



EMPLOYMENT TRIBUNALS

Claimant: Ms M A Fealy

Respondent: J Cullen Thermals Limited

FINAL HEARING

Heard at: Midlands (West) (by CVP)

On: 21 to 23 September 2020

Before: Employment Judge Camp

Appearances

For the claimant: Mr Z Malik, legal executive

For the respondent: Ms S Younis, lay representative (consultant)

RESERVED JUDGMENT

- (1) The claimant's claim fails and is dismissed.
- (2) The respondent's claim fails and is dismissed.

REASONS

Introduction

1. This is a sad case. The claimant was employed by the respondent, a small, family-run thermal insulation and asbestos removal and surveying business, from 1983 until her resignation with effect on 25 May 2018. At the time of her resignation she was the Administration Director, one of three directors, the other two being husband and wife and the respondent's owners: Mr B Slammon and Mrs D Dale. Mr Slammon had been employed by the respondent even longer than the claimant, they knew each other well, and the impression I get is that they had been friends.
2. The claimant resigned after she was told, on or around 18 May 2018, that her hours and pay were being reduced, they having previously been reduced in November 2017. She convinced herself that the respondent had a plan to keep reducing her hours and pay until either she resigned or they decided to make her redundant. I am sure the respondent didn't have any such plan. But the claimant genuinely believed it did and, unfortunately, Mr Slammon's and Mrs Dale's lack of prior discussion and consultation with the claimant did nothing to allay her fears.

3. The claimant went through early conciliation from 21 July to 13 August 2018 and presented a claim form on 13 September 2018. In the claim form she claims unfair constructive dismissal and unauthorised deductions from wages / breach of contract. The wages / contract claim relates to an alleged underpayment of salary from the first reduction in her hours of pay, to unpaid lunch breaks, and to her alleged holiday entitlement.
4. The claimant bases her allegation that she was constructively dismissed principally on a course of conduct that she says breached the so-called trust and confidence term. That course of conduct consists of, by my count, twenty separate allegations dating back to 2010.
5. Although I have ultimately decided the claim in the respondent's favour, the claimant always had a potentially meritorious and relatively straightforward constructive unfair dismissal claim made on the basis of the proposed reduction in her hours and pay in May 2018 coming on top of the reduction of November 2017. Events from 2010 to October 2017, about which there has been a great deal of evidence, are almost entirely irrelevant to the issues I have had to decide.
6. The respondent made its own claim against the claimant, which I shall explain in a moment. Following a hearing on 30 January 2019 before Employment Judge Self, both the claimant's Grounds of Complaint and the respondent's particulars of response (including the respondent's claim) were amended with the Tribunal's permission.
7. The claimant's claim was amended only on a few points of detail.
8. The respondent's claim, as amended, was based on an allegation that the claimant had, "*breached the implied term of trust and confidence and the express term relating to wastage within the respondent's employee handbook that states, "Any loss to us that is as a result of your failure to observe rules of procedure or instructions, or is the result of your negligent behaviour or your unsatisfactory standards of work, will render you liable to reimburse us the full or part cost of the loss."*
9. The amounts claimed by the respondent from the claimant are:
 - 9.1 a sum of £197.40, which she caused to be sent to the respondent's insurance broker for car insurance on her own personal car;
 - 9.2 a sum of £105.26, which she caused to be paid by the respondent in respect of RAC breakdown cover for her car;
 - 9.3 a sum of £115, which she caused to be paid by the respondent in respect of vehicle tax for her car.
10. The evidence that was put before me consisted of witness evidence from the claimant herself and, from the respondents' side, Mr Slammon and Mrs Dale, and their children, Mr C Slammon¹ and Ms J Dale. Ms Dale has worked for the respondent since September 2010. She seems to have had an increasingly prominent role within the business as the years have gone by, particularly latterly

¹ I shall differentiate between Mr Slammon senior and his son by referring to the former as "Mr Slammon" and the latter as "Mr C Slammon".

as a large part of her role has been to assist Mr Slammon, who is, sadly, increasingly unwell as the result of a progressive illness. Mr C Slammon was the respondent's employee since February 2011. He started as a Trainee Surveyor. At the time of the events with which this claim is mainly concerned, he was employed as a Surveyor, but he was doing this only as a part-time role, because he was at university. He left the respondent's employment in August 2019.

11. At the most relevant time – the run-up to the first reduction in hours and pay in November 2017 – the claimant was the only person working full-time in the respondent's offices. Mrs Dale was only an occasional visitor; as already mentioned, Mr C Slammon was part-time and worked both in the office and out conducting surveys; Mr Slammon was mostly out and about seeing customers and checking up on the workforce, often, and as time progressed usually, and in the end always, accompanied by Ms Dale.
12. The documentary evidence consisted of a file of documents of over 350 pages, albeit nearly 100 pages of that was made up of the claim and response forms, amendments to them, and other documents relating to the tribunal proceedings themselves; and most of the rest of the documents were only peripherally, if at all, relevant to my decision.
13. Shortly before the start of the hearing, I was presented with the following in addition: a skeleton argument from Mr Malik, the claimant's solicitor; a chronology and list of issues from the respondent. Ms Younis for the respondent also produced a set of written closing submissions.

Issues

14. In reality, the claimant's case has one issue and one issue only in it, namely: was the claimant dismissed? That issue can be broken down into the following subsidiary issues:
 - 14.1 precisely what happened in and around the second proposed reduction in the claimants pay and the working hours of May 2018?
 - 14.2 was that in and of itself a breach of contract?
 - 14.3 if so, was the breach a fundamental one?
 - 14.4 if not, did the respondent do, and what happened in relation to, the things, (a) to (r), listed under paragraph 12 of the claimant's amended Grounds of Complaint of November 2018?
 - 14.5 did those things, singly or together, breach the implied term of trust and confidence, i.e. did the respondent, without reasonable and proper cause, behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent?
 - 14.6 did the claimant resign in response to the breach, i.e. was the breach of contract was a reason for claimants resignation? I did not need to decide this issue because of my decisions on the others.
 - 14.7 did the claimant affirm the contract before resigning?

15. Had I decided the claimant was constructively dismissed, I would have to have dealt with other issues; but because I have decided she wasn't, they don't arise.
16. The one and only issue in each of the claimant's wages claims are: did the respondent pay the claimant less than she was entitled to, in breach of her contract of employment?
17. The issue in the respondent's claim is: did the claimant breach her contract of employment by causing the respondent to make the relevant payments connected with her personal – non-company – car?

The law

18. The relevant law appears substantially in the issues as outlined above. Dismissal includes an employee terminating, "*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*": ERA section 95(1)(c). What this means was definitively decided by the Court of Appeal in Western Excavations v Sharp [1977] EWCA Civ 165, in the well-known passage beginning, "*If the employer is guilty of conduct which is a significant breach...*" and ending, "*He will be regarded as having elected to affirm the contract.*"
19. As already explained, the claimant mainly relies, as the "*significant* [a.k.a. fundamental or repudiatory] *breach*", on a breach of the trust and confidence term. Any breach of that term is repudiatory. This serves to highlight that it is a high-threshold test: "*destroy or seriously damage*" is the wording used. It is not enough, for example, that – without more – the employer acted unreasonably or unfairly.
20. To further emphasise how grave things must be for there to be a breach of the trust and confidence term, or some other fundamental breach of the contract of employment, I note that a fundamental breach is one going to the root of the contract; one that, adopting the wording used in some of the cases, "*evinces an intention not to be bound*" by the contract.
21. This is – to an extent – a 'last straw' case. An essential ingredient of the final act or last straw in a constructive dismissal claim where what is relied on is a course of conduct is that it is an act in a series the cumulative effect of which is to amount to the breach of the trust and confidence term. The final act need not necessarily be blameworthy or unreasonable, but it has to contribute something to the breach, even if relatively insignificant. See Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493.
22. In relation to affirmation, (which is referred to at the end of the above-mentioned passage from Western Excavations), I note paragraphs 11 to 15 and 21 to 29 of the decision of the EAT in Cockram v Air Products Plc [2014] IRLR 672.

Facts & decision on the issues

23. I shall now go through the claimant's allegations, (a) to (r), one by one. Making findings of fact in relation to each of them and then, separately, setting out my decisions on the issues on the basis of those findings would unnecessarily lengthen what is already going to be a lengthy set of Reasons. Instead, what I am going to do is to make my findings and deal with the issues as I go along.

24. Before doing so, I note that, although Mr Malik for the claimant confirmed in closing submissions that he was focussing his attention on events from late November 2017 onwards, and in particular on the reductions from the claimants wages, he also confirmed that she was maintaining all of her allegations against the respondent and was not making any concessions at all as to the irrelevance of any of the things on which her constructive unfair dismissal claim is nominally based, even in relation to things that happened more than 5 years before her resignation. Therefore I don't think I have any option but to deal with all of them.
25. However I can and do make a general point in relation to everything that occurred before November 2017:
 - 25.1 whatever the claimant felt, objectively assessed, these events had no significant effect on trust and confidence between the claimant and the respondent by the time she resigned;
 - 25.2 this means that even if any of the things that occurred before November 2017 were without reasonable and proper cause and were calculated or likely to destroy or seriously damage the relationship with trust and confidence between the claimant and the respondent (and I don't think any of them were), the claimant was not constructively dismissed because of them;
 - 25.3 as she did not resign at the time, but instead continued to work until her resignation in May 2018, she affirmed the contract of employment in relation to any fundamental breach of it that occurred pre-November 2017 in any event.

(a) The claimant was undermined by Mr Slammon when he unilaterally decided without consultation with the claimant that Ms Dale would start working with the respondent in or around 2010.

26. Underlying this allegation and several others is a general complaint by the claimant which has not really been articulated by her or put forward on her behalf as part of her claim. It is this: she was made a director of the respondent company, but wasn't treated like one.
27. I have to be careful to distinguish between the complaints the claimant may have as a former director, which are not for the Tribunal, and those she has as a former employee, which are. Nevertheless, the fact that she was a director of the respondent meant that she could reasonably expect her status as an employee to be higher than it would otherwise have been.
28. There has been a dearth of evidence about how decisions were made within the respondent. I have heard nothing about board meetings or seen any board meeting minutes, for example. It does, though, seem to be reasonably clear that most or all of the high level strategic decisions taken within the company were made, without significant consultation of the claimant, by Mrs Dale and Mr Slammon.
29. I quite understand why this apparent failure to treat the claimant as if she were a full member of the board of directors would irk her. But it seems to have been the way in which the company was run from at least when Mr Slammon and Mrs Dale

bought it, which was in or around 2011. By the time of her resignation 7 years or so later, it could not, in of itself, have had any significant impact on the relationship of trust and confidence.

30. This specific allegation actually arises from before Mr Slammon and Mrs Dale took over (although Mr Slammon had been a director for some time). I am not satisfied that the respondent lacked reasonable and proper cause for the appointment of Ms Dale; I am not satisfied that her appointment or the manner of it, subjectively or objectively, had any effect on the relationship of trust and confidence between the respondent and the claimant; and in any event, an appointment of 2010 is of total irrelevance to the claimant's resignation in 2018.

(b) In 2010/2011 Brian procured that the claimant sell him her then 5% shareholding in the respondent company on the promise that she could buy it back later, and when the claimant requested the buyback, this was refused without explanation.

31. Factually, the allegation being made by the claimant is slightly different from the allegation set out in her Grounds of Complaint. In her witness statement, she says, *"I did not buy the shares back. I tried to raise the question with [Mr Slammon], but he never said anything more and I was embarrassed... when I did mention it to [Mrs Dale], she just said no."*
32. We are dealing here with events that occurred many years before this claim was brought. Memories have faded, and it is in practice almost impossible to get to the truth of what happened.
33. It is inherently likely that there was simply a misunderstanding or miscommunication between the claimant and Mr Slammon. Whether it was a misunderstanding or something else, it related to shares and had nothing to do with the claimant's employment. In so far as there was a dispute, it was a shareholder dispute not an employment dispute. In any event, there was no substantial evidence of the subject matter of the issue being raised again. It had no importance whatsoever in relation to the latter stages of the claimant's employment. There was no significant damage to the relationship or trust and confidence between employer and employee at the time, still less seven or eight years later when the claimant resigned.

(c) In 2011, at or around the time the written particulars were provided, Mrs Dale stated to the claimant, "No one gets 30 days holiday", notwithstanding the claimant had been entitled to 30 days holiday from 2007.

34. I accept, on the basis of the *"Holiday Planner"* documents in the final hearing bundle, that the claimant at least believed she was entitled to and did in practice use a holiday allowance of 30 days in the late noughties, up to 2011. However, that is of no significance to this claim, because of what happened in 2011.
35. On 14 June 2011, the respondent provided the claimant with a written statement of employment particulars which reduced her entitlement, for all intents and purposes, to the legal minimum. The claimant signed the written statement in June 2011. There is no evidence that she protested or sought to reserve any rights when she signed them. In her witness statement, she states, *"I felt compelled to sign the contract as I could not afford to be out of work"*. When asked about that

during the hearing, she confirmed what she meant was that she felt she had to sign to keep her job.

36. The position is that if there was a variation of her contract of employment in 2011, the claimant expressly agreed to it at the time in consideration for the respondent continuing to employ her. Even if she had not signed up then, her initial lack of objection, her continuing lack of protest, and the very significant passage of time would, taken together, mean she had implicitly consented to this contractual change (if change it was) well before her resignation.
37. Whatever the claimant felt about it in 2011 or in 2018, any change to her holiday entitlement – one that she accepted around 7 years before her resignation – had no effect on the relationship of trust and confidence between her and the respondent by the time she resigned.

(d) In 2011... Dawn unilaterally stopped contractual sick pay

38. Much the same applies to this allegation as to the previous one. The employment particulars the claimant signed in 2011 referred only to statutory sick pay and it was implicit from them that, in so far as contractual sick pay had previously been paid, it was no longer available. The claimant was evidently aware that contractual sick pay was not being paid.
39. The claimant signed a Statement of Main Terms and Conditions of Employment in March 2013. This stated, explicitly, “*There is no contractual sickness/injury payment scheme in addition to SSP*”. Again, this was a document the claimant felt she had no choice but to sign, on the basis that her signing it was a condition of her continuing in the respondent’s employment.
40. There is no substantial evidence that she complained about this change (again, if change it was) at the time or, really, at all. The loss of any entitlement to contractual sick pay from 2011, which the claimant accepted in terms in 2013, is irrelevant to the assessment of whether there was a breach of the trust and confidence term in 2018.

(e) The claimant was made to work back any time she requested for hospital appointments and Pilates, but Mr Slammon, Mrs Dale and Ms Dale routinely took time off, but were nonetheless paid as if working without having to work the time back.

41. Even based on the claimant’s own oral evidence at this final hearing, she was never “*made to work back*” time and this complaint is not made out on the facts. Rather than working extra hours, she took the time off as holiday. She did so off her own bat. It was not something others instructed or required her to do. Similarly, the claimant would sometimes, on her own initiative, come in early so that she could leave early, to attend activities such as Pilates.
42. In addition, it became clear during the claimant’s cross-examination that she had no idea whether other people were making up for any time spent not working during normal office hours by working at other times, as they in fact did. Whereas she herself only worked in the office, and – apart from occasionally starting a little early – essentially only worked during office hours, Brian and Jessica worked significantly more than their contracted hours, without additional remuneration.

43. Even if this allegation in the claim form was factually accurate, it is an allegation about something that had been happening for many years before the claimant's resignation, and I am not satisfied that it had anything to do with it.

(f) In 2014 Mrs Dale requested the claimant give up her company car but for the claimant to pay the benefit in kind however when requested Mrs Dale refused to put down in writing what the benefit to the claimant would be.

44. This is another allegation which fails on the facts. All I am satisfied of on the evidence is that there was a conversation between the claimant and Mrs Dale (several years before the claimant's resignation and again nothing to do with it) to the effect that the claimant might be better off tax-wise if she gave up her company car. Mrs Dale, not being an expert, was not able to tell the claimant what the tax saving might be. Mrs Dale did not 'request' the claimant to do anything relevant and did not 'refuse' to do anything relevant.

(g) On several occasions Mrs Dale was accusatory and abrupt with the claimant when querying simple administrative issues which arose from time to time.

45. I accept that, as in any office, there were times when there was some friction in personal relationships, but not that there was anything remotely out of the ordinary. Certainly, at no stage was any significant damage caused to the relationship of trust and confidence by Mrs Dale's behaviour in this respect.

(h) In 2015 a new CCTV was installed which, without consultation with the claimant, enabled Mrs Dale and Mr Slammon to watch the claimant at work live from home.

46. New CCTV was installed because the previous CCTV system was inadequate. The new system did not enable anyone to spy on the claimant in the office. If that is what the claimant believes, that she is simply mistaken. The claimant did not complain about this at the time, nor am I satisfied it was of concern to her at the time. It caused no significant damage to the relationship of trust and confidence in 2015, and is of total irrelevance to whether or not she was constructively dismissed some 3 years later.

(i) In 2016 once the respondent had moved offices Mr Slammon, Mrs Dale and Ms Dale routinely went up to the house for lunch from which the claimant was excluded.

47. This appears to me to be a further instance of the claimant becoming aggrieved about something purely in hindsight. It is right that, in or around 2016, the respondent moved premises to a building that was situated in the garden of Mr Slammon's, Mrs Dale's and Ms Dale's family home. Occasionally, Mr Slammon, Mrs Dale and Ms Dale might have a meal together in the house. The allegation that this happened "*routinely*" is not substantially supported even by the claimant's own evidence at this final hearing. Even if it had happened routinely, the claimant was not being "*excluded*" in any real sense: it was simply that it was convenient for them to have lunch in their own house. I do not accept that this caused any damage to trust and confidence even when it first happened, and it did not have any impact on trust and confidence by the time of the claimant's resignation.

(j) Once the respondent had moved premises, Mr Slammon, Mrs Dale and Ms Dale would have meetings with Insurers and accountants in the house from which the claimant was excluded.

48. As already mentioned, it does seem to be the case that the claimant's involvement in the high-level running of the respondent company was not as great as one might expect of someone who was a director. However, that was consistently the case from 2011.
49. In relation to this specific allegation, the evidence is sparse. There is nothing, or almost nothing, about it in the claimant's witness statement; and I don't think she gave any oral evidence about it. No doubt there were meetings relating to the running of the company that were held in Mrs Dale's and Mr Slammon's home to which the claimant was not invited. On the limited material available to me: this would have happened because it was convenient, not out of any desire to exclude the claimant; Ms Dale was not involved.
50. The claimant appears not to have raised this as an issue during her employment. There was no significant damage to the relationship of trust and confidence at any time.

(k) Mrs Dale stated to the claimant in or around 2016 that no matter how long she stayed with the respondent she would never get a salary increase as she was on the top salary, notwithstanding that pro rata Ms Dale was on a higher salary.

51. I am not satisfied that Mrs Dale made any such comment. It is her word against that of the claimant and it is inherently unlikely that she would say any such thing. I also note the inconsistency between the allegation in the Grounds of Complaint that this was said, "*in or around 2016*", and what is in the claimant's witness statement: that it was when Mr Slammon and Mrs Dale "*took over*", i.e. in 2011.
52. Further, Ms Dale was not on a higher salary pro rata than the claimant, taking into account Ms Dale's real hours of work rather than her theoretical, contracted hours.
53. Even if this comment was said, on the basis of the claimant's most recent version of events, it was said in 2011 and cannot have had a significant impact on the trust and confidence relationship in 2018, even if it was on her mind at the time, which I doubt it was.

(l) Everyone within the respondent's employ had a salary increase from when Mrs Dale and Mr Slammon took over the running respondent except the claimant.

54. It is not correct that everyone had a salary increase except for the claimant: others were in the same boat.
55. As far as I can tell, the claimant never complained about this during her employment. I don't think pay was a concern of hers during her employment until November 2017. The real issue for the claimant when it came to her resignation was her pay being reduced because of the reduction in hours. The fact that the claimant had not had a pay rise was not, in and of itself, significant so far as concerns the relationship of trust and confidence when she came to resign.

(m) In March 2017 the claimant brought her own car and Mrs Dale said the respondent would tax and insure it and latterly retracted this.

56. The claimant's evidence at this final hearing in relation to this allegation was rather unclear and at times contradictory. On the basis of that evidence, as best I could understand it, the relevant discussions between her and Mrs Dale were not in 2017, which was when the claimant stopped having a company car and got her own car instead, but in 2016, or possibly even longer ago than that. They were the same set of discussions as those to which complaint (f) relates, about whether the claimant would be better off not having a company car. Mrs Dale made no promises to the claimant and when, sometime later, the claimant gave up her company car, she simply assumed that the respondent would continue to pay her MOT and insurance.
57. The claimant does not, in fact, seem to be alleging that the respondent did anything wrong here. Even if she is, I do not accept any such allegation, still less any allegation that what happened was still causing significant damage to the trust and confidence relationship at the time of her resignation, over a year later.
58. What happened in relation to this is relevant to the respondent's claim against the claimant, but is completely irrelevant to her constructive dismissal claim.

(n) On 28 November 2017 Mrs Dale called the claimant into Mr Slammon's office in the morning and, without any prior consultation, informed the claimant she was being placed on short-time working with effect from 1 December 2017.

59. Before coming to events of November 2017, I need to explain a bit of the background.
60. The respondent had made use of short-time working, as and when necessary, for many years. The claimant was aware of this. The case presented to me at first was that that had only ever applied to what were referred to throughout the hearing as "the Men", i.e. to those doing work on site. However, during the hearing the claimant was forced to concede that the respondent had put some office staff on short-time working on at least a couple of occasions. I think the truth was that it simply never occurred to the claimant that she could or might be put on it.
61. When the claimant signed the 2013 Statement of Main Terms and Conditions of Employment, she also signed various other rules, policies and suchlike, and by signing them agreed to them being incorporated into her contract of employment. They were being introduced all at once because, as I understand it, the respondent had acquired new HR advisers. One of those documents was a document headed, "*DEDUCTIONS FROM PAY*". Paragraph 6 of that document was as follows:

If there is a temporary shortage of work for any reason, we will try to maintain your continuity of employment even if this necessitates placing you on short time working If you are placed on short time working, your pay will be reduced according to time actually worked.

62. My view is that that document gave the respondent the right to put her on short-time working, subject always to an obligation to exercise that right reasonably. This would be so even if the respondent did not have a longstanding custom and

practice of putting staff, including administrative staff, on short-time working. As with any other changes made in 2011 and 2013, she agreed to it being a term of her contract in consideration for the respondent continuing to employ her.

63. It is, to say the least, regrettable, and is probably a large part of the reason for the falling-out between the claimant and the respondent, that Mr Slammon and Mrs Dale did not involve the claimant in the discussions that resulted in the decision to put the claimant and others on short-time working. It is evident that the claimant did not appreciate at the time how bad the respondent's financial position was, just as she did not appreciate how unwell Mr Slammon was and how hard he was trying, despite his ill health, to drum up more custom for the respondent to improve its financial position. She remained a director of the respondent's company, but was not really being treated as such. However, as I have already mentioned, her being only nominally a director was not a new phenomenon.
64. The allegation in the Grounds of Complaint gives the impression that the claimant was given just 3 days' notice of being placed on short-time working. That was not so. As she conceded in her witness statement, she was notified on 14 November 2017. Putting to one side the observations already made about how ordinarily all directors of a company would be involved in the drastic decision to put staff on short-time working, 17 days' notice is not unreasonably short, bearing in mind that the reason the decision was taken was the increasingly dire financial state of the company.
65. Although I am sure putting the claimant on short-time working, and doing so without much prior consultation, caused significant damage to the relationship of trust and confidence between the claimant and the respondent in November 2017, the respondent had reasonable and proper cause for what it did and was acting within its contractual rights. In any event:
- 65.1 if and in so far as there was a breach of the trust and the confidence term at the time, the claimant affirmed the contract of employment by continuing to work;
- 65.2 if, contrary to my views, paragraph 6 of the *Deductions from Pay* document did not allow the respondent to put the claimant on short-time working, the claimant agreed to the reduction in her hours and pay in November 2017 and continued to work – reluctantly and feeling she had no choice, but even so – and so agreed to her contract of employment being varied, in consideration for the respondent continuing to employ her.
66. This claim (n), relating to the de facto imposition of short-term working in November 2017, includes a number of subsidiary allegations.
67. The first of the subsidiary allegations – (n)(i) – is that Ms Dale's "*hours had also been reduced the day before however notwithstanding the claimant's directorship status, she was the last to know which was a further demotion in status for the claimant*". This is very similar to other allegations I have already dealt with, to the effect that the claimant was not treated as a director would expect to be treated. I repeat what I have already said about those kinds of allegations:

67.1 the claimant makes a valid point;

- 67.2 this entire dispute might perhaps have been avoided if there had been more consultation with the claimant and if she had been treated as the full director of the company that she was;
- 67.3 however, the claimant had been treated in a similar way for many years and this was not some sudden new loss of status, but a state of affairs that she had long tolerated, without apparent complaint;
- 67.4 any adverse effect on the relationship of trust and confidence in November 2017 was no longer significant by May 2018.
68. Another subsidiary allegation – paragraph (n)(iii) in the Grounds of Complaint – is about an altercation between the claimant and Mrs Dale. It is mirrored by an allegation Mrs Dale makes against the claimant. The claimant complains of verbal aggression by Mrs Dale and of Mrs Dale storming out. Mrs Dale complains of insensitivity by the claimant in relation, in particular, to Mr Slammon’s situation.
69. In short, I don’t think what happened has any significance or relevance to whether the claimant was constructively dismissed when she resigned. I think the slightly different perceptions of the claimant and Mrs Dale of what occurred are based on their perspectives at the time. Because of the lack of warning to and prior consultation with the claimant, the imposition of short-time working came as a shock to her. Part of her reaction seems to have been to question why it was that the business was in such a state that short-time working had to be considered, and in particular why it was Mr Slammon had not been getting sufficient new business in. The claimant did not realise the extent of Mr Slammon’s health difficulties. Mrs Dale, reasonably from her perspective, was angry and upset at what she saw as the claimant’s attack on Mr Slammon and lack of empathy for him. Emotions were clearly running high and both the claimant and Mrs Dale got upset. However, no significant damage to the trust and confidence term was done even at the time by this one-off conversation, let alone damage so bad that significant traces of it remained when the claimant resigned the following year.
70. The final allegation made as part of (n) is a free-standing allegation in its own right and is potentially an important one: that shortly after the meeting between Mrs Dale and the claimant on or around 28 November 2017, Mrs Dale said to her, *“When you are doing half your hours I can make you redundant”*.
71. Although I don’t doubt that the claimant now genuinely remembers Mrs Dale saying this to her, I think she is mistaken, and that she must have misheard or misunderstood something else that was said. This is because:
- 71.1 if there is one thing in this case that is crystal clear, it is that the respondent did not want to make anyone redundant, in any circumstances. The respondent’s solution to lack of work was always short-time working. Indeed, part of the claimant’s complaint is that short-time working was the wrong solution to anything other than very temporary reductions in work, and that if there was a longer-term problem the respondent should have been looking to make redundancies and have followed a full and thorough redundancy consultation process;
- 71.2 the respondent did not want to make the claimant redundant in particular. The claimant was a vital part of the respondent’s business. Following the

claimant's resignation Mrs and Ms Dale between them had to work long hours to cover the claimant's workload, in circumstances where Mrs Dale had no desire to do any office work at all for the respondent;

71.3 the respondent had had professional HR and employment law advisers – Peninsula – since 2013 and it is inherently unlikely that Mrs Dale would have got the idea from them, or from anywhere else, that reducing somebody's hours by 50 percent opened the door to making them redundant. Mrs Dale gave unchallenged evidence that she took advice from Peninsula about short-time working around November 2017. If she had really had redundancy in her mind, she would surely have taken advice about it, and that advice would no doubt have been that any reduction in workload that might lead to a significant reduction in working hours could be used as a justification for redundancy. If the respondent had really wanted to make the claimant redundant, it would surely have done so in November 2017 and not gone through this elaborate charade of reducing the claimant's hours of work by a little bit in November 2017 and then by a little bit more in May 2018;

71.4 the notion that Mrs Dale would both have a devious plan to make the claimant redundant by slowly reducing her work so that she ended up on 50 percent of her contracted hours and openly announce it to the claimant is far-fetched.

(o) On 30 January 2018 Mrs Dale unilaterally imposed upon the claimant that she had to take an extra day off whenever there was a bank holiday Monday, and reiterated this on 20 March 2018.

72. The evidence in relation to this allegation was a little muddled, but the situation seems to have been that: the claimant was entitled to bank holidays off; as the claimant's short-time working included not working on Mondays, a decision had to be made as to what to do about that bank holiday entitlement. The claimant has this back to front and mistakenly thinks that something was to her disadvantage that was, upon analysis, actually to her advantage. If things were simply left with her not working on Mondays come what may, she would effectively lose holiday entitlement; as she wasn't working on Mondays, she wouldn't get paid for that day, whether it was a normal Monday or a bank holiday Monday.

73. Mrs Dale's evidence, which I accept because it was plausible and was in this respect not substantially challenged, was that she took advice from the respondent's employment/HR advisers and at their suggestion asked the claimant to choose another day to take off during each week in which there was a bank holiday Monday, so that the claimant would get a paid day off that week the same as everyone else. There was, it seems to me, reasonable and proper cause for Mrs Dale to do this; I do not accept that it was detrimental to the claimant; objectively assessed, it caused no damage to the relationship of trust and confidence at any time.

(p) The claimant was refused annual leave for February half-term week 2018 on the basis that Mrs Dale was taking her grandchildren to Florida that week however

on 23 February 2018 the claimant learned that no such trip was booked or took place but Mrs Dale failed to disclose this.

74. It remains unclear to me whether the claimant is alleging there was malice involved in this or something else. Be that as it may, the most likely explanation for what occurred is that there was a misunderstanding.
75. It is common ground that Mrs Dale did not take her grandchildren to Florida for February half-term in 2018. Her clear and consistent recollection is that she was never going to be doing so. However, she does recall a conversation with the claimant, sometime in 2017, where she mentioned the possibility of taking her grandchildren to Florida. I suspect what happened was that February half-term came up within this conversation and the claimant thought Mrs Dale was saying that that was when the possible trip to Florida was taking place, and the claimant assumed that meant she couldn't go away then.
76. To the best of my knowledge, nowhere in the claimant's evidence has she said when it was that she sought to book this time off as holiday and had it refused. She has also not explained why it particularly mattered to her that she had that week off (if it did particularly matter). There is no account of a specific conversation with Mrs Dale where she explained to Mrs Dale why she really wanted to take that week off and where Mrs Dale said something along the lines of, "Too bad; you can't."
77. I also note the lack of any specified time frame from the claimant from when this notes request for annual leave February half term 2018 was refused, there is no basis in the evidence for me to find that Mrs Dale should have remembered and should unilaterally have told the claimant, to the extent she had previously refused the claimant annual leave over that week, that she could now take it as annual leave.
78. In her witness statement, the claimant suggested she was aware before February half-term that Mrs Dale was not taking her grandchildren away that week. If it was too late by then for the claimant to take it as holiday and do whatever it was she had wanted to do, she has given no evidence about it.
79. Even if, at some unspecified stage in 2017, the claimant asked to take the week of February 2018 off and was told that she couldn't, or understood that she couldn't from something that Mrs Dale had said:
 - 79.1 I am not satisfied, on the evidence, that what happened was any more than the respondent, through Mrs Dale, exercising its prerogative to tell the claimant, as an employee, that she couldn't take a particular period off as holiday;
 - 79.2 in the absence of any evidence of a detailed discussion between the claimant and Mrs Dale about it, or of the claimant having a very particular reason to want to take that week off which Mrs Dale was aware of, or anything like that, I do not think that any significant damage was caused to the relationship of trust and confidence, and certainly none that lasted to the time of the claimant's resignation.

(q) On 19 April 2018 Mrs Dale had, without prior consultation or warning, deleted files from the claimant's computer while the claimant was not present.

80. This allegation, as advanced at this final hearing, is of no substance even on the claimant's own case. Mrs Dale did indeed delete some files from the claimant's computer. There is no suggestion this was done maliciously. Mrs Dale's substantially unchallenged evidence, which I have no good reason not to accept, was that all she was doing was attempting to tidy up the respondent's computer system by deleting some files that appeared to her not to have been used for some time. She deleted some that, unbeknownst to her, the claimant did still use. The claimant agrees that nothing was permanently lost, because she was able to retrieve the deleted files. On any sensible view, nothing that happened had any impact on the relationship of trust and confidence between employer and employee.

(r) On 18 May 2018 Mrs Dale, without any prior consultation with the claimant, provided her with a letter to sign to the effect that her hours of work would reduce with effect from 21 May 2018 and her pay reduce accordingly

81. There is little or no relevant factual dispute of any substance in relation to this complaint.

82. The claimant has sought to attack the respondent's assertions about its very difficult financial position, but, on the basis of the – admittedly limited – paperwork the respondent has disclosed in support of its witnesses' evidence, there is no objective basis for her doubts in this respect. There was no rational basis for the respondent's proposal to further reduce working hours other than to save money. I have already examined, and rejected, her suggestion that there was some elaborate plan to make her redundant by the back door, or otherwise force her out. She genuinely thought that was what was going on at the time. Part of the reason for her thinking that was the lack of consultation with her. But the respondent did not want to 'get rid' of her, any more than the respondent ever wanted to get rid of anybody.

83. What happened was that Mrs Dale decided to cut the working hours of office staff. She was acting out of financial necessity. It wasn't just the claimant's hours that were reduced, but unfortunately the claimant was not told this because of misplaced concerns about data protection. In the claimant's case, the reduction was a further 3 ¼ hours per week, with a corresponding reduction in pay. This meant that the claimant would have gone from the position as it was prior to November 2017 – 5 days a week, 8.00 am to 4.45 pm Monday to Thursday, and 8.00 am to 3.00 pm on Fridays – to, with effect from 21 May 2018, working 8.15 am to 4.00 pm Tuesday to Thursday and 9.00 am to 3.00 pm on Fridays.

84. I have to decide whether or not this proposed reduction amounted to a breach of the trust and confidence term (or other fundamental breach of contract), either by itself or taken in combination with all that had gone before. It will be cold comfort to the claimant, but it is finally balanced and I have found my decision difficult to make.

85. My starting point is to look at what happened in context and examine the state of the relationship of trust and confidence at the point when this reduction in hours was put to the claimant, on or about 18 May 2018. My view is that, for reasons I

have given when considering each of the individual alleged component parts of the breach of the trust and confidence term prior to then, the relationship of trust and confidence, looked at objectively (which is the way I am obliged to look at it), was in all relevant respects intact. Prior to May 2018, the only thing the claimant relies on in support of her constructive dismissal claim of any substance that is remotely close in time to her resignation is the first reduction in hours, which I have already addressed, and which occurred nearly 6 months previously.

86. What I am therefore in practice assessing is whether what happened in May 2018 was in and of itself a fundamental breach of the contract of employment. As with the previous reduction, I think the respondent was entitled under the contract to impose it on the claimant.
87. The claimant seems to be suggesting that her hours should not have been reduced because she was, allegedly, just as busy as she had ever been, however much work others within the respondent had and whatever the state of its finances. I don't think that can be right as a matter of fact. Ultimately, she conceded the work being done by the respondent reduced. On the evidence, that reduction was considerable. The respondent had gone from having turnover of close to a million pounds in the year ending 30 June 2014 to turnover of under £400,000 for the year ending 30 June 2018. The respondent's witnesses' evidence was to the effect that the office was regularly closing early because there was nothing to do. In the circumstances, the claimant's suggestion that she was very busy is simply not credible.
88. Even if were true that the claimant was rushed off her feet (and I should say that she doesn't put it as high as that) that would not make the respondent's business decision to cut the claimant's and other staff members' hours an illegitimate one. I also note that the reduction in hours proposed in May 2018 was not itself a particularly large one, although it did come fairly shortly on the heels of the reduction that had been made the previous year.
89. The respondent was, then, within its rights to reduce the claimant's hours. To look at it another way, it had reasonable and proper cause to make the reduction it made.
90. Taking all of this into account, the question of whether there was a fundamental breach of the claimant's contract of employment boils down to whether the respondent implemented the decision to reduce her hours in so inept a way, without warning or consultation, and without making clear to the claimant that she was not being 'picked on' and that everyone else's hours were being reduced too, that what would otherwise be permissible under her contract of employment became impermissible and a breach of trust of confidence. By a narrow margin, I don't think it did.
 - 90.1 It is more in her capacity as a director than as an employee that the claimant might reasonably have expected to be extensively consulted with about the proposal to reduce her hours;
 - 90.2 as I have already mentioned several times, the claimant had not been treated as a director might expect to be treated, or as an employee who was also a director might expect to be treated, for many years;

90.3 the claimant's subjective belief that Mrs Dale was (in the words of paragraph 45 of the claimant's witness statement), "*working me out of the company*" is not objectively based.

Damage would undoubtedly have been done to the relationship of trust and confidence, but the high threshold of 'likely to destroy or seriously damage' that relationship is not crossed.

91. The situation was, I think, handled very badly. It is unfortunate that the relationship between the claimant and Mrs Dale was not better than it was. It is also unfortunate that the claimant did not, instead of deciding to resign within 2 or 3 days, seek a serious meeting with Mrs Dale and Mr Slammon to discuss her concerns and, potentially, allay her fears. It is unfortunate too that instead of simply accepting the claimant's resignation, the respondent did not make more of an effort to understand her reasons for resigning and to discuss them with her and to seek to dissuade her from taking that step. However, things the respondent did after the claimant's resignation are legally irrelevant to whether there was constructive dismissal; and poor management and poor communication of the kind the respondent was guilty of are not enough to breach the trust of confidence term.
92. The claimants' constructive dismissal claim based on the trust and confidence term therefore fails.

Breach of express terms

93. For the sake of completeness, I shall now deal with the allegation that the claimant was constructively dismissed by breach of express contractual terms and what is labelled "*breach of duty*", as set out in paragraphs 15 to 17 of the amended Grounds of Complaint.
94. The first of these allegations relies on an assertion that the terms and conditions the claimant signed up to in March 2013 were of no legal effect. I have already rejected this allegation. In short, the claimant expressly agreed to them at the time in consideration for her continuing in the respondent's employment.
95. The next allegation of a breach of an express term is based on the suggestion that "*There was no shortage of work in accordance with clause 6 [of the Deductions from Pay document], which reasonably interpreted under the claimants' contract of employment with respondent meant work for the claimant to do, and therefore the first reduction and the second reduction were in breach of clause 6*".
96. I have already rejected as not credible the claimant's assertion that as a matter of fact there was no reduction in her workload. In any event, I reject this very narrow construction of paragraph 6 of the *Deductions from Pay* document. No doubt the claimant could always find work to do in the office, but the idea that because of this she should be completely immune from short-time working, however little others within the respondent had to do, is contrary to the clear intent of the *Deductions from Pay* document as I see it. I think its intent, and its effect, was to permit the respondent to reduce people's hours and pay whenever the respondent overall suffered a "*temporary shortage of work*".

97. Although this point isn't made in the Grounds of Complaint themselves, the claimant has also argued that the clause was only meant to cater for a shortage of work that lasted a very short period of time. No particular time frame has been suggested on the claimant's behalf. The gist of the argument being advanced is that a shortage of work lasting from November 2017 to May 2018 is not a "temporary" one. In so far as that is part of the case being advanced on the claimant's behalf and is relevant to the allegation that the claimant was constructively dismissed, I reject it too. In the context, temporary means not permanent. The respondent expected work to pick up, and I understand it did pick up later in 2018. There will come a time when a shortage of work, initially thought to be temporary, has gone on for such a long time that it has proved itself not to be so. At that point the employer has to choose between, if possible, getting the affected employees to agree to a permanent reduction in their hours, and making redundancies. I don't think that that point had been reached when the claimant resigned.
98. The allegation that appears in the particulars of complaint under the heading "Breach of Duty" is to the effect that if the respondent did indeed have a discretion to put the claimant on short-time working then that discretion was exercised unreasonably. It seems to me that that allegation is part and parcel of the allegation of breach of trust and confidence. I entirely accept that, in principle, if an employer has a discretion to impose a reduction in hours and pay, as the respondent did in this case, and if that discretion is exercised unreasonably, then that will be a breach of contract and will potentially be a fundamental one. However, for reasons given above, although the manner in which the proposal to reduce hours and pay in May 2018 was put forward left much to be desired, the proposal itself was not a breach of contract and there was reasonable and proper cause for it.

Breach of contract and/or unlawful deduction of wages

99. The claimant makes three freestanding complaints of breach of contract and unauthorised deductions from wages. They are set out in paragraphs 18(a) to (c) of the Grounds of Complaint.
100. The first and third of these complaints rely on allegations I have already rejected, to the effect that the reduction in the claimant's holiday entitlement and the reduction in her working hours and pay in November 2017 were not valid variations of her contract of employment. These complaints fail for the reasons I rejected those allegations.
101. The other freestanding complaint of breach of contract / unauthorised reductions from wages is: "*The claimant was entitled to 1 hour's paid lunch every day until termination of her employment and in breach of the contract the respondent failed to pay the same. Further or alternatively the respondent's failure to pay the claimant accordingly was an unlawful deduction of her wages she is entitled to pay accordingly*". This is, I am afraid, a nonsensical claim. All that happened as a matter of fact is that the claimant's lunch break, which had previously been designated as a period of paid work, was re-designated a non-working period, for which the claimant was not entitled to be paid. The reason for this re-designation was, apparently, advice from Peninsula to the effect that if employees got up to no good on a paid lunch break then the employer could be found vicariously liable

for their wrongdoing, and that designating it as unpaid and non-working time gave the employer some measure of protection. Whatever the merits of that advice, the reality is that there was no reduction at all in the claimant's pay resulting from this re-designation. What effectively happened was that her nominal hourly rate of pay increased. Given that she was not paid less, I simply do not understand the basis upon which she is making this claim.

Claimant's claim – summary and conclusions

- 102. When the claimant resigned, the respondent was not in breach of trust and confidence, or of any fundamental term of her contract of employment. Accordingly, she was not dismissed and her constructive unfair dismissal claim therefore fails.
- 103. There was no breach of contract in relation to the claimant's salary or holiday entitlement, or otherwise in relation to the claimant's pay; there was no unauthorised deduction from wages.

Respondent's contract claim

- 104. The respondent's claim against the claimant concerns various expenses relating to the claimant's own car she had charged to the respondent's account. From the totality of the evidence, it is reasonably clear to me that the respondent's other directors – Mrs Dale and Mr Slammon – did not know that the claimant was going to use the respondent's money to pay for these things; equally that the claimant simply assumed the respondent would continue to pay for them, because it had done so when the car she was driving was owned by the respondent.
- 105. In summary, I don't think there was any breach of duty by the claimant here. In addition, I don't think the respondent thought there was any breach of duty here at the time it discovered the claimant had caused these payments to be made. The respondent discovered them in 2017, and I don't think the respondent would have done anything about them if the claimant had not put in a claim against them.
- 106. Normally an employer would not pay insurance, breakdown cover and vehicle tax for a car that was not put to any business use. However, when the claimant had had a company car, that was never put to any business use by her either. The respondent derived no discernible benefit from paying for insurance, breakdown cover and vehicle tax on the claimant's company car. The principle had therefore long been established that the respondent paid costs associated with the claimant's use of her car, effectively as one of the perks of being an employee who was also a director, despite this being contrary to the company's financial interests.
- 107. The respondent has failed to satisfy me that the claimant was not entitled to authorise these payments in her capacity as a director and a relatively senior employee. The respondent's claim therefore fails.

Sent to the parties on:

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Employment Judge Camp

02.01.2021

For the Tribunal:

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Postscript: I [Judge Camp] must again apologise for the length of time it has taken to produce this decision, which was partly due to my other workload and partly due to administrative issues outside of my control.