obtained a new role at £24,690 that she had made reasonable efforts to find that role and acted reasonably in doing so. There may be many reasons somebody takes a specific role, and it is not appropriate to speculate as to why the claimant took this role, it may have been closer to home, offered more favourable hours, working conditions, may have provided an opportunity for training and/or promotion and so on.
122. It is ultimately for the claimant to prove her losses, and that steps were taken to mitigate appropriately. Simply seeking losses in a schedule of loss is not the same as evidencing those losses and addressing issues of reasonableness of recovery (or, put another way, that loss was mitigated).
123. I am conscious that somebody with the claimant's experience, and otherwise unblemished record of 14 years with the respondent, would likely have found an alternative role, within 6 months of dismissal, from 30 August 2023 (i.e. by 29 February 2024).
124. So, taking account of those issues, and the differences in pay from the old and new employment, I award the following sums from the end of the 12 week notice period:
- a. 22 November 2023 to 2 January 2024 (6 weeks) - £2,131.50; and
 - b. 3 Jan to 28 February 2024 (8 weeks) - £2,144.
125. The tribunal has a discretion whether to increase (or reduce) an award by up to 25% by reason of the employers (or employees) failures to follow the ACAS Code of Practice

on Disciplinary and Grievance Procedures (s.207A Trade Union and Labour Relations (Consolidation) Act 1992.

126. In this case, the criticism made in respect of the disciplinary process is really focussed on the investigation stage and the convening letter for the disciplinary process, with a lack of detail of payments being made. I recognise that this lack of detail is likely to have caused the claimant to believe that she could not properly prepare and that the outcome was likely to have been decided against her, especially when taken together with the other issues I have discussed.
127. In my judgment, the way in which the disciplinary and grievance process was handled was a small part, albeit a contributory one, to the claimant's decision to resign.
128. I conclude that it is appropriate to apply an increase under s.207A TULRCA 1992, but will limit that increase to 10%, which I consider more properly reflective of the deficiencies in the disciplinary process, of which a proper investigation is part of that process, and will therefore award the following sums:
129. Therefore, I make the following award:
 - a. Basic Award: £8,680.50; and
 - b. Compensatory award: £12,288.12, comprising:
 - i. 12 weeks notice period - £6,395.52;
 - ii. 14 weeks pay difference: £4,275.50;
 - iii. Loss of statutory rights: £500
 - iv. 10% uplift on these figures: £1,117.10
130. Accordingly, the total award made is £20,968.62. This sum must be paid to the claimant within 14 days of this decision being sent to the parties by the tribunal.

Employment Judge C Kelly
18 July 2024