



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss AM Jaramillo Silva

Thibaut Delahaye

Heard at: London Central

On: 3 - 4 September 2019

In chambers: 15 October 2019

Before: Employment Judge Lewis

Representation

For the Claimant: In person (with PSU support)

For the Respondent: Mr J England, Counsel

RESERVED JUDGMENT

1. The claims for statutory sick pay and for holiday pay are dismissed on withdrawal as these sums have been paid.
2. The claim for unfair constructive dismissal is not upheld.
3. The claim for underpaid notice is not upheld.
4. The claim for underpaid wages is not upheld.
5. It is therefore not necessary to have a hearing for remedy and the provisional date which we fixed is cancelled.

REASONS

Claims and issues

1. Miss Jaramillo Silva brought claims for unfair constructive dismissal, underpaid wages, unpaid holiday, statutory sick pay and underpaid notice pay.
2. I went through the claims at the start of the hearing. The issues were agreed as follows:

Unfair constructive dismissal

- 2.1. Whether Mr Delahaye fundamentally breached Miss Jaramillo Silva's contract or conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. The incidents which Miss Jaramillo Silva says caused her to resign and culminated in the last straw were these:
 - 2.1.1. Cancelling her hospital appointment in March 2018.
 - 2.1.2. Failing to provide a P60 pay slip and pension contributions regularly or at all after April 2018.
 - 2.1.3. Being required to continue working in June 2018 after injury to her knee.
 - 2.1.4. From September 2018 onwards, having last minute tasks imposed on her at the end of the day and being required to work late.
 - 2.1.5. Ms Alfonsi's proposal of 17 September 2018 to reduce Miss Jaramillo Silva's hours from 45 to 25 per week and to stop paying lunch breaks, when in practice Miss Jaramillo Silva was still being required to work 40 hours per week.
 - 2.1.6. From September 2018 onwards, facing unreasonable demands and criticisms.
 - 2.1.7. Being shouted at for wanting to take holiday at the end of October 2018.
 - 2.1.8. On 7 November 2018, being sent an email proposing 21 hours a week and no lunch breaks plus an increase in duties, when Miss Jaramillo Silva was in fact working 8 hours a day.
- 2.2. Whether Miss Jaramillo Silva resigned promptly in response to any such breach or whether any such breach was waived.
- 2.3. If there was constructive dismissal, whether the dismissal was fair by reason of redundancy or some other substantial reason.

Underpaid wages

2.4. This is a claim for the difference between the old rate of pay and the imposed new rate for the period 1 October 2018 – 23 November 2018.

Underpaid notice

2.5. This is a claim for the difference between Miss Jaramillo Silva's old rate of pay and the imposed new rate for 5 weeks.

Holiday pay

2.6. This is a claim for 3 days holiday in 2014-2015; 1.5 days holiday in 2015-2016; 0.5 days holiday in 2017-2018 and untaken holiday in 2018-2019 up to the termination date. Mr Delahaye says he has paid holidays.

Statutory Sick Pay ('SSP')

2.7. This is a claim for SSP for 15, 19, 21 and 22 November 2018. Mr Delahaye says he has paid what is due.

3. There was also a claim for £30 expenses for the Sicilian Dry Cleaners which had not been reimbursed. This claim was accepted and Mr Delahaye paid Miss Jaramillo Silva in cash at the start of the tribunal hearing. On that basis, she withdrew the claim. By agreement, I then dismissed the claim on withdrawal.

Procedure

4. The tribunal heard from the claimant (Miss Jaramillo Silva) and on her behalf, from Mr Buddrige. She also produced short witness statements from her children, Anaelisa, Joanne and Nicolas. Thibaut Delahaye and Laetitia Alfonsi provided witness statements and gave evidence for the respondent. There was a file of 211 pages for me to look at. Miss Jaramillo Silva did not provide a full witness statement specifically for this final hearing. She asked me instead to read the short statement she had provided for the preliminary hearing (pages 39 – 42 of the file) and her tribunal claim form.

5. Miss Jaramillo Silva applied at the start for the respondent's witness statements to be struck out because they were not sent to her until 27 August 2019, well past the deadline ordered by EJ Potter. Mr England said this had happened because his solicitors had not realised that Miss Jaramillo Silva believed she had already provided a witness statement, ie the one she used for the preliminary hearing in April 2019.

6. I decided not to strike out the respondent's witness statements. They had now been supplied. I could see why there was some confusion regarding whether Miss Jaramillo Silva had provided her witness statement. Anyway, the respondent's witness statements were provided a week before the start of the hearing and not at the very last minute. I asked Miss Jaramillo Silva if she

wanted to postpone the hearing so she had more time to prepare but she wanted to go ahead.

7. Unfortunately no judge was available for the three days fixed for the hearing. I only had two days. I therefore suggested that we deal only with liability (whether Miss Jaramillo Silva wins or loses). I would then go away and write the decision, which I would send out in the post.
8. During the hearing, Miss Jaramillo Silva told me she had not prepared any questions for Ms Alfonsi and Mr Delahaye. When it came to cross-examination time, she did not know what to do. I therefore asked those witnesses some questions to find out what they would say about the key points in Miss Jaramillo Silva's case. Miss Jaramillo Silva had prepared some questions for Mr Delahaye which she asked. I also helped her to focus her questions on the key issues in dispute.
9. One difficulty I had throughout was that Miss Jaramillo Silva's evidence was vague on many points.

Fact findings

10. Miss Jaramillo Silva started working for Mr Delahaye as a housekeeper on 14 October 2013. Mr Delahaye is married to Ms Alfonsi and they have four children, who were then aged 13, 11, 9 and 2½.
11. Miss Jaramillo Silva started on a rota which was 10 am – 7 pm, Monday – Friday including lunch breaks. Miss Jaramillo Silva was also expected to do up to 20 hours babysitting per month. Any extra work would be paid at £12/hour. After one month, Ms Alfonsi told Miss Jaramillo Silva she did not need to start till 11 am.
12. The pay was £480 week. Miss Jaramillo Silva was allowed to take one hour lunch break. There was no discussion regarding whether this was paid or not. The original written contract said nothing about lunch breaks. It set out the daily hours but did not express this as a total. It set out an annual salary which no one in the hearing referred to and which, as far as I can see, did not match any of the weekly figures either side were referring to.
13. In September 2015, Miss Jaramillo Silva agreed to go back to a 10 am start. Her pay was increased to £520 week. Miss Jaramillo Silva stopped doing babysitting from September 2016 because she felt it was unpaid. There was still no discussion regarding whether lunch breaks were paid. I believe this question was not in anyone's mind. The agreed pay was identified as a weekly sum and the start and finish times were specified together with the right to take a one hour lunch break.
14. Miss Jaramillo Silva's duties included cleaning and tidying, washing and ironing, changing the bed, preparing beds for guests, feeding the cats, helping the two oldest children with Spanish homework, and generally looking

after and playing with the youngest child which included feeding him, playing with him, showering him, taking him to the nursery, putting him to bed and reading him stories.

15. In August 2016, the oldest child left home. In September 2017, Ms Alfonsi discussed with Miss Jaramillo Silva the possibility of reducing her hours and going part-time because there was less work to do. Miss Jaramillo Silva became upset because she needed the money to support herself and her family. Ms Alfonsi suggested she could help Miss Jaramillo Silva find a second part-time job, but Miss Jaramillo Silva was not keen on the idea of working two part-time jobs.
16. Ms Alfonsi spoke to Mr Delahaye and they decided they would keep Miss Jaramillo Silva full-time for another year. Ms Alfonsi says that was out of sympathy for Miss Jaramillo Silva. Miss Jaramillo Silva says it was because Mr Delahaye had been left on his own to look after the house for a week-end and did not like having to do more housework himself. I am not in a position to state their motives. It may have been a combination of both factors. In any event, Ms Alfonsi told Miss Jaramillo Silva they would keep her full-time for one more year, but then she would want her to go part-time.
17. On 17 November 2017, the family moved from the five-floor house in Belsize Park to a 3-storey house in Regal Lane. Her duties were similar and also included cleaning the two cars, cleaning windows and sweeping leaves. Miss Jaramillo Silva was told to start at 11 am each day and her pay was reduced back to £480/week. She was still entitled to take a one hour lunch break. Again there was no discussion whether or not lunch breaks were 'paid' and no one addressed their mind to this.

March 2018: cancelling hospital appointment

18. Ms Alfonsi had booked tickets to go to the Harry Potter play on 2 March 2018 with her daughter and her daughter's best friend.
19. A few days before 2 March 2018, Miss Jaramillo Silva told Ms Alfonsi that she had a hospital appointment on that day for a breast health check-up. Miss Jaramillo Silva had had surgery for low-grade breast cancer in February 2015. Miss Jaramillo Silva showed Ms Alfonsi the appointment on her mobile phone. The hospital message said that appointments could be rearranged if inconvenient. Ms Alfonsi told Miss Jaramillo Silva she needed her on that day for something important. She said she wanted Miss Jaramillo Silva to start work early and drop and collect her youngest son from school.
20. It was only the next day when Miss Jaramillo Silva asked the youngest son where they were going, that she found out it was a theatre trip. Miss Jaramillo Silva was extremely upset that Ms Alfonsi had prioritised a theatre trip over Miss Jaramillo Silva's health.
21. Ms Alfonsi says she had told Miss Jaramillo Silva about the booking about one month previously and to keep the day free in order to help her out. Miss

Jaramillo Silva says this is not true and she had not been told about the booking. I believe Miss Jaramillo Silva's memory is correct on this point. If she had already been told about the theatre, she would not have been surprised and upset when the youngest son told her where Ms Alfonsi was going.

22. Miss Jaramillo Silva says Ms Alfonsi snatched the mobile phone from her hand and cancelled the appointment. Ms Alfonsi denies this. She says she asked Miss Jaramillo Silva whether it was urgent and Miss Jaramillo Silva said not. She says that Miss Jaramillo Silva agreed to rearrange the appointment and asked her to use the phone to send a text to cancel. Ms Alfonsi says they both thought there would be a delay of one month at most. In the event, it took many phone calls by Miss Jaramillo Silva to fix a new date, which was not until September.
23. I believe there is some truth in both accounts. I suspect that Ms Alfonsi pressurised Miss Jaramillo Silva into agreeing to postpone the appointment and brusquely took the phone from her hand the minute she agreed. This is the most inherently likely sequence of events given the relationship between the two. Also, if they were both thinking the delay would only be one month, that suggests some discussion and likely agreement, if only reluctantly.
24. Ms Alfonsi accepted in the tribunal that she may have been able to arrange for someone else to take the youngest son to and from school. She said she had not thought of that at the time because this was a bit last minute.

Being required to work after injuring knee

25. On 18 June 2017, Miss Jaramillo Silva was standing on a chair to clean a window sill. The chair slipped and she badly hurt her leg. After 10 minutes, Miss Jaramillo Silva went downstairs to start cooking. She was in pain. When Ms Alfonsi came down later for tea, Miss Jaramillo Silva told her what had happened. Ms Alfonsi did not realise how bad the injury was. She left Miss Jaramillo Silva to continue cooking and went off to her karate class.
26. The knee injury was painful and Miss Jaramillo Silva had to go to the Royal Free on 20 June 2018. She also went to see her GP who signed her off for a week. On 21 June 2018, Miss Jaramillo Silva texted Ms Alfonsi: 'Morning Leticia, I had to go to hospital last night I torn my muscles, I have to rest to get better and take pain killers. Lucky is not the ligaments'. Ms Alfonsi replied 'Hello Ana sorry to hear I hope you get better soon'
27. At the start of September 2018, when the family returned from their summer holiday, Miss Jaramillo Silva told Ms Alfonsi again about her knee. Ms Alfonsi had forgotten about it and asked again how it happened. Miss Jaramillo Silva continued to have pain from her knee and would complain about it to Ms Alfonsi. She did not ask for any time off.

Failing to provide P60, pay slips and pension contributions

28. The government required employers automatically to enrol workers onto a pension scheme from December 2017. Miss Jaramillo Silva was eligible. Mr Delahaye did not set this up till March 2018, though he did make the due back payments. Mr Delahaye also forgot to pay in the employer's contributions in June or July 2018 when he was on holiday. Miss Jaramillo Silva found this out because the pension regulator telephoned while he was away. Mr Delahaye was fined for the delay. After that, he made regular payments. He also paid Miss Jaramillo Silva's contribution as well as his own throughout.
29. Mr Delahaye did not give Miss Jaramillo Silva payslips with her weekly pay. He used an on-line platform, Stafftax, to generate pay-slips and P60s. He was too busy to print them off and hand them to Miss Jaramillo Silva. He told her she could access the portal herself. Miss Jaramillo Silva did not find it easy to do that. Although she found the difficulties with payslips irritating and would have preferred to be provided with them weekly or monthly, Miss Jaramillo Silva was mainly concerned to get the payslips in preparation for meeting her accountant, and Mr Delahaye would print off batches of payslips at those points.
30. Mr Delahaye had operated this way from the beginning. In 2015, Miss Jaramillo Silva's accountant had offered to produce the payslips himself, but Mr Delahaye had said it was cheaper on-line.

Cutting hours

31. As already mentioned, in November 2017, the family had moved to a much smaller house and in August 2018, the second oldest child moved out.
32. In September 2018, Ms Alfonsi told Miss Jaramillo Silva that they needed to meet and discuss reducing her hours. On 16 September 2018, Ms Alfonsi texted her to say 'We need to talk about work hours as we need to reduce them, I know we had the discussion before but ... we cannot continue like this'. They met the next day. Ms Alfonsi suggested that Miss Jaramillo Silva work 5 hours/day on 5 days/week. Ms Alfonsi said she would not need to give Miss Jaramillo Silva breaks because this was less than a 6 hour day. Miss Jaramillo Silva suggested she work three days/week from 11 am – 7 pm. Ms Alfonsi suggested Monday Wednesday and Thursday, but Miss Jaramillo Silva preferred Monday, Wednesday and Friday. This was agreed. They agreed that the new rota would start on 1 October 2018.
33. I have found the evidence about paid lunch breaks vague, inconsistent and difficult to resolve. The difficulty is that no one had ever thought about whether breaks were paid or not until this point. As I have said, the original agreement for basic pay was a weekly sum, not an hourly rate.
34. The subject came up for the first time on 17 September 2018 only because Ms Alfonsi did not want the claimant to have breaks at all. The problem was not paying for them. It was that Ms Alfonsi did not want Miss Jaramillo Silva occupying her lounge at lunch breaks any more. She wanted her own space. The suggestion of 5 hour days would in her mind have

avoided the need to give breaks. When Miss Jaramillo Silva suggested and then agreed 11 am – 7 pm, there had to be lunch breaks. The question as to whether they would be paid was left in the air to be decided at some point by Mr Delahaye.

35. Miss Jaramillo Silva then asked if she could have a pay-rise. Ms Alfonsi said she should discuss that with Mr Delahaye. On 23 September 2018, Miss Jaramillo Silva texted Mr Delahaye to say, 'I had a meeting with Laeticia regarding my new Rota from 1 October, I would like a meeting to discuss, please let me know when it is most convenient for you'.
36. Shortly after, Miss Jaramillo Silva and Mr Delahaye had a conversation about her pay. At this point, Miss Jaramillo Silva and Mr Delahaye started to discuss her future pay in terms of an hourly rate. Miss Jaramillo Silva felt that part-time workers should be paid a higher hourly rate. She wanted £15/hour. Mr Delahaye disagreed. He felt he was already paying her above the market rate. He was also paying her pension contributions. However, he did say he might be willing to increase the hourly rate to some extent. Miss Jaramillo Silva insisted on £15/hour.
37. They spoke again around the end of September. Again they could not agree on a rate and Miss Jaramillo Silva insisted on £15. According to Mr Delahaye, he had told her he would consider an increase to £12.80/hour or £13 maximum. According to Miss Jaramillo Silva, he only offered, ie £12.05 per hour. It is difficult for me to make sense of the evidence about pay at this point. As I have said, up till now, no one had thought of Miss Jaramillo Silva's pay in terms of an hourly rate. However, Miss Jaramillo Silva expressed her request for a rise in hourly terms and Mr Delahaye responded in kind. But they never established what they both thought the existing hourly rate was, as this of course depended on whether lunch breaks were paid. The later dispute and the evidence to the tribunal reflects an attempt by both sides to retrospectively impose an hourly rate which was never the agreed basis for the pay (apart from the overtime rate, which was not an issue in the proceedings).
38. As for whether Mr Delahaye made an initial offer of £12.05 or £12.80, it is hard to say. There were many discussions and it must be difficult for both sides to remember. On balance, I accept Mr Delahaye's evidence because £12.05 seems an unlikely figure to suggest.
39. Miss Jaramillo Silva started working the new rota from 1 October 2018 and continued to do so. Mr Delahaye paid Miss Jaramillo Silva on the same basis as previously. She was working 3 days instead of 5 from 11 am – 7 pm as before, and he was paying her three fifths of her previous weekly wage.
40. Mr Delahaye spoke to Miss Jaramillo Silva on about 9 October 2018 about her pay. Miss Jaramillo Silva was still asking for £15/hour. Mr Delahaye offered £13/hour. Miss Jaramillo Silva felt the pay for part-time work should be much higher and she did not accept the offer. There was no discussion

about pay for lunch breaks. Nor did Miss Jaramillo Silva say that she had not agreed the new hours.

41. Miss Jaramillo Silva continued to work the new rota through October, but she remained very unhappy about her pay and complained about it regularly to Ms Alfonsi.
42. On 28 October 2018, Miss Jaramillo Silva again texted 'I have notice I didn't get an increase in my wages as discussed. It's possible to start early this week and do Monday Tuesday and Wednesday? Could you please also pay my wages in today thank you have a nice day'. The text said nothing about disagreeing with the reduction to 3 days or about the lunch break issue. Ms Alfonsi replied that Miss Jaramillo Silva and Mr Delahaye had not yet come to an agreement about the pay increase.
43. Mr Delahaye had a further discussion with Miss Jaramillo Silva on about 29 October 2018. Miss Jaramillo Silva still wanted £15/hour. Mr Delahaye said he would not go above £13/hour. On 30 October 2018, Miss Jaramillo Silva texted Ms Alfonsi to say that there was no agreement. She said she had told her accountant that she had not had a rise for 5 years.
44. Miss Jaramillo Silva says that she did not agree on 17 September 2018 to the reduced hours. However, I believe that she did for the following reasons. She did not agree to the initial proposal of 5 hours/day across 5 days; she negotiated the same number of hours over 3 days and then further negotiated her preferred 3 days. She worked the rota from the start date agreed (1 October 2018) and continued to do so until 15 November 2018 when she went off sick and subsequently resigned. She never said in writing that she did not agree with the reduction in hours. She asked for a written contract when she took advice, but that is different to saying she did not agree the hours. The follow-up discussions, orally and by text and email, were all about an increase in the hourly rate of pay, not about the reduction in hours.

From September 2018 on, having last minute tasks imposed at end day and being required to work late

Unreasonable demands and criticisms from Sept 2018 on

45. Miss Jaramillo Silva said many times during her evidence that she had been subjected to unreasonable demands and criticisms from September 2018 and that she had last minute tasks imposed at the end of the day or was required to work late. However, she was very vague about the details. She gave a few examples, but it was impossible for me to judge how often such incidents happened and whether they really were unreasonable. I could not judge whether Ms Alfonsi was simply a demanding employer or whether she was behaving completely unacceptably. I could not work out from the limited evidence whether Ms Alfonsi had always behaved the same way or whether something had changed.
46. In her witness statement, Miss Jaramillo Silva said that her relationship with Mr Delahaye and Ms Alfonsi deteriorated when they could not agree how

much she should be paid for house-sitting for a two week period when Mr Delahaye and Ms Alfonsi were going to Corsica to build a new house. No date is given for this, but it took place while the family lived in Belsize Park and must therefore have been in 2015. Miss Jaramillo Silva also said in her witness statement that at the same time, Ms Alfonsi always tried to give her last minute tasks, making her finish after 7 pm. So it would appear that this had been the way of working for at least 3 years.

47. I accept Miss Jaramillo Silva was forced to leave late on a number of occasions from August / September 2018. This was confirmed by Mr Burrige. But I cannot say whether this was any more frequent than previously or why it was happening. Miss Jaramillo Silva was also arriving 10 – 15 minutes late a number of times. The exchange of texts on 10 October 2018 shows that Miss Jaramillo Silva was regularly arriving late in this period.
48. It is clear the working relationship deteriorated after the September 2018 conversation about reducing hours. Miss Jaramillo Silva felt she was being asked to do 5 days work in 3 days. However, the house was smaller. Two of the children had by then moved out. There must logically have been less to do.
49. From September 2018, Ms Alfonsi was asking Miss Jaramillo Silva to be more efficient and asking her to do cleaning at the end of the day when previously Miss Jaramillo Silva would have been feeding and playing with the youngest child. This came as a shock to Miss Jaramillo Silva because it changed a long-standing routine.
50. Tensions gradually increased between Ms Alfonsi and Miss Jaramillo Silva because Ms Alfonsi was managing her in a more hands-on way to fit the work into the reduced hours. But the main problem was that Miss Jaramillo Silva felt she should be paid more for the reduced hours. Miss Jaramillo Silva lost enthusiasm for the job. Sometimes she came in late. In turn, Ms Alfonsi became more tetchy.

End October 2018, shouted at for wanting to take holiday

51. On 8 October 2018, there was an argument between Miss Jaramillo Silva and Ms Alfonsi about holiday. Ms Alfonsi raised her voice. Miss Jaramillo Silva had 5.5 days untaken holiday from the previous year. Ms Alfonsi said she could take 5 days and that Miss Jaramillo Silva had to take the days when it suited Ms Alfonsi and Mr Delahaye. 20 – 27 October was agreed.
52. Miss Jaramillo Silva emailed the next day to say she would appreciate it if Ms Alfonsi did not get annoyed and raise her voice when discussing work matters. Ms Alfonsi replied 'I do not like to talk about it and get upset, so please forgive me, and understand that this is why I prefer to write'. She went on to explain that they felt they had overpaid holidays the previous year, not to mention the number of times Miss Jaramillo Silva arrived 10 – 15 minutes late without saying anything. That is why she had not wanted to talk about the 0.5 days left.

Resignation

53. In October 2018, Miss Jaramillo Silva took advice from a CAB. On 2 November 2018, Miss Jaramillo Silva emailed Mr Delahaye to say, 'For the new contract of 3 days per week 8 hours per day from 11 am until 7 pm Mon, Wed & Thu. I require payment of £15.00 per hour net £360 per week as discussed with Leticia as this is part-time working the hourly rate is higher. This is based on the original contract of £12.00 per hour net 5 years ago which states an increase will be applied every year in December which you have not implemented. This rate needs to be backdated to 1st of October when the contract started. I look forward to receiving your confirmation.'
54. I note here that the original written contract simply said, 'Your salary will be reviewed annually in December.' This is not a promise of an increase. In any event, it is not suggested in this claim that failure to give an annual rise was a breach of contract and a reason for resigning.
55. On 7 November 2018, Ms Alfonsi told Miss Jaramillo Silva that she would not be paid for her lunch breaks and sent her an email setting out information from the GOV.UK site about rest breaks at work. After setting out the right to one uninterrupted 20 minute rest break during the work day, the email added 'The break doesn't have to be paid – it depends on their employment contract'.
56. There was no further email dated 7 November 2018 in the file of papers for the tribunal which sets out what Miss Jaramillo Silva put in her issues at number 2.1.8.
57. There was no discussion about whether this would affect the amount Miss Jaramillo Silva was currently being paid and Mr Delahaye continued to pay three fifths of the previous weekly total for a 5 day week.
58. On 15 November 2018, Miss Jaramillo Silva went off sick with stress
59. On 18 November 2018, Mr Delahaye replied to Miss Jaramillo Silva's 2 November email to confirm the new contract started on 1 October at a net hourly rate of £12 for 21 hours per week (7 hours worked Monday, Wednesday and Thursday). He added, 'For information in the old original contract your net salary was actually £10.70 per hour, as you had 45 worked hours per week at the time.' This appears to be a retrospective hourly calculation in response to Miss Jaramillo Silva's requests for a higher hourly rate. Mr Delahaye did not set out the actual hours during which the claimant was now expected to attend work.
60. On 23 November 2018, Miss Jaramillo Silva sent in a letter of resignation. She said she had taken legal advice that on 17 September, she had been informed by Ms Alfonsi that her weekly hours would be reduced from 40 to 24 as from 1 October with no paid lunch break. She said this loss of hours and

therefore wages broke a fundamental term of her contract and she had lost trust and confidence.

SSP

61. Mr England explained in his closing submissions that Miss Jaramillo Silva had in fact been paid more than she was required to be paid. Miss Jaramillo Silva was unable to explain to me why she said SSP was owed. As I explained to Miss Jaramillo Silva, I was unable to deal with this claim if she could not explain to me why anything was due.

Notice

62. Miss Jaramillo Silva was told she need not work her notice. She was paid notice pay instead. The claim is that she was paid based on her new hours but she should have been paid on her old hours

Holiday

63. The holiday year started each October. Ms Alfonsi and Mr Delahaye had agreed that Miss Jaramillo Silva carry over 5.5 days' holiday from 2017/8. In October 2018, Ms Silva was paid for 5 of those days. She was paid the balance of half / day with her final pay packet.

64. In the holiday year 2018/9, Miss Jaramillo Silva worked from 1 October 2018 until her resignation on 23 November 2018. Her annual entitlement was $3 \times 5.6 = 16.8$ days. She was entitled to a proportion representing 1 October – 23 November 2018.

65. Near the end of the hearing, Miss Jaramillo Silva and Mr Delahaye agreed to settle the holiday pay claim for £220, which was paid on the spot. This claim was therefore withdrawn.

Law

66. Miss Jaramillo Silva contends she was constructively dismissed under s95(1)(c) of the Employment Rights Act 1996. Under s95(1)(c) an employee is dismissed where she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.

67. An employee will be entitled to terminate her contract without notice to her employer only if the employer is in repudiatory breach of contract: see Western Excavating (ECC) v Sharp [1978] ICR 221. The claimant contends that her employer was in breach of the implied term of trust and confidence. Breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract (Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT).

68. In Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, [1997] IRLR 462. the House of Lords held the implied term of trust and confidence to be as follows:

'The employer shall not without reasonable and proper cause conduct itself in a manner calculated *and* likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

The italicised word 'and' is thought to be a transcription error and should read 'or'. (Baldwin v Brighton & Hove City Council [2007] IRLR 232).

69. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. The bar is set much higher. The fundamental question is whether the employer's conduct, even if unreasonable, is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
70. There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, ie from the perspective of a reasonable person in the claimant's position. (Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420, CA.)
71. The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (Nottinghamshire County Council v Meikle [2004] IRLR 703, CA; Wright v North Ayrshire Council UKEATS/0017/13.)
72. The duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually can be justified as being within the four corners of the contract. (United Bank Ltd v Akhtar [1989] IRLR 507, EAT).
73. A claimant may resign because of a 'final straw'. The key case of London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493 establishes these principles in regard to the final straw:

- (1) the final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial.

- (2) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.
- (3) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the 'final straw' consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test.
- (4) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence."

74. The claimant must not 'affirm' the breach. A claimant may affirm a continuation of the contract in various ways. She may demonstrate by what she says or does an intention that the contract continue. Delay in resigning is not in itself affirmation, but it may be evidence of affirmation. Mere delay, unaccompanied by any other action affirming the contract, cannot amount to affirmation. However, prolonged delay may indicate implied affirmation. This must be seen in context. For some employees, giving up a job has more serious immediate financial or other consequences than others. That might affect how long it takes the employee to decide to resign. (Chindove v William Morrisons Supermarket PLC UKEAT/0043/14.)

75. An employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts, even if he or she has previously affirmed, provided the final act forms part of the series (in the way explained in Omilaju). The final action does not land in an empty scale. (Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.)

Conclusions

76. I now apply the law to the facts to decide the issues.

Issue 2.1: overview

77. Mr Delahaye (and Ms Alfonsi on his behalf) did not behave in a way that was calculated or likely to destroy trust and confidence. It is not enough that an employer is demanding, lacking generosity or difficult. It is not even enough that an employer is unreasonable from time-to-time. The employer must have behaved in such a bad way that all trust and confidence is destroyed.

78. The various incidents mentioned by Miss Jaramillo Silva do not always show Mr Delahaye and Ms Alfonsi in a flattering light. But working relationships between a housekeeper and family are very personal. By their

nature, they tend to be informal and often have small tensions and irritations. I will now consider each of the incidents Miss Jaramillo Silva referred to.

79. *2.1.1: Cancelling the hospital appointment.*

I agree with Miss Jaramillo Silva that it was selfish and disappointing for Ms Alfonsi to prioritise a theatre trip over a check-up when Miss Jaramillo Silva had had breast cancer. However, I don't think Ms Alfonsi went as far as cancelling the appointment without permission. I think she put pressure on Miss Jaramillo Silva to agree to postponing the appointment, and Miss Jaramillo Silva agreed, both of them thinking there would only be a short delay. As it turned out, it was a very long delay, but Ms Alfonsi was not anticipating that. She had already booked the theatre tickets and was taking her daughter and a friend. She did not think of finding someone else to look after her youngest son because the problem came up at the last minute. I do not consider this is enough to amount to a breach of trust and confidence.

80. *2.1.2: P60 and pension*

Mr Delahaye was three months late in setting up the pension arrangements and missed contributions in June or July 2018 when he was on holiday. This was sloppy and he had to be chased and fined by the Pensions Regulator. However he did make the necessary back payments and from then on, made regular payments. He also voluntarily paid Miss Jaramillo Silva's contribution throughout. I therefore do not consider this was enough to be a breach of trust and confidence.

81. Mr Delahaye's approach to payslips was unhelpful and probably unlawful as Miss Jaramillo Silva was unable to access the portal. He could not be bothered to print the payslips himself and he did not want to pay Miss Jaramillo Silva's accountant to provide printed copies. However, although she would have preferred regular payslips, Miss Jaramillo Silva was only really concerned when she had to visit her accountant and on those occasions, Mr Delahaye would print out the necessary batch of payslips. It was poor practice. But Mr Delahaye is a small employer. He was at least using an on-line platform to create the payslips and P60. He provided paper copies when Miss Jaramillo Silva really wanted them. This went on throughout Miss Jaramillo Silva's employment. So while not condoning his behaviour, I do not think it amounts to a breach of trust and confidence.

82. *2.1.3: being required to continue working after knee injury*

This claim was that Miss Jaramillo Silva was still required to work the rest of the day after falling off the chair. Ms Alfonsi did not check Miss Jaramillo Silva was able to continue working after falling off the chair because she did not realise the seriousness of the injury and did not appreciate Miss Jaramillo Silva was in considerable pain. Miss Jaramillo Silva does not say that she told Ms Alfonsi she was in so much pain that she could not work. Maybe Ms Alfonsi could have been more sympathetic, but that is a long way from breach of trust and confidence. The next day, when Miss Jaramillo Silva texted to say

she needed to rest, Ms Alfonsi did not instruct her to come into work. She wished her better. Miss Jaramillo Silva was signed off work for one week. As for September 2018, Miss Jaramillo Silva simply complains that Ms Alfonsi seemed to have forgotten about the accident. Although her knee was still painful, it did not mean she was unable to work and she did not tell Ms Alfonsi that her knee meant she was unable to work.

83. *2.1.4: Last minute tasks and being required to work late from September 2018*

An employer is entitled to impose last minute tasks within an employee's working hours. There is more of a problem if the employer is insisting they be completed so that the employee is regularly late leaving. In this case, there were occasions when last minute tasks were given and Miss Jaramillo Silva was required to stay late. There were also occasions when she arrived late and gave no explanation. This had happened at least since 2015. It may have become a little worse. I was not given enough evidence of what was happening to be able to say this was breach of trust and confidence. There was a small level of flexibility in arrival and leaving times which had gone on for a while. The nature of the job would inevitably lead to last minute requests for help and some give and take. What I was told about was not sufficient to amount to a breach of trust and confidence.

84. *2.1.5: Proposal on 17 September 2018 to reduce hours and stop paying lunch breaks*

Ms Alfonsi told Miss Jaramillo Silva on 17 September 2018 that she needed to reduce her hours. The difficulty for Miss Jaramillo Silva is that she agreed. Moreover, she negotiated 3 days/week at 8 hours/day rather than the hours suggested by Ms Alfonsi which were 5 days/week at 5 hours/day. What made Miss Jaramillo Silva unhappy after that was not the reduction in hours in itself, but the fact that her subsequent request for an increased hourly rate to £15/hour was refused.

85. There was no breach of any concrete contract term by the reduction in hours. She did not make the agreement conditional on an increased hourly rate. That was an independent request.

86. I also do not think it was a breach of trust and confidence for Ms Alfonsi and Mr Delahaye to ask her to reduce her hours. They did not need someone to work full-time. Two children had moved out and although they occasionally had house guests, they now lived in a much smaller house. They had realised they did not need Miss Jaramillo Silva to work full-time one year previously and they had discussed it with her. She had been upset. They had told her they would keep her full-time for one more year but then they would have to reconsider.

87. Regarding paid lunch breaks, I find that Miss Jaramillo Silva never had a right under her contract to be paid for lunch breaks. It was not mentioned in the written contract and it was not verbally agreed. Miss Jaramillo Silva's pay

was agreed from the outset on a weekly salaried basis. An hourly rate was agreed only for overtime. It was also agreed that Miss Jaramillo Silva would have an hour's lunch break, but I cannot infer purely from that, that the lunch break was paid. Nor can I see any basis for implying a term that lunch breaks were paid. It was not necessary for breaks to be paid in order for the contract to work, nor was it obvious that they must be paid, nor had they in fact been clearly paid in the past

88. I noticed that the original hours of 10 am – 7 pm including a one hour lunch break added up to 45/week for which Miss Jaramillo Silva was paid £480. When Miss Jaramillo Silva's hours were reduced after one month to a total of 40 because of a later start time each day, the pay remained the same. This reinforces my view that the contractual pay was not calculated on an hourly basis. At that point, £480 for 40 hours works out at £12/hour, but it did not do so before or after. In September 2015, Miss Jaramillo Silva's hours went back to 45 and her pay only went up to £520/week, which would entail a lesser hourly sum.

89. There was therefore no breach of any contractual term to pay lunch breaks. Nor was there breach of trust and confidence on this newly arisen point. No one had thought about whether lunch breaks were paid before 17 September 2018, when it was sparked because Ms Alfonsi had said that on her 5 hour / day proposal, she would not need to give Miss Jaramillo Silva breaks at all. When Ms Alfonsi agreed to the three day variation, she accepted that meant Miss Jaramillo Silva must have a break, but the subject of payment for the break now arose. It was left vaguely that Mr Delahaye would decide whether to pay lunch breaks. So even if there had been a contractual right to paid lunch breaks (which I do not believe), at this point there was no decision not to pay such breaks. The matter was left open for discussion.

90. *2.1.6: unreasonable demands and criticisms from September 2016*

This was another matter on which I was given insufficient evidence to reach clear conclusions. Ms Alfonsi was entitled to ask Miss Jaramillo Silva to do cleaning at 6 pm rather than look after the youngest son. It may have been a change of a long-standing routine, but there was no reason why Ms Alfonsi was not allowed to say what tasks within the job description she would like done at what time within hours. Ms Alfonsi was also entitled to say that now Miss Jaramillo Silva was employed for only 3 days, she needed to make efficient use of the time. I have not been given evidence of any unreasonable demands or criticisms of the seriousness which would amount to a breach of trust and confidence.

91. *Being shouted at for wanting to take holiday*

Ms Alfonsi raised her voice and she should not have done. She may have done so from time-to-time on other issues. It is not good practice, but it can happen, especially in the kind of domestic employment relationship involved here. The example given to me was not serious enough to amount to a

breach of trust and confidence. Ms Alfonsi did not say anything terrible. She apologised in writing the next day and explained why she felt no more holiday was owed.

92. *Issue 2.1.8: 7 November email proposing 21 hours/week and no lunch break with an increase in duties when Miss Jaramillo Silva was in fact working 8 hours/day.*

The email of 7 November 2018 which I was shown simply confirms that 20 minute rest breaks need not be paid. It does not contain the other elements mentioned in this issue.

93. I believe Miss Jaramillo Silva means to refer to the email of 18 November where Mr Delahaye confirmed 'the new contract started on 1 October at a net hourly rate of £12 for 21 hours per week (7 hours worked Monday, Wednesday and Thursday)'. In fact, Miss Jaramillo Silva was required to come in at 11 am and leave at 7 pm (8 hours) and given a lunch break, so she was not required to work throughout the 8 hours. This email effectively confirmed that lunch breaks would not be paid.

94. As I have said above, Miss Jaramillo Silva never had the right to a paid lunch break. There was therefore no breach of a specific contractual right to paid lunch breaks. Nor do I think this was a breach of trust and confidence. Until the discussion on 17 September, no one had thought about whether lunch breaks were paid or not. After 17 September, the basis on which both sides calculated Miss Jaramillo Silva's pay was reconsidered, essentially because Miss Jaramillo Silva started talking about hourly rates and wanted to negotiate an hourly rate of £15. Some employers may have been more generous regarding whether they chose to pay for the lunch break, but that does not make it any breach of trust and confidence that Mr Delahaye did not wish to do so.

Overall on Issue 2.1

95. I find that Mr Delahaye and Ms Alfonsi did not behave in a way to breach trust and confidence in any of the above examples. I have also thought about the overall picture. I still do not find that they did so. As I explained in the legal section, it is not enough that Miss Jaramillo Silva personally feels trust and confidence is broken.
96. For all these reasons, I find there was no constructive dismissal. The claim for unfair constructive dismissal therefore fails.

Issue 2.2

97. I do not in any event find that Miss Jaramillo Silva resigned for any of the reasons set out above in issue 2.1. I believe she resigned purely because her pay was not increased to £15/hour. She believed that part-timers should in principle be paid a higher rate.

98. I have taken into account that the resignation letter says the reason for resigning was the cut in hours and the failure to pay lunch breaks. However, this letter does not reflect all the discussions and texts leading up to the resignation. It is clear that what led to breakdown of the relationship and upset Miss Jaramillo Silva was that Mr Delahaye was not prepared to increase her pay to £15/hour. Miss Jaramillo Silva was completely focused on this point. There is no ongoing complaint about the reduction from 5 days to 3, and the issue of whether lunch breaks are paid is also barely mentioned. I do not believe these were factors in the resignation.

99. For this reason also, the claim for constructive dismissal would fail.

Issue 2.3

100. This issue does not arise because there was no constructive dismissal.

101. However, I would add that even if the reduction from 5 to 3 days had been a constructive dismissal, it would not have been unfair. There was less work to be done in the house. Two children were no longer living there and the family was now in a smaller house. Even with some extra tasks added on, Mr Delahaye and Ms Alfonsi felt there was not enough to keep Miss Jaramillo Silva occupied full time. Mr Delahaye was legally entitled to decide he no longer wanted to employ a housekeeper full-time. Miss Jaramillo Silva had been informed a year previously that this would happen. She had been kept on at that point when it was not completely necessary. Ms Alfonsi then discussed the required change face-to-face with Miss Jaramillo Silva in September 2018. She agreed that the hours could be worked over 3 long days even though she would herself have preferred 5 shorter days. I understand why it is upsetting for Miss Jaramillo Silva to lose income but – even if there had been a fundamental breach of contract in the reduction of days – the dismissal would not have been outside the band of reasonable responses.

Wages

102. This claim was for the difference between the old rate of pay, ie based on 5 days, and the new rate, ie based on 3 days, from 1 October 2018 – 23 November 2018. Miss Jaramillo Silva agreed to the reduced hours. She was paid three fifths of what she had previously been paid. No wages are therefore owing.

Notice

103. Miss Jaramillo Silva agreed to the reduced hours. Her notice pay was therefore correctly calculated.

Holiday pay

104. As already explained, this claim was settled and dismissed on withdrawal.

SSP

105. As already explained, the respondent explained that Miss Jaramillo Silva had already been paid her SSP and had in fact been overpaid. Miss Jaramillo Silva was unable to explain to me in any way at all what her claim was based on. I therefore dismiss this claim.

Final comments

106. Miss Jaramillo Silva feels that after all she did for Mr Delahaye and his family, they took advantage of her and were mean with money and made unreasonable demands. It was particularly painful because of the close personal working relationship which was involved over several years. I understand that. But even taking the type of employment into account, at the end of the day, it is an employment relationship, and the employer's behaviour was not so bad that it was against the law.

Employment Judge Lewis

Dated: 23 Oct 2019

Judgment and Reasons sent to the parties on:

24/10/2019

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For the Tribunal Office