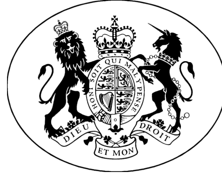

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs M Hazeldine	v	**General Dynamics Information Technology**

PRELIMINARY HEARING

Heard at: **Sheffield** **On:** **4 & 5 December 2017**

Before: **Employment Judge Rostant (sitting alone)**

Appearance:

For the Claimant: **In person**

For the Respondent: **Miss R Dickinson, of counsel**

RESERVED JUDGMENT

The claim of unfair dismissal fails and is dismissed.

REASONS

1. By a claim presented to the Employment Tribunal on 7 August 2017, the claimant complained that she had been constructively unfairly dismissed. The respondent responded and the matter was set down for hearing with standard case management orders being made for a hearing to last two days on 4 and 5 December 2017 at Sheffield Employment Tribunal. There was a considerable amount of correspondence between the parties in relation to documents and by the time of the hearing I had before me one agreed bundle running to some 188 pages, one bundle produced by the claimant called 'Essential Elements' and a third bundle, not agreed by the parties but produced by the respondent, running to some further 112 pages. In accordance with case management orders I had witness statements for the claimant who was the only witness giving evidence for the claimant and Ms Jaye Gannon, CHSS Operations Manager, Mrs R Roberts, Out of Hours Team Leader and Ms J A Hargreaves, Team Leader.

2. At the outset of the hearing I canvassed a number of issues which were evident from the claimant's witness statement and which needed to be resolved before the outset of the hearing. In the first place there was the question of

documentation. The claimant’s witness statement complained of the failure by the respondent to adduce a number of documents which she regarded as relevant. Of those, upon enquiry, there were only two classes of documents which were still not disclosed by the respondent. The first was the claimant’s quality sheets for the six months immediately prior to her resignation. Having discussed the matter with the claimant and the respondent I ordered that there be no disclosure of those documents since I could not establish with the claimant why they would be relevant to the matters that she was seeking to raise before the Tribunal. In particular the claimant indicated that they demonstrated that the quality of her calls was entirely acceptable during that period. However the respondent was not asserting anything to the contrary Save for one call in March, the claimant had suffered no disciplinary measures in relation to the quality of her calls during that period and if the claimant was facing any difficulties in that time it related not to the quality of her calls but the length of time that she was taking over. For those reasons I took the view that the specific disclosure of some 30 documents, all of which would have revealed that the quality of the claimant’s calls was acceptable, was not required for the purposes of a fair hearing. I took a different view however, of the requirement that the respondent disclose to the claimant records of her one to one meetings with her line manager during the same period. In any event, the respondent agreed that those should be disclosed and explained that if any had not been disclosed that was simply due to the fact that the member of staff responsible for collating the data, Ms Gannon, had been absent for much of the period running up to the trial. During the course of the morning of the first day three documents were disclosed and inserted into the bundle.

3. I also raised with the claimant whether or not she was seeking in fact to pursue claims of disability discrimination, either in relation to her own disability, or in relation to her daughters’ disability. This question was prompted by the way in which the claimant’s witness statement was framed as well as her grievance letter to the respondent, both of which mention the Equality Act 2010, and passages in both of those indicating a complaint that the claimant may have suffered discrimination. The claimant was completely clear before me that she did not wish to pursue a complaint of discrimination but wished only to complain of constructive unfair dismissal and the case proceeded on that basis.

4. I then raised with the claimant the size of her schedule of loss, I asked her whether she understood that a statutory cap applied in claims where the case was only one of unfair dismissal. The claimant said that she understood that but that she had nevertheless produced a schedule of loss which greatly exceeded the statutory cap on the basis that she was following the advice that she had been given as to how to lay out a schedule of loss.

5. We then turned to the supplemental bundle produced by the respondent and not agreed by the claimant. The claimant complained that the supplemental bundle contained matters which, as far as she was concerned, were of historical relevance only and did not focus on the issues which were before the Tribunal. I ruled that as and when any particular document in that supplemental bundle was referred to me I would make an individual decision as to whether or not its relevance was such as it was appropriate to be included in the documents before the Tribunal and the claimant was content with that

approach. In the event, during the course of cross-examination Miss Dickinson did refer one or two documents from the supplemental bundle and the claimant raised no objection to being referred to them and it seemed to me that they were entirely apposite and relevant.

The issues

6. This is a complaint only of constructive unfair dismissal. The burden rests upon the claimant to establish that she has resigned in response to acts or an act which amounts to a fundamental breach of the contract of employment. The claimant asserts that she has resigned in response to a cumulative series of acts which, taken together, amount to a breach of the term of mutual trust and confidence. The authorities establish that a breach of that term will always amount to a fundamental breach of the contract of employment. The claimant relies upon on a 'last straw'. The last straw is the incident on 24 March 2017 when, whilst working at her desk, she was given a letter, not in an envelope, which said that she would receive no pay rise for the following year. The claimant confirmed that her complaint is not so much that she was being refused a pay rise but rather that that letter had been given to her with no warning, no face to face meeting with the relevant manager and without her having had her annual appraisal. Furthermore, she contends that it was just put in front of her whilst she was working, not even in an envelope and in full view of her colleagues. The relevant letter is at page 54 of the bundle of documents and reads

"*following a review of employees' salaries, this letter is to confirm that your salary was not increase on 1st March 2017, in view of your current performance. As discussed, when your performance reaches the required level, your salary will be reviewed. If I can help you in any way to achieving the standard that we require, please don't hesitate to contact me*"

The claimant's other complaints can be summarised as follows. In the early part of her career, despite making helpful suggestions that brought about useful changes to the respondent's systems, thus indicating her competence and ability to move on, she did not progress in her career with the respondent and in fact never progressed beyond her starting grade of Customer Service Representative 1. Next, the claimant complains that her line manager for most of her employment, Ms Rose, deliberately over-monitored the quality of the claimant's calls in order to find fault in her performance and that this over-monitoring continued from September 2014 until Ms Rose's departure from the respondent's employment in May 2016. The claimant then complains that her requests for training or advancement opportunities that would better fit her to move up the respondent's career structure were refused; those were training to become an Emergency Duty Officer, an invitation to train new starters and an opportunity to shadow Ms Gannon. The claimant also complained that she was placed on a Performance Improvement Plan in September 2016 in relation to her call times but was not advised of this until mid-November. Next, the claimant complained of a failure by the respondent to adjust her shift pattern in or around January 2017 to accommodate her in a time of domestic crisis. The penultimate complaint relates to the handling by the respondent of an incident in which the claimant was involved in a call from a customer where the respondent found fault and finally, as already set out above, the letter in relation to the pay rise.

7. The respondent asserts that the acts upon which the claimant relies do not amount to a fundamental breach of contract, or in the alternative that the claimant did not resign in response to them but rather resigned in response to the anxiety that she would be dismissed in any event for her handling of the call for which she was due to face a disciplinary process on the day of her resignation. To the extent that the claimant relies upon the conduct of Ms Rose, the respondent points out that Ms Rose left the business 9 months before the claimant's resignation and therefore if the claimant is only relying upon the conduct of Ms Rose or that is the only conduct which is found to be capable of amounting to or contributing to a fundamental breach of contract then the claimant's continued employment past that stage should be taken as affirming those breaches.

8. In the claimant's witness statement, a number of matters, not complained of in the claim form emerged as issues. For example at paragraph 15 and 16 the claimant effectively sets out what would amount to a complaint of a failure to make a reasonable adjustment, this is not complained of in the claim form and the claimant confirmed that she was not pursuing a claim of disability discrimination. I have, in the circumstances, concluded that it would not be appropriate for me to take into account as an alleged breach of the claimant's contract a failure the respondent to locate the claimant's work station in a different place. The claimant also complains about a delay in giving her a warning due her ill health which meant that that warning was still current at the time of her next trigger point, resulting in a second warning. This too is not a matter which features in the original claim form and upon examination the claimant said that her complaint was really that warnings for absence ought not to have been treated as conduct warnings which totted up with warnings for poor work quality. This too is not a matter complained of in the original claim form. I have however, taken it into account not as an alleged breach of contract which caused the claimant to resign, but in my considerations as to whether or not, if there was a dismissal and it was unfair, the claimant would fairly have been dismissed in any event in relation to her conduct over the March 2017 phone call. Finally, on the subject of the claimant's witness statement a great deal of time in the witness statement is expended on the issue of whether or not the respondent was aware in general terms of the ill health issues faced by the claimant's daughters. That appears to be relevant in the main to the unreasonableness or otherwise for the refusal of the shift change in early 2017, although in the witness statement it does again look like evidence that is designed to support a free-standing complaint of associative discrimination.

The Law

9. Section 95(1)(c) provides that an employee is dismissed if they resign in response to behaviour by the respondent. Case law establishes that the conduct must amount to a fundamental breach of the Contract of Employment and that the claimant must resign in response to that treatment. The respondent in this case does not assert that if there was a dismissal it was nevertheless fair and therefore section 98 of the Employment Rights Act 1996 dealing with the fairness of a dismissal is not engaged.

Tribunal's finding of fact

10. Below I set out the facts of this case which are agreed between the parties and which provide a basic narrative of the events.

    9.1 The respondent company provides customer care call services on behalf of a variety of customers including a number of London Borough Councils.

    9.2 One of the services it provides is an out of hours call service for domestic emergencies such as electricity or water problems in Council houses.

    9.3 It also provides call services for people wishing to speak to social workers out of hours.

    9.4 The claimant commenced her employment with the respondent working on the out of hours call services on 9 June 2014.

    9.5 She was initially employed on a six month probation. The claimant's immediate line manager was Ms Andrea Rose and she remained her team manager until she left the respondent's employment in or around April 2016. Ms Rose was herself line managed by Mrs Jaye Gannon. During the claimant's first six months she had a number of discussions with her immediate line manager, those discussions were classed as 'simple discussions' and are the first stage of the respondent's disciplinary process. The discussions essentially centred around call quality and failure to follow the appropriate scripts or comply with the requirements for documenting the call and forwarding relevant information to the appropriate receiver (for example the Social Services Department or Emergency Repair Providers), there was also one simple discussion in relation to a breach of the Data Protection Act.

    9.6 Based on her performance, the decision was taken to extend the claimant's probation for a further three months.

    9.7 The next probationary review was held by Mrs Rachel Roberts (nee Treloar) on 9 April 2015 at which point the claimant's performance had improved dramatically and Miss Treloar felt able to say that probation had been passed and to confirm the claimant's employment.

    9.8 The claimant has two daughters, both of whom have significant health problems.

    9.9 The respondent was aware in general terms of the claimant's daughters' health problems.

    9.10 At the claimant's mid-year performance review, held by Ms Rose on 10 September 2015, the claimant was scored as good or better than good on most of the relevant metrics.

    9.11 At the claimant's annual appraisal for 2015, carried out in February 2016 by Ms Rose, the claimant again was scored as having given a good performance. The claimant is recorded as commenting as follows

    "*the role as CSR (customer service representative) has been exciting and stimulation [sic] and I will strive to better all areas of my role and to progress in the company*"

9.12 During 2015 the claimant was given time out of work to improve her typing to improve her call time.

9.13 On 18 March 2016, the claimant was interviewed by Ms Rose in relation to a series of sickness absences that had triggered a stage one review under the respondent's absence policy. Each of her absences were reviewed and they appeared to be for a variety of different reasons including asthma, a problem with the claimant's ears and a reaction to certain medication. The claimant was issued a first written warning although the written warning was issued on the basis that the claimant already had a verbal warning issued to her on 3 March for a conduct issue (that earlier warning related to the claimant's being rude to customers in calls).

9.14 The claimant appealed neither the verbal warning nor the written warning in relation to absence.

9.15 Ms Rose left the business in April 2016.

9.16 In June 2016, the claimant increased her hours from 30 to 37 and in July from 37 to 37.5 per week.

9.17 The claimant's new line manager following the departure of Ms Rose was Julie Hargreaves.

9.18 On 17 August 2016 Miss Hargreaves issued the claimant with a final written warning, the claimant's absence since the last warning having triggered stage 2 of the respondent's process. This was expressed as a final written warning (capability) in the letter notifying the claimant of the warning – see page 45.

9.19 At the end of September, the claimant was put on a Performance Improvement Plan in relation to her call handling time.

9.20 That Performance Improvement Plan was commissioned by the claimant's line manager Miss Hargreaves although the paperwork was done by Mrs Roberts.

9.21 On 17 November 2016, the claimant had a one to one with her line manager Miss Hargreaves. Out of that meeting two matters emerged, the first was that she had improved her call handling time, reducing it to 3.51 minutes.

9.22 The other matter was that the claimant marked herself as having a morale at 10 which was the highest possible and indicating that she was 'quite happy' She did however, indicate that she would like training in relation to billing reports carrying out the functions of an Emergency Duty Officer and shadowing Miss Gannon and becoming involved in training new agents.

9.23 In October, the claimant asked for and was granted a temporary change of shifts to cope with an emergency relating her daughters' health.

9.24 On 7 December, the claimant applied to Miss Gannon for time off on a Friday and to swap a shift around to cope with her husband's temporary absence. That too was granted.

9.25 The claimant was taken off her Performance Improvement Plan by the end of December having successfully reduced her call handling time.

9.26 In mid-January 2017 the claimant met her line manager again for a monthly one to one. She indicated that she would like to move five hours that she worked on a Saturday to another day, she also indicated that her morale was low, down at 3. She indicated that she did not require any training at present.

9.27 The claimant again saw Miss Hargreaves in mid-February when her morale had got worse and when she indicated that what the respondent could do to improve that would be to allow her to spend time with her family at weekends (a reference to the shift change first mooted the previous month). She also indicated that she was at that stage helping new starters and that that had gone well. She said that she wanted no training at present.

9.28 Contrary to the respondent's own guidelines, the claimant did not get an annual appraisal at the start of 2016.

9.29 Having received no positive response to her request for a change of working hours to no longer work five hours on a Saturday the claimant contacted Ms Gannon directly by email on 22 February – see page 48. The relevant part of the email reads as follows

"*I've worked every weekend since I started in June 2014 and I need to spend some time with my family as I am not seeing anyone including Dean (*the claimant's husband*) for a few hours during the day at the weekend. I know this is OOH (*out of hours*) but most of the staff have at least either a Friday or a Saturday or a Sunday off. I am happy to just drop the five hours if you don't want cover elsewhere. Can you have a look at the rota to see if there is anything you can do please?"*

Ms Gannon responded as follows –see page 48

"Unfortunately taking you off a weekend shift is not possible as this will only open up a can of worms for me with the other 35 members of staff asking for me to take them off a weekend shift too. I could by all means look at moving your hours from evening to day? If you are wanting a Friday off then someone would have to swap with you, I am already short on Fridays so I am having to recruit to fill it"

9.30 In early March one of the respondent's customers, Harringay Council, complained about two calls which one of their tenants had made to the respondent. One of those calls involved the claimant.

9.31 Miss Hargreaves listened to the call and interviewed the claimant on 15 March 2017. The reason for the investigation was that it was thought that the claimant had failed to follow the appropriate termination process for a call and that her tone and attitude during the call was 'suspect'. Following the investigation the matter was referred to Ms Gannon.

9.32 On 19 March Ms Oreskovic, Human Resources Adviser, wrote to the claimant inviting her to attend a disciplinary hearing on 24 March, warning the claimant that the outcome of the meeting could range from no further action to 'gross misconduct'. The claimant understood that to mean that she might be dismissed.

9.33 The claimant attended work on 24 March. Whilst she was working Mrs Roberts handed her a letter which she should have received earlier that month.

9.34 The letter was from Mrs Gannon and was dated 9 March, as relevant the letter (page 54) reads as follows

"Following a review of employee salaries this letter is to confirm that your salary was not increase on 1 March 2017 in view of your current performance as discussed, when your performance reaches the required level, your salary will be reviewed. If I can help in any way to achieving the standard that we require, please don't hesitate to contact me."

Upon receiving that letter the claimant left, terminating her employment.

9.35 On 29 March, the claimant sent a letter of grievance headed 'Direct Discrimination - discrimination by association'. The grievance was investigated but ultimately rejected.

The Tribunal's conclusions on the alleged breaches of contract

10 Failure to progress and to offer training

The claimant's complaint is that she was never permitted to progress beyond CSR level 1. It is agreed by the parties that the next level up is CSR 2, a level which carries some responsibilities and is the first step on the management ladder. Beyond that there is Assistant Team Leader and then Team Leader. It was the unchallenged evidence of the respondent that whilst the claimant was in employment there were only three rounds of appointments to CSR 2. The first was when the claimant was still in probation. The the claimant went in for the second round and was scored. Only one person out of 35 employees was appointed and the claimant was not the top scorer. The final opportunity to progress happened whilst the claimant was in a Performance Improvement Plan(PIP). The claimant did not challenge the respondent's evidence, which in any case has documentary support for it, that no consideration is given to advancing a CSR from level 1 to level 2 whilst they are in a PIP. Whilst the claimant was in employment there was one recruitment round for Deputy Team Leaders for which the claimant did not apply. The question of training is to some extent linked with the complaint of lack of progression in that the claimant asserts that the training that she was seeking would have improved her chances of progressing. Upon examination, it appears that the claimant was given some training and the claimant does not challenge the evidence of the respondent when it says that she was given time off work to improve her touch typing in order to improve her call handling time and furthermore the claimant was given the opportunity to mentor and train new starters. It is however the case that Mrs Gannon did not respond to the claimant's desire to shadow her for a day and that a positive decision was taken not to give the claimant the opportunity to train as an Emergency Duty Officer. The explanation given for this, again which was not challenged by Mrs Hazeldine, was that the duties of an Emergency Duty Officer normally are reserved to level 2's and above and that it is a specialised position.

11 At this stage, given the way in which the claimant's case developed it is appropriate to deal with the fact of the PIP in September 2016. I find, contrary to

the claimant's initial case that she was advised of this plan at the end of September 2016. She appears to have signed plan documents at the end of September and there was a review in mid-November of her October performance. The claimant did not at that stage protest that she had been hitherto unaware that she was in a PIP. The claimant now asserts that that PIP, ostensibly based on her failure to meet call handling time targets, was a fabrication and that she did in fact meet the relevant call handling time targets and that there was no reason for her to go onto the PIP, other than Mrs Gannon's desire to prevent the claimant from being in a position to advance to level 2. It was during the hearing that this proposition was advanced for the first time. It was not put to Mrs Gannon during cross examination of Mrs Gannon and only emerged during the claimant's cross examination of Miss Hargreaves, her line manager at the relevant time. The claimant did not mention it in her grievance, written immediately after her resignation, or in her claim form. Indeed, rather than asserting that Mrs Gannon had now decided to deliberately block her progress, in her grievance the claimant referred to her distress that the disciplinary process was to be handled by the person who she regarded as her only friend in the respondent's organisation, namely Mrs Gannon. It is my conclusion that there is no evidence to support what is, on the face of it, a very serious accusation levelled at the respondent, namely that evidence was fabricated in order to create a spurious need for a PIP.

12 This leads me to two conclusions, the first is that the reason for the claimant's failure to be advanced to level 2 in the Autumn of 2016 is indeed the fact that she was on a PIP and the second that the claimant's freestanding complaints about the PIP as a separate breach of contract cannot be sustained. The evidence given by the respondent, which I accept, and which in any case is unchallenged by the claimant, is that PIPs occur when an employee falls below a particular Key Performance Indicator for three months consecutively. At no point until this hearing has the claimant ever said that she did not fall below the appropriate target for call time and indeed she originally approached the matter on the basis that the only reason that she did fall below target was that she was more conscientious in the recording of calls and in the paperwork associated with them than her colleagues were. Miss Gannon's evidence on that was that all employees are expected to do all of the paperwork and that there was no evidence that other colleagues were not carrying out the appropriate paperwork. Accordingly a PIP was appropriate. That is evidence which the claimant is not in a position to challenge and which I have no reason to reject. Accordingly, the PIP was something which the respondent was entitled to put in place for the claimant and it must be observed that the claimant's call times improved so that the Plan was ended in December. Call times are digitally recorded and stored in the respondent's information systems making the possibility of fabrication inherently improbable.

13 Overall I reject the claimant's complaint that there is to be any breach of contract or any contribution to a breakdown in the relationship of trust and confidence arising out of a failure on the part of the claimant to progress or a failure on the part of the claimant to receive training. The respondent appears on the evidence to have treated the claimant no differently than it would treat any other employee in relation to progression. It was agreed that there would not normally be progression during probation. The claimant was not the only person who failed to progress to CSR 2 in the next round and I have dealt in

detail with the third opportunity. The claimant is not entitled to insist on training other than that training which is necessary for her to carry out the job for which she is employed, and the respondent is entitled to exercise its discretion as to what training opportunities it offers to the claimant bearing in mind its own view of the claimant's capabilities and potential.

14 It is evident to me that the claimant was frustrated by what she saw as a lack of progression but I am not satisfied on the evidence that this is caused by Miss Gannon or anyone else taking a conscious decision to frustrate the claimant's ambitions.

15 <u>The bullying and harassment of the claimant by Ms Rose</u>

The claimant complains that whilst she was her line manager, Ms Rose was threatened by the claimant's obvious abilities and ambitions and took every opportunity to excessively criticise her and to bully and harass her. I am in no doubt that the claimant and Ms Rose did not enjoy a comfortable relationship. That much was confirmed by Mrs Gannon and is bourne out in particular by the text exchange between the claimant and Mrs Gannon when Mrs Gannon communicated to the claimant the fact that Ms Rose intended to leave the respondent's employment (see pages 56a and onwards). Indeed, one of Mrs Gannon's texts explains her decision to inform the claimant of Ms Rose's departure in terms as a desire to "spread a bit of sunshine your way". However, an uncomfortable personal relationship with your line manager does not necessarily amount to that line manager using her authority in such a way as to amount to a breach of the term of mutual trust and confidence. The claimant relies on her assertion that Ms Rose's principal method of exerting a malign influence over her was to "cherry pick" her calls in order to find fault in her call handling. In this context, the term "cherry picking" requires some explanation. Call monitoring is routinely done on the basis that five calls a month for each operative are monitored for quality of call and for outcome in terms of the relevant paperwork. That process of monitoring feeds into the Key Performance Indicator statistics, kept for each employee, which have relevance for things like whether or not a Performance Improvement Plan is put into place and how employees fare at mid-year review and annual appraisal which in turn would have a consequence for pay rises. It was the claimant's contention that Ms Rose, instead of listening to five calls, would listen to more than five calls for the claimant, continuing to listen to calls until she found unsatisfactory calls and then use that as an opportunity to get at the claimant. I am absolutely certain that that was a concern that the claimant had during her employment. Mrs Gannon confirmed that the claimant made that complaint and that there was a meeting involving Ms Rose, Mrs Gannon and the claimant herself to discuss the matter. I am not satisfied, however, that the claimant has made out her case that that was indeed happening. In the first place, Mrs Gannon gave unchallenged evidence that as a result of that meeting although she, Mrs Gannon, was personally satisfied that no cherry picking was going on, the claimant was offered the opportunity of nominating the five calls that she wanted monitored each month. Secondly neither Miss Hargreaves nor Mrs Roberts corroborated the claimant's assertion that they were aware of the fact that Ms Rose was cherry picking the claimant's calls. Most tellingly, however, there is no evidence that the claimant was placed in Performance Improvement Plans or suffered any formal consequence in relation to call quality with the

limited exception of a verbal warning delivered at some point early in 2016. That warning was not appealed. It seems inherently improbable that if Ms Rose's purpose was to make life difficult for the claimant by cherry picking calls she did not use the results of that effort to put the claimant through formal process. Indeed, there very little evidence at all that Ms Rose took any formal steps against the claimant and, to the contrary, her appraisals were on the whole positive. For the first time during this hearing the claimant contended that she had been in a number of PIPs during her employment and that the PIP in September 2016 was the last in a long line. I do not accept that evidence. The claimant did not mention any other PIPS in her witness statement, nor did she mention any other PIPs in her claim form, nor has the respondent been able to disclose any evidence of any such plans. My conclusion is that, on balance, although the claimant may have perceived that Ms Rose was, in her conduct towards her, oppressive and bullying, there is insufficient evidence before me to establish that that was indeed the case and the claimant's perception is not sufficient to establish a breach of contract.

16 Even if it were the case that Ms Rose's conduct amounted to a breach of the term of mutual trust and confidence I am nevertheless satisfied that the contract was affirmed by the claimant. Ms Rose left in April 2016. I am satisfied on the evidence before me that at the time that she left the claimant was contemplating putting in a formal letter of grievance about her conduct. That seems to me to be corroborated by the reference to keeping 'my letter back' in the text exchange already referred to above. The claimant herself gave evidence to say that in the period up to April 2016 her dissatisfaction with work rested entirely with the conduct of Ms Ros. I am clear that the claimant's decision to continue working, and indeed positive decision not to put in a grievance in April 2016 is indicative of the fact that the claimant at that point believed that her troubles were over and that she could continue in work with the respondent without the difficulties that she had been experiencing up to that point, that is to my mind a positive decision amounting to affirmation and moreover an unconditional waiver of any breaches up to that point. Few month's later the claimant was able to say that here morale was at te maximum rating of 10, despite being on a PIP and a final warning due to her attendance at work.

17 <u>The claimant's warnings</u>

The claimant does complaint about the fact that she received warnings. During her employment she seems to have received three, none of those warnings were appealed. The claimant's complaint about the two absence warnings appears to be on the basis that it ought to have been obvious to Human Resources that she had an underlying ongoing health condition and that that should have been taken into account when considering whether it was appropriate for her absences to trigger warnings at stage one and stage two. The evidence shows however, that the claimant was given numerous opportunities in return to work meetings and in disciplinary meetings to state that she had an ongoing underlying condition and to explain what that was. The claimant now says that that was a generalised anxiety condition but at no point, stretching from her application form to the last of her return to work meetings, did the claimant ever explain that. Indeed, the reason for her illnesses were it appeared to be entirely unrelated to any mental health problems, variously relating to problems with her foot, with her chest, with her ears and with

migraines and a reaction to medication. I can see no evidence to support the contention that those warnings were unfair or unreasonable given the nature of the respondent's contractual absence policy. It is to my mind significant that the claimant did not appeal any of the warnings that she received from the respondent.

18 As already indicated, at a late point, indeed not until the first day of the hearing, the claimant shifted a complaint in relation to at least one of her absence warnings by saying that it was given on the basis of conduct and that it was given at the level of a written warning when it should only have been a verbal warning because it was wrongly regarded by the respondent as being cumulative with an earlier verbal warning for poor call handling. For what it is worth I agree with the claimant that it was entirely inappropriate to treat the claimant as starting on a higher level in the absence procedure process merely because she had a pre-existing verbal warning in relation to what can properly be described as conduct. It is quite wrong to treat warnings in relation to absence as cumulative with warnings in relation to conduct unless there is good reason to believe that the absence is not genuine. It appears that that is a distinction that was recognised at the final written warning stage when the final written warning was given by reason of capability and it is further evident that Mrs Gannon, had she ever got round to hearing the disciplinary hearing on 24 March, would not have regarded the claimant as being on a final written warning in relation to conduct. I would have been prepared to regard this impermissible conflation of conduct and capability as something which could have contributed to a breach of the term of mutual trust and confidence had it been at all evident that the claimant was concerned about this at the time. The grievance letter, which is the nearest communication in time to the resignation, does not raise that issue, nor does the claim form and it really only emerged in response to my questioning the claimant about the exact meaning of paragraph 15 of her witness statement. In that paragraph the complaint appears to be unhappy not so much about the nature of the warning but about the fact that it had been given because it had been given in relation to absences caused by the claimant's generalised anxiety disorder and furthermore that the fact that it had been delayed meant that it was still live when the second warning was put in place. Therefore, despite my criticisms of the respondent's processes I am satisfied that the claimant was not treating that matter as breaching the relationship of trust and confidence but was more troubled by what she perceived as the unfairness of giving her warnings at all given her underlying health condition.

19 <u>The failure to grant the claimant a change of shift.</u>

The claimant first requested a move away from five hours work on a Saturday morning in a one to one meeting with her line manager in February 2017. The claimant says in her evidence, which was not challenged, that she raised the matter informally earlier on and was told that the matter would have to wait until after Christmas. At any rate, it was certainly raised on a formal basis with her line manager in the January one to one. The request was repeated the following month. Oddly, the claimant does not complain and has never complained, of the fact that she did not receive an immediate response to those two requests. There is no explanation given by the respondent for why Miss Hargreaves did not take that matter up with Mrs Gannon. Miss Hargreaves was not cross-examined on the matter. Had there been a criticism by the claimant I would

have regarded it as a just criticism. The claimant was entitled to expect that her line manager would make the appropriate enquiries in response to her saying that her morale was low and that an improvement could be achieve by a change of shift. The claimant is, however, critical of the fact that ultimately the response to her request from Mrs Gannon, by way of email of 22 February was in the negative. The claimant is particularly critical because she asserts that the respondent must have known that that request came out of the very difficult home circumstances, caused principally by the ill health of the claimant's two daughters. I am satisfied, and indeed the respondent does not really challenge the fact, that the respondent did know that there were significant health problems experienced by the claimant's two daughters. Indeed, the respondent had been generous in granting the claimant emergency dependency leave, about which the claimant makes no complaint, had agreed a temporary change of shifts for six weeks in October and November 2016, again a matter which the claimant does not complain about and had been prepared to accommodate a shift swap in December, once again a matter that the claimant does not complain about. In each case, it is apparent that the claimant made it explicit that the reason for the adjustment was problems in relation to her daughters and I am satisfied therefore that the respondent's attitude generally was one of consideration and helpfulness. The claimant's case loses a great deal of force when it becomes obvious that at no point in her requests to the respondent for a change of shift away from Saturday morning did she make it clear that this was to respond to the particular needs of her daughters. Indeed, the email to Mrs Gannon only refers to one member of the family by name and that is the claimant's partner and in all of the cases the request is made on the basis of the generalised desire to spend more time with her family. The claimant was requesting a change to her contractual hours and there was no obligation on the part of the respondents to agree to that change, Mrs Gannon responded saying that she did not agree to that change and giving good operational reasons for not doing so. Although I accept that the claimant would have been unhappy with that outcome, it does not seem to me to amount to conduct on the part of the respondent that breaches or would even contribute to a breach of the fundamental term of mutual trust and confidence. There is no evidence that Mrs Gannon was behaving in an arbitrary, capricious, unfair or unreasonable way in her handling of that request. Evidence that a request similar to that was granted to the claimant's sister, after the claimant resigned and not until the summer of 2017, does not help me in understanding the reasonableness or otherwise of the decision made in February of that year and indeed Mrs Gannon gave perfectly cogent evidence as to why the situation had changed somewhat by the time the claimant's sister came to make her request in August.

20 The disciplinary proceedings

Although the claimant has made a reference to the fact of the disciplinary proceedings hanging over her head in her claim form, during the course of the hearing she acknowledged that the handling of that matter was not relied upon by her as contributing to any breach of contract. That was an acknowledgment which frankly the claimant had little choice but to give, given the fact that it is obvious from the transcript of the call that her handling of that call fell below the respondent's standards and that it had triggered a justified complaint from the customer.

21 The letter in relation to pay

Initially, it appeared from the claim form that the claimant was complaining that the decision not to award her a pay rise was a breach of contract or contributed to the breach of the term of mutual trust and confidence. However, upon hearing the claimant in evidence, it became apparent that she was not expecting a pay rise given her travails in the previous year and that what troubled her was the process by which she was given that news. I take the view that the claimant was entitled to be disturbed by the way in which the matter was dealt with and indeed it is evident that Mrs Roberts, who gave her the letter, saw almost immediately that she had not done things as well as they should have been done and apologised by text to the claimant. The letter suggests that the claimant had had an annual appraisal and that the matter of her pay had been discussed. That was not so and the claimant was learning that she was to receive no pay rise, as it were out of the blue, in the form of a rather baldly expressed letter. Secondly, the letter was not handed over in any meeting, so that the claimant was not in a position to discuss it. It was simply put on her desk, Thirdly, the letter was somewhat delayed. Fourthly the letter was not even contained in an envelope and might have been legible to anybody .Fifthly, the letter was given to the claimant at her workstation in full view of others and indeed it prompted a question from one of the claimant's colleagues as to what it was about.

It is to be hoped that the respondent has learned its lesson. Matters of pay are always sensitive and it is difficult to imagine a less appropriate way of informing an employee of a decision in relation to her pay, other perhaps than a formal announcement to the claimant in front of all of her colleagues in a way that would have been audible to them. I do not take the view however that that matter is sufficient to amount on its own to a fundamental breach of the claimant's contract; it was inept but not malicious and was not sufficiently serious on its own to fatally undermine the relationship of trust and confidence. The question really is whether that matter, which is relied upon by the claimant as a last straw, is sufficient when linked with any other matters to found a complaint of constructive dismissal.

22 The authorities on this matter are relatively clear, the Tribunal must consider whether the last straw is sufficient to revive a breach of contract relying upon other earlier matters and in so doing must consider the length of the gap between this incident and earlier incidents, the nature of any waiver, any connection between this conduct and earlier conducts (although none is strictly necessary), and the nature of any previous waiver. In the first place, it must be recalled that my finding is that there were no earlier breaches of contract. If there were any at all they arose from the conduct of Ms Rose. I have set out my findings on the nature of affirmation and waiver. My own view is that even if there were breaches of contract in relation to Ms Rose's conduct this matter is not sufficient to revive them to allow the claimant to claim constructive unfair dismissal. The nature of this incident is entirely different; it arises out of incompetence rather than any deliberate attempt to oppress the claimant. It is nearly a year after Ms Rose resigned, during which I find there have been no other matters the claimant could have relied on as contributing to a breach of contract and in any case I take the view that the claimant gave as near as possible an unequivocal waiver to Ms Rose's conduct in her assertion that she would not now put in a grievance having heard that Ms Rose had resigned. For

all of those reasons I find that although there was a last straw about which the claimant can legitimately complain it did not contribute to a fundamental breach of the claimant's contract of employment and not sufficient on its own to amount to a breach. For those reasons, I find that the claimant has not been dismissed and her claim fails.

23 Even if I had found that the claimant had been dismissed I would have found that her compensation should be significantly limited. The claimant was, on the day of her resignation, facing a disciplinary hearing. I have read the transcript of the hearing and the claimant does not challenge the respondent's assertion that it was conducted in breach of its normal protocols. The claimant is supposed to have given three warnings before she terminated the call, she did not. The claimant is supposed to have remained polite during the call, more or less regardless of provocation. The importance of that is emphasised by the fact that call handlers are always dealing with people who are under stress since they are reporting some sort of domestic emergency. The particular caller in this case had experienced leaking from a pipe and had already made two previous calls with no result. It is evident that the caller was concerned that little was being done to communicate the urgency of the situation to the emergency services and when the claimant indicated that she would be sending another email he asked the claimant whether or not she was in fact going to make a telephone call herself. The caller interrupted the claimant whilst she was making a response at which point the claimant said "would you like me to explain to you or are you going to actually tell me how to do my job this morning". Perhaps unsurprisingly, this prompted a rather negative response from the caller at which point the claimant raised her voice and the caller complained about her raising her voice. The claimant responded "it goes both ways as well; if you want the respect from the call handler then give me some back alright". That prompted some foul language on the part of the caller and the claimant concluded the call as follows "its no wonder you don't get the response that you require with the vulgar mouth that you have got; you ought to be ashamed of yourself. I am terminating the call". Mrs Gannon described that call as one of the worst that she had ever heard. The claimant's case is that Mrs Gannon will have heard significantly worse and that she is likely only to have received a strong telling off for her handling of that call.

24 For my own part I would regard that call as undoubtedly worthy of discipline and the claimant has not significantly challenged that. The question is what was the likely outcome of that disciplinary hearing? The claimant now says that there was unlikely to be any serious consequences or perhaps at most a written warning. However, it is interesting to note that that is not the view that the claimant took at the time of her resignation. Her grievance letter indicated that she was concerned that she would lose her job. In my view, there must have been a significant chance that the claimant would not survive that disciplinary hearing. Whilst I think it would have been wrong for Mrs Gannon to take into account the final written warning for attendance, she could have taken into account the earlier verbal warning for rudeness and she would in my view have been entitled to treat the handling of that call as so far outside what was appropriate as to dismiss the claimant on the grounds of gross misconduct. Whether she would have done that is a matter of speculation but she gave evidence to the Tribunal that it was the first call in which she had ever heard a call handler admonishing a caller. In the circumstances, I accept the submission

by Miss Dickinson that any compensation should be reduced by 75% whilst noting of course that this is an alternative finding and that no compensation is payable on the basis of my primary finding that there has not been a dismissal.

25 For all of the reasons outlined above this claim is dismissed.

Employment Judge Rostant

Dated: 13 December 2017