EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case Number: 4103174/2022**

Hearing held in Glasgow on 10 October 2022, 13 October 2022 and 14 October 2022

10 **Employment Judge M Whitcombe**

Elizabeth Ann McLaughlin — **Claimant**
Represented by:
15 **Gemma McCormick**
(The claimant's sister)

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Caledonia Social Care Limited — **Respondent**
Represented by:
Peter Grant-Hutchison
(Advocate)

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JUDGMENT

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The judgment of the Tribunal is as follows.

(1) The claimant was not constructively dismissed. The claim for unfair dismissal therefore fails and is dismissed.

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(2) The claim for unpaid bonus as damages for breach of contract was withdrawn during the hearing and is now dismissed.

(3) The claim for unlawful deductions from wages in the form of unpaid additional entitlement to paid annual leave fails and is dismissed.

(4) The claim for unpaid mileage payments succeeds and the claimant is awarded £94.96 as damages for breach of contract.

(5) The claim for deductions from wages in the form of unpaid entitlement to "TOIL" is ongoing and will be dealt with in a separate judgment following a further hearing.

REASONS

Introduction

1. The claimant was employed by the respondent from 1 June 2015 until 8 February 2022 when her resignation by a letter dated 11 January 2022 took effect. The claimant was originally hired as a Home Support Worker ("HSW") but from November 2017 until the end of her employment she held the role of Care at Home Service Manager ("CHSM"). The claims were commenced by a claim form received by the Tribunal on 9 June 2022. Several of them were not clearly identified in the claim form (ET1) and emerged for the first time in the Schedule of Loss. One of the contractual claims did not appear there either. All of the claims are resisted by the respondent.

Claims and issues

2. The issues were clarified and recorded at the start of the hearing. Some care and additional focus was required before the evidence could begin. The claimant's representative put a conspicuous amount of work into the presentation of her sister's case, but her lack of experience meant that the issues were sometimes rather unclear or confused. We arrived at the following position.

Constructive unfair dismissal

3. The claimant alleges that she resigned in response to the following fundamental breaches of her contract of employment:

   a. a breach of the (fundamental) implied term of trust and confidence;
   b. a fundamental breach of the employer's implied contractual duty to provide a safe place and/or system of work.

4. It was also argued on the claimant's behalf that there was a relevant breach of the Health and Safety at Work Act 1974. In submissions the claimant also referred to the Health and Safety at Work Regulations 1999. As I pointed out at the start of the case, the issue in a constructive dismissal case is primarily breach of contract rather than breach of statutory duty. Further, there is no cause of action against an employer in the Employment Tribunal for breach of health and safety legislation.

Overwork

5. In relation to both of the above contractual arguments, the key factual issue concerned the claimant's workload during the period April 2021 to October 2021 and the adequacy of the support offered by the respondent. The claimant's case is that during that 6 month period she not only carried out the duties of a CHSM totalling 35 hours per week, but also covered some of the duties of a HSW, resulting in overwork and an unacceptable work-life balance. The claimant alleges that this was not an occasional issue, but rather a long term one, as a result of unfilled vacancies and absences.

Reason for dismissal

6. In the case set out in the response form (ET3) the respondent did not put forward any potentially fair reasons for dismissal if a constructive dismissal were to be established. In response to my questions at the start of the hearing the respondent's counsel nevertheless sought to advance just such an

argument, and eventually applied for permission to amend the response to that effect. Having heard submissions and having applied well-known principles from the ***Selkent*** line of cases, I refused the respondent's application to amend. Full oral reasons were given at the time. The most important factors were the very late timing of the application, the lack of any explanation for that lateness, the fact that additional evidence would be necessary and the fact that a late amendment was prejudicial to the claimant's position and disconcerting to her lay representative, who was understandably unsure precisely what the respondent was seeking permission to do.

7. The case was therefore heard on the basis that the respondent denied the alleged breaches of contract but did not put forward a potentially fair reason for dismissal if the claimant succeeded in proving that she had been constructively dismissed.

Breaches of contract or deductions from wages

8. Certain other payments were claimed either as damages for breaches of contract falling within the Employment Tribunal's contractual jurisdiction or else as deductions from wages.
    a. Bonus. This claim was eventually withdrawn on 13 October 2022 because it was accepted on behalf of the claimant that there was no evidence of a *contractual* right to bonus.
    b. Unpaid entitlement to annual leave, the allegation being that along with other employees the claimant was granted an additional 10 days' leave as a reward for hard work during the Covid-19 pandemic.
    c. Deductions from wages corresponding to accrued time off in lieu ("TOIL").
    d. Unpaid mileage payments relating to client visits.

9. This judgment deals with all of the claims except for that in relation to TOIL. In an effort to ensure fairness, that aspect alone was separated off for further evidence and submissions. I had come to the conclusion that both sides

needed to engage further with the detail of the evidence in support of that claim. The TOIL claim will be the subject of a separate judgment. This step also enabled the hearing of all the other claims to conclude within the original allocation of time, despite the unavoidable loss of some time when problems were experienced with induction loop equipment in the hearing room.

10. Otherwise, all of the evidence and submissions were heard by the end of proceedings on 14 October 2022. I subsequently refused an attempt by the claimant to reopen and expand the claim for mileage expenses for reasons given orally on 30 November 2022 and in writing in a case management order of the same date.

Evidence

11. The hearing was conducted on the basis of a hard copy file of documents running to 458 pages. A supplementary e-bundle of 154 pages was concerned with the TOIL issue. Some of the documents were really a written analysis or submissions prepared by the claimant's representative rather than primary sources of factual evidence. As the respondent's representative rightly pointed out, it is important not to treat that analysis as though it is evidence. Sometimes the analysis might be open to challenge, and frequently the primary sources on which it was based were unavailable. It did not gain any greater weight simply because the claimant was invited by her representative to agree with it. I gave much greater weight to primary sources, properly tested in cross-examination.

Witnesses

12. I heard from the following witnesses, all of whom gave evidence on oath or affirmation and were cross-examined:
    a. The claimant.
    b. Derek Oliver, Managing Director.
    c. Stuart Robertson, Operations Director for the whole organisation and

the claimant's line manager from about September 2018.

13. All evidence in chief was oral and witness statements were not used.

5 *Witness orders*

14. Some issues had arisen prior to the hearing in relation to witness orders. Essentially, the claimant had sought and obtained orders for the attendance of Gemma Welsh and Loraine Stupart. They both subsequently contacted the
10 Tribunal giving what appeared to be very good reasons why those orders should be revoked. The claimant's representative was content for that to happen and did not apply for any further witness orders or for a postponement of the hearing.

15 *Timetabling*

15. In order to ensure fair shares of the available hearing time, evidence and submissions were timetabled in accordance with rule 45. The parties were allowed 2 hours for the examination in chief of each witness and then 2 hours
20 for cross-examination. That plan left sufficient time for submissions and possibly also deliberation and an oral judgment. Time saved in certain areas meant that I was sometimes able to give the claimant's representative slightly more time than that, given her lack of legal experience. However, it was eventually necessary to enforce the adjusted timetable to prevent repetitive
25 cross-examination. In order to save the claimant's representative time, I pre-read the documents identified by her during a lunch break, so that she did not have to use up her allocation of time simply introducing those documents. Oral submissions were limited to 30 minutes for each side. Both had also prepared written submissions and the claimant's submissions were almost
30 entirely written.

Adjustments

16. The claimant's representative has impaired hearing. Generally, I asked Ms McCormick to make sure that I was made aware if at any point she was struggling to hear clearly what other people were saying. At one point problems were experienced with the portable induction loop equipment used in the Tribunal hearing room. Experiments with alternative equipment and seating arrangements did not fix the problem and so the hearing was adjourned to the next day. The claimant's representative confirmed that she was able to hear the proceedings satisfactorily when they resumed.

Findings of fact

17. I made the following findings of relevant fact. Where facts were disputed I made my findings on the balance of probabilities, in other words a "more likely than not" basis.

The respondent

18. The respondent is a company based in Glasgow which offers flexible and personalised home support services to enable vulnerable people to live independently in their own homes. It provides support for a wide range of health and social care needs. At the relevant times the respondent had about 90 employees and about 250 clients.

The claimant's role

19. The claimant joined the respondent on 1 June 2015 as a Home Support Worker ("HSW"). When the claimant became a Care at Home Service Manager ("CHSM") in November 2017 she was responsible for the day-to-day management of the support service for East Renfrewshire, Renfrewshire and North Lanarkshire. Prior to her resignation she was managing 16 Home Support Workers. The claimant was clearly a committed and diligent

employee with a very strong work ethic and sense of vocation.

Duties and workload

20. The claimant's duties were to direct the day-to-day management of services, to manage the support services themselves, to start up new services, to control scheduling and rotas, to conduct supervision and appraisals for front line staff, to hold team meetings and to help to recruit new staff.

21. The claimant had a good working relationship with Derek Oliver, the Managing Director, who thought highly of the claimant and her work ethic. In the period relevant to this claim, the claimant's line manager was Stuart Robertson, Operations Director. She had four formal supervisions with him each year.

22. Prior to the period of most relevance to this claim, an informal meeting took place on 20 December 2019 to mediate between the claimant and Stuart Robertson (Operations Director). Some friction had occurred between them in a context which is not directly relevant to this case and on which there is no need for me to make any findings. Towards the end of that meeting Derek Oliver (Managing Director) raised concerns about the number of home visits that the claimant was carrying out and was worried that it might lead to important management tasks not being done. Stuart Robertson had observed that the claimant needed to look at other options rather than use herself for cover, and that it had not been necessary to use managers to cover any of the visits when the claimant had been off sick.

23. For the purposes of this hearing the allegation of excessive workload focused on the period from April 2021 until October 2021. At the relevant times, the claimant was trialling a compressed working week, during which 35 contracted hours would be worked over 4 weekdays. Part of the objective was to improve work-life balance. The claimant was happy with that arrangement and she does not argue that it played any part in the alleged

breaches of contract.

24. During the same period the claimant was also undertaking an SVQ Level 4 management qualification which was mandatory for her role. She began to study for that qualification in February 2021 and the work in connection with it was carried out in non-working time. The claimant expressly stated that she did not make any criticism of her employer in relation to the SVQ and the time taken to work towards it.

25. Difficulties in recruiting HSWs and high levels of staff absence during the pandemic meant that in addition to carrying out her own remit as CHSM, the claimant would additionally cover home support visits either during the day, in evenings or sometimes at weekends. The implications of the Covid-19 pandemic meant that the claimant was working from home during that period and undertook home visits in locations such as Clarkston, Busby, Thornliebank, Giffnock, Newton Mearns, Barrhead and Neilston.

26. It was conceded in the claimant's written submissions that she worked few weekends. Mostly, the home visits she carried out were during the working day or in evenings. The main dispute between the parties concerned her workload during the period from April 2021 until October 2021. The claimant's position was that the need to carry out home visits during the week (work which would normally be done by a HSW) meant that she had to catch up with the paperwork and the other duties of a CHSM in evenings and at weekends. She maintained that the overall effect was that she worked excessive hours. The claimant's evidence was that during the relevant six month period she worked two Saturdays, one Sunday and about 30 evenings.

27. An important issue in the case was therefore whether the home visits undertaken in this period were necessarily working hours in addition to the normal requirements of the claimant's CHSM role. I am not persuaded that they necessarily were. I found Mr Robertson to be a cogent and credible witness who gave his evidence without any hint of exaggeration, evasion or

contradiction. I accept Mr Robertson's evidence that he agreed with all managers that if they were having to do home support visits the respondent did not have the same expectations of what they should achieve in their management role. The priority was providing support to vulnerable people during the pandemic. On that basis I find that the time the claimant spent on home visits was offset to some extent by a reduced expectation that she would be able to cover all the normal elements of her management role.

28. Further, Mr Robertson was prepared to arrange for other staff to carry out supervisions instead of the claimant and he took on some of the claimant's management responsibilities, such as supervisions and reviews, himself. He made it clear that he did not expect the claimant to work in excess of her contracted hours to cover two jobs. I find that those were meaningful, supportive steps which sought to address the risk of overwork while the respondent was short-staffed at HSW grade.

29. As a manager, the claimant was able to manage her own diary. That meant that if it was necessary for her to carry out a home visit one evening, she could start her working day later so that the visit took place within her working day. While that would do little to prevent the disruption of the claimant's evening, it would at least reduce the risk of working excessive hours overall.

30. It was common ground that the respondent was short-staffed during the relevant period. The recruitment and retention crisis in the care sector is well-known and has been ongoing for several years. It certainly affected the respondent. The progress of the Covid-19 pandemic aggravated matters. In the claimant's geographical area 6 staff left the organisation in the months immediately following January 2021. By June 2021 the claimant line managed 16 contracted and sessional workers. She considered that number to be 6 short of the staffing level necessary to cover all home visits.

31. While the pandemic continued, and certainly for the period from April to October 2021, the respondent's practice was to have short twice daily video

meetings with all managers and office staff. The purpose was to check how people were doing during a brief 5-10 minute catch up. The meetings went on longer if required. I find that these meetings were one means, but certainly not the only means, by which the claimant could have raised concerns about her personal workload.

32. The claimant had a role in recruiting new staff. In that capacity she posted on Facebook, was involved in a recruitment day and contacted former employees to see whether they might be interested in coming back to work. She made suggestions to management as to how they could recruit and retain staff. In particular, the claimant saw the relatively low mileage payment of £0.20 per mile as an obstacle.

Documentary evidence relevant to workload

33. The claimant referred extensively to the "Worker Visit List and availability", and print outs of it were in the joint file of documents. I did not find this to be an especially helpful tool with which to assess the claimant's workload at any particular time. While it provided some evidence of the dates and locations of home visits undertaken, it did not record the time spent on management duties. The respondent's evidence, which I accept, is that there was a reduced expectation to carry out management duties if home visits were being undertaken by a manager too. The claimant's workload during this period was an aggregation of both types of work, but these documents only really established that the claimant had been carrying out home visits. That was not in dispute. Similarly, these documents did not record the extent of "TOIL" granted and taken to offset any additional hours worked.

34. The claimant also relied on a document headed "Home Support Records (June to Sept 2021)". It had apparently been prepared by the claimant and her representative by examining the calendar on the claimant's laptop before it was handed back to the respondent. The primary source (i.e. the computer calendar) was not available or referred to during the hearing and so the

accuracy of the document could not be tested in cross-examination. Nor could the accuracy of the calendar itself be tested in cross-examination. It was accepted on behalf of the claimant that it did not always tally with the "Worker Visit List and availability", which concerned me. Additionally, its usefulness as a tool for assessing the claimant's overall workload was limited by the fact that it did not measure the extent of the management duties undertaken over the corresponding period, or the TOIL approved by the respondent and taken by the claimant to compensate for additional hours worked. For those reasons I gave this document only limited weight.

35. Similarly, I gave a separate table headed "Home Support Visits (HSV) – June 2021" only limited weight. It was prepared by the claimant's representative and was therefore not really evidence at all. It has the same weaknesses as the other documents considered in the immediately preceding paragraphs. It is of limited use when trying to assess the claimant's overall workload.

36. In my judgment the best available documentary evidence of overall workload was found in the TOIL sheets. Only those showed the net effect of compensatory time off on the total hours worked, and only those reflected the hours spent by the claimant both on home visits and also on her normal management duties. If the totality exceeded the claimant's contracted working hours, it should be reflected in an increased TOIL balance.

37. The sheet headed TOIL 8 (not submitted at the time but created by the claimant retrospectively from her diary and expense forms) covers the period from 5 April 2021 until 27 August 2021. A normal working day equates to 8.75 hours, at least on that sheet. The sheet shows a cumulative entitlement to 45 hours of TOIL on 5 April 2021 and a cumulative entitlement to 36.5 hours on 27 August 2021. Therefore, the claimant's accrued entitlement to TOIL had reduced over the period covered by the sheet. That is significant, because it suggests that TOIL was more than compensating for the additional hours worked when not on leave. I do not ignore the evidence of certain peaks. During the period covered by the form the accrued entitlement had risen as

high as 73.25 hours by 30 June 2021, but once TOIL actually taken by the claimant is factored in, the claimant worked very slightly less than the hours which would otherwise be worked in accordance with her contract. TOIL was taken on 7 separate days, and 6 of them were full days off.

38. My conclusion is therefore that the claimant was not working excessive hours on a sustained basis during the period 5 April 2021 until 28 August 2021 once TOIL actually taken is factored in, as it should be. That time off served to reduce the total hours worked, gave the claimant additional time to rest and served to restore her work-life balance.

39. The sheet which was treated (but not headed) as TOIL 9 would have been the next in sequence. While it would be expected that the starting TOIL balance on sheet 9 would match the closing balance on sheet 8 they are actually half an hour apart, but neither side made anything of that anomaly. The "brought forward" cumulative entitlement to TOIL was 37 hours, and it had increased to 54 hours by 21 October, a net increase of 17 hours. That equates to about 2 additional days of TOIL accrued over a 7-8 week period.

40. The sheets can also be read together. The accrued TOIL balance was 45 hours on 5 April 2021 and had increased to 54 hours by 21 October 2021 when the claimant went on leave. That represents a net increase of 9 hours over a period of around 6.5 months. My finding is therefore that once allowance is made for the effect of TOIL actually taken, the claimant was averaging about 90 minutes of additional work per month in the period relevant to this claim. While there were undoubtedly peaks and some very busy weeks, the bigger picture is much more balanced.

41. Much the same point can be made in relation to a table prepared by the claimant's representative, titled "Evening and Weekend Working for period Apr 21 – Oct 21". It does not tally exactly with the primary sources but the general impression is the same. The starting TOIL entitlement on 5 April 2021 was 43 hours and the closing balance was 38.5 hours. Once again, that

shows a net reduction in TOIL balance because TOIL had been taken in a way which more than compensated for the additional hours worked.

42. I make one further finding in relation to TOIL sheets. Most managers submitted them on a monthly basis, which enabled the respondent to assess the workload of the manager concerned. The claimant only submitted three TOIL sheets in 2021 and only two in the period on which this claim is focussed. That made it far more difficult for the respondent to spot increases in workload promptly.

Support

43. At the start of October 2021 the respondent told the claimant that other managers would be covering some of the home visits in her area. Stuart Robertson said that both he and Derek Oliver would cover visits and that staff from finance and HR would also get involved. I find that this was a genuine, meaningful and supportive intervention with the aim of reducing the claimant's workload. Not only was the respondent offering extra help with management activities properly belonging to the CHSM role, it was also drafting in additional help with the home visits that the claimant was having to cover herself.

44. The claimant was permitted to take time off *in lieu* of hours worked in excess of the contractual level ("TOIL").. The claimant would notify more senior management if she felt entitled to take TOIL because she had worked in excess of her 35 contracted hours and would make notes about it in her calendar. However, that calendar was not available during the part of the hearing which considered workload and constructive dismissal. The claimant took TOIL in May, June, July, August and October 2021.

45. The claimant took annual leave in the last week of October and the first week of November 2021. Three extra days of leave were requested and approved by the respondent. That seems to have come from the accrued TOIL balance

rather than annual leave entitlement. The claimant needed those days in order to give her sister respite from the care of their mother. I accept the respondent's argument that it was prepared to approve a relatively long period of leave to help the claimant and to take account of her personal circumstances, despite the staffing pressures that the respondent was dealing with at the time. It would not ordinarily have authorised more than two weeks' leave without much more notice.

46. The respondent contacted the claimant on the last day of her annual leave to inform her of her duties for the next day. That was routine and the claimant did not criticise the respondent for having done so.

47. In cross-examination the claimant accepted that she knew that she could ask for protected time in which to carry out her management responsibilities, and that she did sometimes ask for it. She also accepted that protected time was usually granted when she asked for it. The respondent authorised several days of protected time in which the claimant could switch off her phone and disregard emails to have a full day to focus on paperwork.

48. By October 2021 the respondent had taken on a new worker with prior social care experience and it was optimistic that the new worker would be able to cover the majority of the visits that the claimant had been undertaking. Another worker who had been off sick was also due to return to work. The respondent was confident that the need for the claimant to undertake home visits would significantly reduce in the very near future.

49. The claimant did not at any time prior to commencing sick leave inform her line manager Stuart Robertson that she was anxious, exhausted or that she had been working excessive hours over a long period of time.

Sick leave

50. The claimant commenced a period of sick leave on 8 November 2021 from

which she did not ultimately return to work.

51. The claimant attended a welfare meeting on 15 November 2021. Its purpose was to discuss the claimant's welfare informally given that the reason for her absence had been stated to be work-related stress. I find that to have been an appropriate, meaningful and supportive step. The claimant was asked whether she was regularly working over 35 hours per week and she confirmed that she was and was having to do her typing up at weekends.

52. Mr Robertson explored in detail the sources of the claimant's stress. They included worry about losing her job if the company folded (which was not an issue in this claim) and working hours in excess of a 35 hour week. However, the need to complete reviews, assessments and client paperwork were not said to be causing the claimant to suffer stress. The claimant also acknowledged that Mr Robertson had offered to help out with the supervisions that the claimant was required to carry out, which she found helpful. Mr Robertson checked that the claimant was keeping a record of her TOIL and she confirmed that she was.

53. The claimant said that she wished to be "self-referred" to Occupational Health because in her view she needed counselling or cognitive behavioural therapy.

54. The claimant considered herself unfit to attend any other meetings on the advice of her GP and felt that she needed a complete break from work, including supportive meetings. The respondent ensured that the claimant was not contacted for a period of about 3 weeks over the holiday season.

55. At times during this hearing the claimant suggested that she was "refused" a referral to occupational health. I reject that analysis. I prefer the respondent's version of events, which is that it wished to receive the results of a stress risk assessment before making a referral. It was reasonable for the respondent to wait for that risk assessment before making a referral because it might well have revealed practical steps that could have been taken to alleviate stress,

steps which could be taken rapidly and before making a referral to occupational health. Further, the respondent's decision to do things in that order made it more likely that a subsequent referral to occupational health would be well-informed and useful.

56. The claimant's firm position in evidence was that by November 2021 she required counselling, cognitive behavioural therapy or an "impartial voice". My finding is that it was not possible to identify the appropriate medical intervention, if any, at that stage. The claimant's opinion as a lay person is clear but there was no medical evidence to support it. The respondent was progressing towards an occupational health referral without undue delay and there was nothing to indicate an immediate referral for counselling or CBT other than the claimant's own opinion and wish.

57. As a result of an administrative error, the respondent delayed by about 11 days before sending out the risk assessment paperwork to the claimant. The respondent sent it out on 26 November 2021. The claimant received it around the beginning of December 2021.

58. The claimant's evidence was that the respondent acted in a way which was inconsistent with the advice given to her by her GP, which was that she needed a complete break from work. I do not accept that analysis. Quite properly, the claimant was not required by the respondent to do any work while on sick leave. That does not mean that the respondent was prohibited from contacting her for any purpose, and especially not supportive purposes. I find that the respondent's contact with the claimant after the commencement of sick leave was of an appropriate and supportive nature.

59. The claimant was invited to a further meeting in January 2022, but before that meeting could take place the claimant resigned. The claimant submitted her letter of resignation on 11 January 2022. Her resignation was effective from 8 February 2022. The reason for resignation given in the claimant's letter was, "the circumstances highlighted to management/HR on the Risk Assessment

form", which the claimant felt would mean that a return to work would continue to have a negative impact on her health and well-being. The claimant stated that her current sickness absence for work-related anxiety and stress was a result of working excessive hours over a 6 month period.

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60. During the notice period, on 13 January 2022, the respondent acknowledged receipt of the claimant's resignation letter dated two days earlier. Mr Robertson said he was sorry about the claimant's ongoing ill health. He also invited the claimant to an exit interview on 2 February 2022 to discuss the
10 comments she had made in her resignation letter.

Additional annual leave entitlement

61. The claimant's case was based on an alleged promise by management that
15 managers would receive an additional 2 weeks' paid annual leave to reward hard work during the Covid pandemic. The claimant suggested that Mr Robertson had said this to her in about August 2021, but it is not referred to in any of the documents generated at around that time. The claimant says that it was an oral agreement which was never reduced to writing or
20 evidenced in writing. The only corroboration was a hearsay document from another employee. I give that hearsay evidence no weight because the author did not attend the hearing for cross-examination.

62. Mr Oliver stated firmly and clearly that the respondent had never made any
25 such promise. Mr Robertson unequivocally denied any such offer or arrangement. I prefer the respondent's evidence to that of the claimant because if any such offer had been made it would be so unusual and so costly that it would surely have been made in writing and notified to staff in a more formal way. The respondent's suggestion in cross-examination was that the
30 claimant might be thinking of a discussion about when to take annual leave that staff had not been able to take during the pandemic. That is a plausible explanation for a misunderstanding on the claimant's part, but even if it is not correct I find that the claimant has failed to prove the existence of the relevant

agreement on the balance of probabilities.

Relevant legal principles

5 *Constructive dismissal*

63. It is for the claimant to satisfy the Tribunal that she was constructively dismissed for the purposes of s.95(1)(c) of the Employment Rights Act 1996. Otherwise, the legal effect is that her employment terminated by a resignation 10 which is not to be treated as a dismissal.

64. The claimant must prove that the respondent was in repudiatory breach of her contract of employment. That entails proving a "significant breach going to the root of the contract of employment, or which shows that the employer 15 no longer intends to be bound by one or more of the essential terms of the contract" (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221, CA). The Court of Appeal expressly rejected the argument that the predecessor provisions of s.95(1)(c) ERA 1996 introduced a concept of reasonable behaviour into the contract of employment. An employee is not able to resign 20 and claim constructive dismissal merely because their employer has behaved *unreasonably*.

65. If the claimant establishes a repudiatory breach of contract then she must also demonstrate that the breach caused her to resign and that she did not 25 delay too long before resigning, thereby affirming the contract and losing the right to claim constructive dismissal.

66. A breach of the implied term of trust and confidence is necessarily fundamental (***Morrow v Safeway Stores plc*** [2002] IRLR 9, EAT) – it is a 30 "fundamental term". Breaches of other contractual terms may or may not be of the required seriousness. It is essentially a question of fact and degree whether the breach reached the level described in ***Western Excavating*** (above). The test of whether there was a repudiatory breach of contract is

objective, and it neither depends on the subjective intentions of the employer (***Leeds Dental Team Ltd v Rose*** [2014] ICR 94, EAT) nor on the subjective perception of the employee.

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67. If a fundamental breach of contract occurs, then it cannot be "cured" by the employer's subsequent actions. However, an employer may of course act to make amends to prevent such a breach from occurring in the first place (***Bournemouth University Higher Education Corporation v Buckland*** [2010] ICR 908, CA).

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Relevant contractual terms

68. It is uncontroversial that the following terms are implied into every contract of employment.

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a. The implied term of trust and confidence. It is a fundamental breach of contract for either party, without reasonable and proper cause, to conduct itself in a manner 'calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee' (***Courtaulds Northern Textiles Ltd v Andrew*** [1979] IRLR 84, EAT, ***Malik v BCCI*** [1997] ICR 606, HL).

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b. That the employer will provide and maintain for the employee a safe place and system of work.

Contractual interpretation

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69. The approach to contractual interpretation can be taken from ***Investors Compensation Scheme Limited v West Bromwich Building Society*** [1998] 1 WLR 896, HL. A contract must be construed according to what a reasonable person would understand it to mean if they had all the background knowledge reasonably available to the parties at the time of contracting.

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Submissions

70. The parties made their submissions primarily in writing. The additional oral submissions were brief. I do not think that any useful purpose would be served by replicating those largely written submissions in a separate section of these written reasons. Instead, I will deal with all of the main points made in the course of my reasoning.

Reasoning and conclusions

Constructive dismissal

71. As the authorities cited above require, I have considered the question of breach of contract *objectively*. Whether the issue is framed in terms of the implied term of trust and confidence, or in terms of the implied duties to provide a safe place and/or system of work, my conclusion is that the respondent was *not* in repudiatory breach of contract. The consequence is that the claimant was not constructively dismissed and that the claim for unfair dismissal fails. My reasons are set out in the following paragraphs.

72. First, the claimant has not persuaded me that her workload was excessive overall, once the effects of TOIL are taken into account. It is right to take the effect of TOIL into account because it gives compensatory leave for periods in which the claimant worked in excess of her contractual hours. It serves to restore work-life balance. During the whole period over which I was asked to consider the claimant's hours they were only very slightly in excess of the contractual expectation. I refer to my findings of fact in relation to the TOIL sheets (paragraphs 36 to 42 above).

73. I accept that those TOIL sheets might not tell the whole story, and that looking at an average over a period of several months might disguise shorter periods in which working hours were excessive. I also accept that the overall number of hours worked is not always the whole point, and that work in the evenings

or (much more rarely in the claimant's case) at weekends can disrupt and harm a worker's personal life regardless of any compensatory leave taken later under a TOIL scheme. However, it is important to look at the whole of the respondent's conduct and to look at it in context. Once the matters set out in the following paragraphs are considered, I find that there did not come a point at which the respondent was in repudiatory breach of contract.

74. The respondent made it clear that if the claimant were undertaking home visits, there was a reduced expectation in relation to her management role. That offset the extra hours worked undertaking home visits and served to reduce the stress the claimant might otherwise be under.

75. The claimant managed her own diary and could adjust her start and finish times to ensure that home visits in the evenings were within working time. That might possibly mitigate the impact on the claimant's personal life but it would certainly ensure that excessive hours were not worked.

76. By the end of the relevant period, the acute staff shortage had eased slightly as a result of the recruitment of one experienced member of staff and the return of another, such that the home visits that the claimant had been covering herself would largely be covered by HSWs.

77. The respondent arranged for other managers and head office staff to assist both with home visits and with management tasks, and by doing so reduced the personal burden on the claimant.

78. As a manager, the claimant was to a large extent trusted to manage her own time. If the claimant found her workload intolerable then that could and should have been drawn to the attention of her own line manager, who would then have been in a position to act. The claimant did not draw excessive workload to his attention during the relevant period, April to October 2021. This is not intended to be a criticism of the claimant. The point is simply that the respondent's actions must be judged in the context of the facts as it

reasonably understood them.

79. The claimant did not submit her TOIL sheets monthly. I do not highlight that fact to criticise the claimant. The relevance of the point is that the respondent did not have the benefit of monthly indications of hours worked in excess of the contractual level. Monthly submission of TOIL sheets would have enabled the respondent to spot emerging problems more quickly.

80. The respondent made the claimant aware that she could request protected time to carry out management duties and when it was requested, the respondent was usually able to approve it.

81. The respondent took a helpful and supportive attitude to the claimant's request for annual leave, followed immediately by leave from her TOIL balance. It would not ordinarily have approved so much continuous leave without more notice, but it did so in order to alleviate the stress the claimant was under.

82. The support given to the claimant once she commenced sick leave was meaningful and appropriate. The welfare meeting was supportive and sought to establish the reasons for the claimant's work-related anxiety and depression.

83. I reject the suggestion that the advice given by the claimant's GP for a complete break from work meant that the respondent could not communicate with the claimant at all. It did so primarily in order to support her, and no more than was necessary.

84. The respondent's decision to populate a stress risk assessment before a possible referral to occupational health was justified. It might have led to swifter action and earlier results than waiting for an occupational health report and it also served to make any subsequent occupational health referral better informed and more useful.

85. The slight delay in sending out the stress risk assessment was not significant.

86. The claimant was not denied a referral to occupational health, the respondent simply wanted to carry out a stress risk assessment first. It had reasonable cause for doing so. I reject the claimant's submission that the respondent showed a lack of urgency. The claimant was also off sick with no prognosis for an early return in any event.

87. For those reasons, I find that the respondent was not in breach (still less a repudiatory breach) of the duty to provide a safe place and system of work. I also find that the respondent did not do anything which, objectively speaking, destroyed or caused serious damage to the relationship of trust and confidence. The respondent also had reasonable cause for handling the welfare meeting, the stress risk assessment and the occupational health referral in the way that it did.

88. The claimant was undoubtedly a diligent and hard-working manager who put the needs of clients ahead of her own. I have no doubt that she genuinely feels that her employer is to blame for the stress she was under and her ill-health. However, I must assess objectively whether the respondent's conduct amounted to a fundamental breach of contract and I have concluded that it did not.

Additional holiday entitlement

89. This claim fails because of my findings of fact in paragraphs 61 and 62 above. The claimant has not proved on the balance of probabilities that there was any such agreement.

Mileage payments

90. This claim turned on a single issue between the parties. The respondent

claimed that it was entitled, as a matter of contract, to deduct from any claim for mileage payments the distance between the claimant's home and her normal place of work. That reflects HMRC rules on payments of expenses in respect of journeys to a main place of work and it is easy to see the logic of that approach if the claimant was carrying out client visits having first attended the respondent's office.

91. However, at the relevant time the claimant was not attending the respondent's office at all, she was working from home because of the pandemic. When the claimant carried out home support visits she did so from her own home and then returned to her own home. Consequently, the claimant was claiming expenses reflecting the whole of the journey from her home to the client and back, without any deduction reflecting the distance between her home and the office.

92. I find that as a matter of contract the claimant was entitled to do so. The respondent conceded that there was no written agreement, policy or guidance that supported the deduction of mileage reflecting a journey that the claimant had never made, a journey from her home to the office. There was no written term supporting the respondent's position. It was not argued that there was any basis upon which a term of the sort relied on by the respondent should have been implied into the contract either.

93. Applying the principles of contractual interpretation set out above, I find that a reasonable observer knowing the background would conclude that the claimant was entitled to claim for the journey actually undertaken in the course of her employment, and was not obliged to deduct an entirely fictional journey to the office which she had never undertaken. Alternatively, that reasonable observer would conclude that any rule based on a normal place of work had to be applied in a modified way, to reflect that the claimant's normal place of work had changed and had become her home address. Either way, the result is the same. There is no contractual authority for the reduction made by the respondent.

94. The claimant is therefore entitled to the agreed sum of £94.96 as damages for breach of contract.

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Employment Judge: **M Whitcombe**
Date of Judgment: **22 December 2022**
Entered in register: **23 December 2022**
10 **and copied to parties**