



EMPLOYMENT TRIBUNALS

Claimant: Miss K Suleman

Respondent: Key Stage Teacher Supply Limited

HELD AT: Manchester **ON:** 2nd, 3rd, 4th May 2017
11 August 2017 (in chambers)

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: In person

Respondent: Mr D Bansal, Solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's claim of constructive unfair dismissal fails and is dismissed.

REASONS

1. The claimant brings a claim of constructive dismissal following her resignation from the respondent's employment on 3 May 2016.

The Issues

2. The issues for the Tribunal are as follows:

- (1) Did the respondent act in such a way as to fundamentally breach the claimant's contract of employment by acting in breach of the implied term of trust and confidence by –
 - (i) Treating the claimant unfairly in relation to the following breaches –
 - (a) her pay in April 2015 (set out in paragraphs 1-2 of the claimant's particulars of claim);

- (b) attendance outside of the office on client visits June 2015 (paragraph 9 of the particulars of claim);
 - (c) accused of being the instigator of an incident with a colleague (paragraph 10 of the particulars of claim);
 - (d) a breach of confidentiality re absence in pregnancy June/July 2015 (paragraphs 12 and 13) and the meeting of April 2016 (paragraph 14);
 - (e) working hours incident in January 2016 (paragraphs 3-5 of the particulars of claim);
 - (f) incident on 1 March involving Nick Bailey and Collette Holden (paragraph 7 of the particulars of claim);
 - (g) meeting with Jane Scott on 7 April 2016 (paragraph 7 of the particulars of claim).
- (2) If so, did the claimant resign in response to the breach/breaches or for an unconnected reason?
 - (3) If so, did the claimant delay in resigning such that she could be said to have waived the breach/breaches or done anything to affirm the contract?
 - (4) If the claimant was dismissed what was the reason for her dismissal and was that reason a potentially fair reason within the meaning of section 98 Employment Rights Act 1996?
 - (5) If so, did the respondent act reasonably or unreasonably in all the circumstances in treating that reason as sufficient to dismiss the claimant?
 - (6) If the dismissal was unfair, did the claimant contribute to her dismissal by blameworthy conduct?
 - (7) If so, by what proportion, if any, is it appropriate to reduce any compensation payable to the claimant?
 - (8) If the dismissal was unfair what was the likelihood that the claimant would have been dismissed in any event had a fair process been conducted, and is it just and equitable to reduce the claimant's compensation accordingly?

Respondent's Submissions

3. The respondent submitted that there was no fundamental breach of the contract and no last straw had been identified. If there was a fundamental

breach of contract then the claimant acquiesced in it, and that she did not resign in response to any alleged breaches but did so in order to avoid her perceived certainty of dismissal at a disciplinary hearing listed for 12 April 2016. Further, that had the claimant not resigned it is contended she would have been fairly dismissed in any event following a rearranged disciplinary hearing for gross misconduct and/or for a breakdown of trust and confidence in the claimant.

Claimant's Submissions

4. The claimant submitted that the matters set out in the List of Issues were singly or collectively sufficient to found a fundamental breach of contract entitling her to resign.

5. The claimant identified the meeting of 7th April as the last straw in her final submissions.

Witnesses

6. For the claimant the Tribunal heard from the claimant herself. For the respondent the Tribunal heard from Mr Nicholas Bailey, Director; Jane Scott, Managing Director; Collette Holden, Payroll Manager; Edward John Belshaw, employee. In respect of Ms Josie Hitchen, Branch Administrator (Blackburn) I had a witness statement but she was too ill to attend.

7. In respect of the claimant's witness statement - the claimant raised a number of additional issues which had not been pleaded and were not in the list of issues so I advised that I could not take them into consideration and the claimant did not object.

Findings of Fact

8. The respondent is a private company formed in 2000 and recruits teachers and support staff to educational establishments principally in the North West. Its main office is in Blackburn and it has a branch office in Chorley and one in Lancaster. It has three directors and shareholders. Jane Scott is Managing Director and Nick Bailey a Finance Director. They manage and run the business. They currently have 16 employees.

9. The claimant began working for the respondent on 12 August 2010 based at the Blackburn office as a full-time recruitment consultant. Initially the position was to cover for the Branch Manager during her maternity leave.

10. In mid July 2013 the claimant was issued with a revised contract of employment containing her terms and conditions of employment which included rules/policy including rules of conduct, disciplinary and grievance rules and procedures and the telephone use policy. From October 2014 the claimant reported to Jody Hitchen, Branch Manager.

11. In April 2015 the claimant raised concerns about her pay with Jane Scott and Nick Bailey. This meeting came about because Jane Scott observed that the claimant was not quite herself and looked unhappy, and she invited the

claimant to this meeting. It was agreed she raised concerns about salaries in the business and how it was unfair that new employees were earning more money than her. The respondent operates a commission structure and it is possible consultants can earn more than their peers dependant on their desk size and the work they put in to grow their desk (i.e. the number of clients they have).

12. The respondent was undergoing a review of its "reward and recognition" package and it was true they had recruited a new member of staff in August 2014 who inherited a very busy desk. It became apparent that the commission scheme needed adjusting as the respondent felt that it was not fair for him to earn more commission than the others when he had only just joined, and Jane Scott advised the claimant of this at the meeting. It was also discussed that the claimant's desk was not as busy as in previous years and therefore she was not earning as much commission as other consultants. They agreed that their pay structure was not in line with the marketplace and acknowledged that the claimant felt undervalued, but they could not revise everything overnight. However, they believed that a consultant of the claimant's seniority would earn about £24,000 a year and therefore after this meeting they agreed to increase the claimant's salary from £22,000 to £24,000 with effect from 1 April 2015. The claimant said she raised that men were being paid more than women and that this information had come from Colette Holden. The respondent said the discussion was about the unfairness of a new member of staff earning more, that he happened to be male but the issue was how much his desk could earn.

13. In the claimant's view the respondent had not approached this matter in the rational way they suggested, and it was only because the claimant pressed them stating that she was confident if they looked at the Payroll Manager's information they would find unequal pay that a pay rise was offered. However I prefer the respondent's version of events as the claimant herself agreed that the issue had been highlighted for her when she had assisted a new male member of staff with understanding the commission structure. She neither presented nor sought then nor since then any information regarding men and women's rates of pay at the respondent which I would have expected if this had been an issue.

14. She also stated that Nick Bailey had said 'if you don't like it you can leave' however in her claim form information she said he said 'if you aren't happy and there's nothing we can do you may need to look for something else'. Due to this discrepancy I find that Mr Bailey did not make the more abrasive comment the claimant refers to but the more innocuous one referred to in her claim form.

15. The claimant accepted the salary rise and did not raise the issue of being undervalued or receiving less pay because she was a woman at any subsequent point in time.

16. The claimant said she also raised concerns in February or April 2015 regarding Jody Hitchen's behaviour saying it was distracting, unsupportive and inappropriate, and that she spent a long time at work undertaking

personal activities, taking personal calls, but would criticise other members of staff if they did the same.

17. In June/July 2015 the claimant said Jody Hitchen treated her unfairly when she criticised her for the length of time it had taken her to visit clients, and that she discussed it with other members of staff, including new trainees. As a result of the claimant taking so long other members of staff could not go on lunch. The claimant felt this was unprofessional and inappropriate, demeaning and unfair, because there were no rules on how long it should take to visit clients. The respondent's response at tribunal was that on that particular day they were very busy and it was very unfair because no-one could take their lunch.

18. In cross examination the claimant agreed that Jodie Hitchen had raised with her a lack of communication regarding her whereabouts on the basis at least of health and safety if nothing else. The claimant accepted in cross examination that this was a reasonable thing to do. The claimant gave evidence that she was late because she had had to deal with a particularly difficult issue with a client, an issue of the respondent underpaying supply teachers, and hence that was the reason for her delay, but ultimately the issue was not simply the delay but the fact that the respondent did not know exactly where the claimant was. The claimant did not raise this as a complaint at the time.

19. The claimant raised an issue of breach of confidentiality in respect of Colette Holden which she said had arisen in June/July 2015. The claimant said that on returning to work after undergoing a pregnancy termination she was congratulated by Colette Holden on her pregnancy. As she had only informed her manager of the reasons for her absence she believed Colette Holden should not have been aware that the claimant was pregnant. Colette Holden's evidence was that she knew the claimant had had a termination. She said that the claimant had broken down in the kitchen when she had returned to work and said to her "don't tell anybody what was on the sick note". Colette Holden had said "I do not know what was on the sick note" and then the claimant told her that she had had a termination. Ms Holden stated in her witness statement that she had not known this up until then, and that she gave her a hug as a result of this. She also said she did not tell anyone about this at all.

20. In cross examination the claimant said she had had to tell Ms Holden about the termination because she was under the erroneous impression that the claimant was pregnant, and that she had picked this up from the sick note which set out that she had morning sickness. Ms Holden would see the sick note due to her role in payroll.

21. The position in cross examination was confusing. Colette Holden confirmed she was aware of the termination from information on the claimant's medical note but did not want to disclose this. In cross examination Ms Holden said she did know the claimant had had a termination as it was on one of the sick notes. The claimant denied there was any reference on her sick

note to a termination and that Ms Holden only knew because she was forced to tell her when she congratulated her on her pregnancy.

22. I prefer the claimant's view of events as it was more inherently logical and the sick notes could have been provided but were not. Whilst this could have been because Ms Holden was providing new information an application could have been made to admit further evidence..

23. There was another incident on 1 October 2015 between the claimant and another employee, "Gabby". Nick Bailey was involved in interviewing staff afterwards to find out what had happened. There had been a disagreement which had escalated into a swearing match. A verbal warning was given to both staff members, who agreed to put the matter behind them and move on. However Nick Bailey suggested in a meeting with the claimant that she was the instigator of the trouble and that other staff were not happy with her. Nick Bailey's evidence was that other staff had spoken to him confidentially and so he could not reveal the detail, and also he did not wish to cause trouble between members of staff.

24. The claimant also complained about members of staff suggesting that she was not real ill when she returned from sick leave. However in evidence the claimant provided no details of this including there being no mention in her witness statement and therefore I do not accept this occurred.

25. On 24 November 2015 the claimant presented a grievance against senior management and leadership dated 1 October 2015. A grievance meeting was arranged with Jane Scott and Hillary Eastwood, a HR consultant.

26. The claimant referred to the investigation into the incident between herself and her colleague on 17 September 2015 and was questioning whether a proper investigation was undertaken. She said she was accused of causing hostility in the office and that a few people had raised this. The claimant stated in her grievance that this was an unsubstantiated accusation. If she was quiet she was concentrating on her work or it may be a result of the Branch Manager having a word with her in that summer. The Branch Manager had said that she needed the claimant to be more onside and that "everybody in the office has come to me voicing concerns". The claimant was confused by this as non-one was complaining about her. She asked for specific examples and was not given any. The claimant asked individuals afterwards and three out of the four people in the office said they had not expressed any concerns, and the fourth person said she had noticed the claimant was less talkative and had asked the Branch Manager if something was wrong. The claimant felt that the Branch Manager was exaggerating the situation.

27. The claimant then raised concerns she had with the Branch Manager:

- comments made by the Branch Manager: that she had inherited a team of people who she had never have employed;
- that the claimant's job role did not exist;

- there was a lack of communication between the Branch Manager and herself, she did not know what she was doing;
- that she had been unfairly targeted regarding the length of time she took on her visits when attempting to resolve negative comments made by a client against the company;
- that she felt her role had been devalued by the Branch Manager;
- that concerns had been raised unfairly and in an exaggerated way.

28. The claimant was then particularly concerned that the directors had raised the same issues with her using the same terminology as the Branch Manager, and that Mr Bailey had said that all the fingers were pointing at the claimant again. Jane Scott had agreed to look into the matter again, whereupon Mr Bailey had said to her “we are going to waste another day yet again”.

29. The claimant concluded by saying that the investigation that had taken place was in relation to the incident between herself and Gabby Hacking but that members of staff were interviewed who were not even present at the incident. The claimant had been accused of various things with no evidence. The claimant had been absent and the Managing Director and Financial Director were aware of the nature of her absence and the vulnerable position she was in, and she felt they were exploiting that vulnerability in an attempt to manage her out of the company. They ignored the fact that she had brought her concerns regard her colleague, Gabby, to the manager’s attention 3-4 weeks prior to the incident and that the Finance Director had discouraged a fair investigation by saying “there is no point as it’s your word against everybody else’s” and “so we are going to waste yet another day”.

30. When the claimant was finally given an example by the Finance Director of the difficulty she had caused he referred back to an occasion three years ago, nothing to do with the investigation or any of the matters raised in .

31. A meeting was held on 10 December to discuss the claimant’s grievance. It was conducted by Hilary Eastwood from the respondent’s HR and legal advisors, Mentor. The outcome letter of 14th December stated that the claimant had agreed things had improved and that her relationship with Gabby and her branch manager was now positive. The respondent acknowledged that a better process of investigation into the Gabby incident could have taken place. No further action was deemed necessary and the claimant was given the right to appeal the outcome but she did not do so.

32. The next issue which arose was in January 2016 regarding the claimant’s working hours. It was suggested in Ms Hitchen’s statement that the claimant had wanted a change in working hours. I find that the claimant’s contracted hours were 9.00am to 5.30 and that these were changed at the claimant’s request to 7.30 to 4pm. I accept the claimant’s evidence that it was proposed to her that she change her hours from working 7.30am to 4.00pm to working 9.00am until 5.30pm with the possibility of hours changing more regularly to cover overall hours of 7.30am to 5.50pm. However I also accept Mrs Scott’s

evidence that this was because after the claimant had changed her hours at her request they had noticed that a client's work had reduced and one client found it difficult to contact her. The claimant protested about the hours proposed as she did not want to work 9.00am until 5.30pm (although these were her contractual hours) as she preferred the earlier hours so that she could leave at 4.00pm. There was evidence in text messages of some change and the claimant protesting that she needed to contact her schools from 7.30am whereas she was being asked to come in at 8.00am. Jody Hitchen explained that she needed people in towards the end of the day. The claimant then said she had an appointment at 4.30pm so she needed to leave at 4.00pm, which she had booked at Christmas based on the fact that she had 7.30am starts. Ms Hitchen suggested that they would see how it went but the claimant continued to complain, saying that her schools needed to hear from her from 7.30am onwards. Jody Hitchen agreed to discuss it the next day.

On Tuesday 5 January Ms Hitchen said it was unreasonable of her to expect the claimant to call "Lois" before setting off to work if she was coming in at 8.00am, therefore she offered to contact clients on her behalf when she got in at 7.30am.

33. In response to the claimant's resistance the respondent agreed to change her hours back to 7.30am to 4.00pm. In the claimant's witness statement she only refers to the respondent attempting to change her hours and gives no specific dates. Accordingly I find this issue only lasted for a few days.

34. In February 2016 when Mr Bailey noticed an excessive amount on the respondent's corporate mobile phone bill relating to the claimant's mobile phone. He called her into the office and explained that the charges were higher than expected i.e. £180. The claimant explained she had changed the work sim card to a personal handset by mistake. Mr Bailey advised the claimant not to do it again and ensure she kept the sim card separate. As she was unable to reimburse the money immediately it was agreed they would deduct an amount from her monthly salary. Mr Bailey discovered the charges incurred related to a psychic helpline and he was concerned about the claimant and advised her that professional help would be a better way of dealing with any problems rather than ringing a premium rate psychic.

35. In February/March the claimant also complained that she was given the work which should have been done by Collette Holden and Nick Bailey in chasing large amounts of money owed to the business by two of her clients, and that this distracted her from undertaking her normal work.

36. In March 2016 she states that Nick Bailey and the Payroll Manager, Collette Holden, approached her and Nick Bailey started to yell at her about an error she had made on some invoices. She tried to explain her understanding of what she had done but she said that Collette Holden accused her of lying and Nick Bailey continued to shout at her in front of other members of staff.

37. On 1 March 2016 Collette Holden said that she had told the claimant on several occasions about invoices with a particular client who requested

specific information otherwise they would not process the invoice for payment. When she received another invoice from the claimant which did not have the required information in she advised Nick Bailey and showed him the invoice. He decided to speak to the claimant and they both went to the claimant's desk. Mrs Holden denied that Mr Bailey had shouted at the claimant. He had spoken politely but the claimant had raised her voice and disputed that she had been previously told about including the information. Mrs Holden said she did not call the claimant a liar but said that she had been told. Mrs Holden left and felt as she was leaving that the claimant was speaking in a loud voice and was being dismissive of Mr Bailey. I accept that Mrs Holden did not call the claimant a liar having considered the statements taken at the time about this.

38. Mr Bailey said that he asked the claimant if she needed more training and the claimant became confrontational, starting banging her desk drawers, stood up, collected her bag and walked past him without any explanation. He then followed her and asked her where she was going and she replied that she should have gone home by now anyway and she "didn't need this shit". Mr Bailey said the claimant had no right to speak to him that way, at which point she pushed past and walked towards the front entrance. He did not follow her but sat down, shocked at what had happened. Other employees reported that she had said, "I'm not paid enough for this shit" and to tell Jane she would not be in the next day. Mr Bailey was adamant it was the claimant who was aggressive and it was "incorrect that Collette accused the claimant of lying but had simply pointed out she had been told about this before".

39. Mr Bailey asked other members of staff to record their recollection of the incident while it was still fresh in their minds.

40. Sochia Enos stated that she was aware that:

"Nick and Collette approached Kelly at her desk and they were discussing a timesheet. She heard Kelly raise her voice and Kelly said 'I've never been told that before' and Collette responded 'Kelly, you have'. Collette then went upstairs. Kelly continued to raise her voice at Nick and during this Nick said he would get more training for her. Kelly banged her drawers and walked round Nick who said very calmly to her 'where are you going?' to which she responded with a raised voice 'I'm going home', He replied, 'Is it time for you to go home?' and she said 'Yes actually' saying something else ending with 'to put with this shit' and she 'stormed through to the back office to get her coat. Nick followed her and said 'Kelly, you cannot swear at me, you just swore, everybody heard it'. Kelly denied it...."

and then the witness answered her phone, and she could hear Kelly shouting while she was on the phone. Sochia Enos said had not heard Nick Bailey raise his voice.

41. Jody Hitchen intervened and said everybody needed to calm down. The claimant continued shouting and said, "I won't be in tomorrow, you can tell Jane that too".

42. Jody Hitchen stated she did not hear the claimant swear.

43. Collette Holden confirmed that she had said to the claimant she knew that she had to put this information in the invoice. She provided further information but that was later said to have been hearsay.

44. Mr Belshaw's evidence to the tribunal was that the claimant had said "I am not paid enough to put up with this fucking shit. I'm off. I am not going to be in tomorrow." He maintained his view in cross examination however Mr Bailey did not refer to the claimant saying 'fucking' he was upset at the claimant using the word 'shit'. Accordingly I find that the claimant did not use the word 'fucking' but she did say 'I am not putting up with this shit'

45. The claimant did not return to work after 1 March. On 8 March Ms Scott emailed the claimant about her absence and the claimant said she would be sending in a sick note which would cover her until 11 March. On 15 March Ms Scott had to remind the claimant that they needed the doctor's note in order to pay enhanced sick pay, and they needed to know if the claimant was returning to work on the next Monday. On 16 March the claimant photographed copies of her sick note and sent them to the respondent.

46. Jane Scott emailed the claimant again on 30 March to say that she needed to catch up with her regarding the issue of the work's mobile and suggested they got together on Monday afternoon "to have a chat", which she agreed to on 21 March, and a meeting took place on 7 April. In relation to the mobile the respondent's corporate mobile contract had been suspended because of a bill for £3919.24 which it turned out had been incurred by the claimant between 1st and 8th March.

47. Ms Scott said that she explained that the meeting was "a general discussion about her health, her return to work and the phone bill" and was held at the Chorley branch. Ms Scott asked Keeley Lord to be present from Mentor who would make notes of the meeting, but she did not advise the claimant of this. Notes were produced which the claimant stated were not accurate but she could not suggest the ways in which they were defective.

48. The claimant was asked about what happened with Mr Bailey and Colette Holden on the last day she was in work. She agreed she had said "I'm not taking this shit" twice, and that Nick Bailey had shouted "have you heard that everyone?" and that she went to tell Nick Bailey in his office that he had humiliated her and he said, "what do I have to do, drag you in behind closed doors to have a word with you?". The claimant was upset and went home.

49. The claimant was then asked about the telephone bill for £3,919.24 which was the same issue as Mr Bailey had talked to her about previously. She said she had failed to swap the sim card back. She had thought she was using a pre paid one and that she did not realise that the sim had not been changed until the phone was barred. The claimant said she had initially rung EE to see whether she could pay the money back herself but that was not possible.. She said there were two ways to sort it out – paying it off from her wages or set up an agreement or a "CCJ against me". She said it was her mistake and

“I need to find a solution to pay it off as soon as possible. I own the mistake and want to pay it off”.

50. The claimant said that Keeley Lord said to her when Mrs Scott was out of the room ‘ what are you going to do’. I accept this as Keeley Lord did not give evidence.

51. Jane Scott decided that she needed to hold a disciplinary meeting regarding this and wrote to the claimant on 7 April asking her to attend a disciplinary meeting on 12 April at the Chorley branch, and she said that it would be conducted by herself and Keeley Lord, with Pat Adams in attendance as witness and note taker. Ms Scott advised the claimant that she was now suspended from work on normal pay with effect from 11 April and that it could be viewed as gross misconduct and the outcome could be summary dismissal. It was set out in the respondent’s disciplinary procedure that that gross misconduct could be ‘causing loss, damage or injury through serious carelessness or gross negligence’

52. On 19 April the claimant emailed Jane Scott and produced a doctor’s note for the next two weeks. She said:

“Following your misleading attempt to have me attend what was a formal meeting on Thursday 7 April and not an informal coffee and a chat as previously suggested by yourself, my recovery has declined and it is recommended that I do not engage in any work related activity until I am healthy enough to do so. After having time to process the series of events following our meeting on Thursday 7 April and seeking professional legal advice I have already expressed serious concerns over confidentiality and my own health and wellbeing following ongoing mistreatment which have led to my sickness along with equal financial loss which has not since been acknowledged, mentioned or addressed by yourself.

Further to this I suspect that the unethical way in which I was treated from the week before the meeting on 7 April and the months previous to this suggest your quick attempt to lull me into a position whereby you could arrange a hearing to permanently dismiss me before investigating and being held accountable for any wrongdoing made against me following the concerns that I have raised leading to my sickness in previous to this. I would expect a return to work meeting from you as the employer in order for you to honour your obligations by addressing the reasonable adjustments needed to ensure my safety and fair treatment before undergoing any work formalities including formal meetings and interrogative questioning. The fact that you did not do this not only supports your lack of care, for that remains consistent from my previous concerns, but indicates that you already intended to suspend or dismiss me before any meeting or questions were asked, and by knowing that you were setting up a formal meeting failed to make this clear by leading me to believe in our initial conversation on Wednesday 29 March at 11:56 that we were meeting up for an informal coffee and a chat.

I am sickened by how far the company are willing to go to escape any accountability for the welfare of the staff. You have a payroll manager that has been happy to disclose information on staff on numerous occasions causing concern and unease amongst staff, including information on my sick notes by offering her congratulations to me on my return to work from being pregnant when I was returning from a traumatic termination, and then in directly posting something on social media around the time I was paid regarding depression which makes me further question the action that has not been taken against your management and how my personal information has been processed.

In addition you have a branch manager that doesn't care to respect her team by respecting peoples' sicknesses in an open office to which I have suffered ridicule from other colleagues due to her unethical and disrespectful approach.

Regardless of the fact that I am not the only member of staff that has these concerns and has brought them to your attention as you have taken no action to enable staff to feel safe and secure at work, I then discover that you still proceeded to invite another colleague, Pat Adams, into my hearing which I requested should be kept confidential to which you agreed.

Considering the company has never been seen to take breach of confidentiality seriously and given the number of underhanded attempts of treating me unfairly which I have documented and which also include written evidence of your manager of admitting her unfairness towards me, I don't feel appropriate measures have been taken to ensure fairness and safety to my wellbeing during this process.

As there are a number of concerns regarding data protection, health and safety and mistreatment of staff, I will not engage in any procedure that has been and is continuing to involve unfair treatment towards me until appropriate measures have been put in place and addressed fairly and until I am well enough to have a fair hearing. That includes having a HR representative that can at least demonstrate non bias and professionalism throughout the process as opposed to speaking to me inappropriately whilst you are out of the room.

I have copied my solicitor into this email requesting that we have a response as a matter of urgency by the end of the day regarding details of the meeting and whether or not the meeting is postponed due to the concerns as stated above."

53. Ms Scott replied stating she would agree a postponement of the meeting until the claimant was well enough to discuss it. The respondent also asked the claimant to provide her consent to get medical information about her absence. The claimant had not replied by 28 April and therefore Ms Scott emailed her for an update about the medical consent form.

54. The claimant did not reply to that email but on 3 May emailed Ms Scott to say she was resigning from her post in the light of a fundamental breach of contract, breach of trust and confidence, last straw doctrine. She did not give any further details.

55. The claimant's resignation was accepted on 3 May. It was headed "Resignation under constructive dismissal". The respondent confirmed that the claimant had not paid back the mobile phone bill.

56. The respondent referred to their disciplinary policy which described as gross misconduct 'causing loss, damage or injury through serious carelessness or gross negligence'. Their telephone policy stated that the company's mobile phones were for company use only, limited private use would be tolerated for essential matters but lengthy and or casual chats and calls at premium rates would not be.

57. The claimant made a claim to the tribunal of constructive unfair dismissal on 2 November 2016.

The Law

Constructive Dismissal

58. An employee may lawfully resign employment with or without notice if the employer commits a repudiatory breach. Resignation can be interpreted as an election by the employee to treat himself as discharged from his contractual obligations by reason of the employer's breach. This is known as constructive dismissal and is a species of statutory unfair dismissal by virtue of section 95(1)(c) Employment Rights Act 1996.

59. It was described in **Western Excavating (ECC) Limited v Sharpe [1978]** by Lord Denning as follows: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed".

60. An employee must act reasonably quickly in responding to a repudiatory breach of contract otherwise s/he may be taken to have accepted the continuation of the employment contract and affirmed the contract. However, mere acceptance of salary without the performance of any duties by the employee will not necessarily be regarded as an affirmation of the contract following an employer's repudiation. In **W E Cox Toner (International) Ltd v Crook 1981 EAT** it was said that delay by itself was not enough there either had to be an additional factor(s) or continued delay. An employee can work 'under protest' but must make it clear that he or she is reserving their right to accept the repudiation of the contract. The EAT also considered this matter in **Chindove v William Morrison Supermarkets Limited [2004]** which said that:

“He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue, that the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case the employee is at work then by continuing to work for a time longer than the time in which he might reasonably be expected to exercise his right he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time, all depends upon the context. Part of that context is the employee’s position.”

61. An employee may affirm the contract or waive the breach when they delay too long, and the Tribunal may need to decide what was the effective but not necessarily the sole cause of the resignation in order to determine whether the employee resigned in response to the breach (**Jones v F Siri & Son (Furnishers) Limited [1997]**).

62. A claimant can rely on implied or express terms of the contract. Express terms can be written or oral. The claimant relied on the breach of the implied term of trust and confidence in this case as well as the duty to provide a safe working environment and to investigate a grievance.

63. In **Wood v WM Car Services (Peterborough) Limited [1982]** the Court of Appeal approved the development of the implied term of trust and confidence. It was finally given House of Lords’ approval in **Malik v BCCI** in 1997 where Lord Steyn stated that the question was whether the employer’s conduct so impacted on the employee that viewed objectively the employee could properly conclude the employer was repudiating the contract. It is not necessary to show that the employer intended to damage or destroy the relationship of trust and confidence. The court said the Tribunal should “look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it”.

64. In **Malik** the formulation is that the employer “must not conduct itself in a manner calculated and likely to destroy confidence and trust” and it is relevant to consider whether the employer’s conduct in question was “without reasonable and proper cause”. This is not the same as the range of reasonable responses test. However clearly if there was proper cause the claim will fail.

65. In proving breach an employee may pray in aid evidence of past repudiatory breaches even though he waived his right to object to them at the time. **Lewis v Motorworld Garages Limited [1985]**. In **London Borough of Waltham Forest v Omilaju [2005]** Court of Appeal it was held that:

“In order to result in a breach of an implied term of trust a final straw, not itself a breach of contract, must be an act in a series of earlier which cumulatively amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that when taken in conjunction with the earlier acts on which the employee relies it amounts to a breach of the implied term

of trust and confidence. It must contribute something to that breach although what it adds may be relatively insignificant so long as it is not utterly trivial. The final straw viewed in isolation need not be unreasonable or blameworthy conduct, however an entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective."

66. Further, in **Niblett v Nationwide Building Society EAT [2008]** it was said in the context of an employer's conduct of the grievance procedure that:

"The implied term of trust and confidence is a reciprocal obligation owed by the employer to the employee and employee to employer. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It has never been the law that an employer could summarily terminate the contract of an employee merely because the employee behaved unreasonably in some way. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. In the context of the implied term of trust and confidence the employer's conduct must be without proper and reasonable cause and must be calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."

67. A failure to make adequate investigations into allegations of bullying or harassment can amount to a fundamental breach of contract – **Reed and another v Stedman EAT [1997]**.

68. The particular incident which causes the employee to leave may in itself be insufficient to justify resignation but may amount to constructive dismissal if it is the last straw in a deteriorating relationship. This means that the final episode itself need not be a repudiatory breach of contract although there remains the causative requirement that the alleged last straw must itself contribute to the previous continuing breaches by the employer, **Waltham Forest Borough Council v Omilaju [2004] CA**, and not be an unjustified sense of grievance.

69. Therefore the claimant has to show that the matters s/he relies on either individually or cumulatively amounted to a breach of the implied term of trust and confidence. He then has to establish that that breach played a part in his decision to resign (here a resignation letter maybe of evidential value but it is not determinative of what was the effective cause for the resignation) and he has to show that he has not unduly delayed or affirmed the contract.

70. A claimant can also rely on specific breaches without a continuing course of conduct however if they are in the past an argument maybe made that the claimant has either affirmed by not doing anything about it or it may found as

a fact that the claimant has not resigned because of that breach given the passage of time.

71. The respondent can argue that there was a fair dismissal if constructive dismissal is found. Here the respondent relied on the claimant's incurring of a second significantly large mobile phone bill after being advised not to do so. The respondent relied on misconduct and/or SOSR reason in this case as a potentially fair reason within section 98(1)(b) of the Employment Rights Act 1996. The SOSR being a lack of trust and confidence in the claimant.

72. Further, that if the claimant had been unfairly dismissed the claimant would still have been dismissed in any event had a proper procedure been followed (**Polkey v A E Dayton Services Ltd [1998]** House of Lords).

73. Further, the respondent relied on contributory conduct in relation to remedy. The Tribunal can reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the employee and its contribution to the dismissal (section 123(6) Employment Rights Act 1996), and also any basic award may be reduced for the same reason. (Contributory conduct)

74. In respect of the issue of contribution a three stage approach should be taken as set out in **Nelson v BBC No. 2 [1979]** – that the conduct is culpable or blameworthy; it must have actually caused or contributed to the dismissal; it must be just and equitable to reduce the award by the proportion specified.

Conclusions

75. In relation to each breach I make the following findings:

(1) Disparity in pay – April 2015

- (i) The claimant claims that men and women were paid different pay. This is potentially a breach of contract as this is how it is treated under the Equal Pay Act and discriminatory conduct will nearly always be a fundamental breach of contract. However, the claimant had no evidence that this was the case other than gossip. She did not plead that there was any systematic lack of equal pay but said in her complaint:

“In April 2015 the claimant made a complaint in relation to unfair treatment with regards to pay and responsibilities after it became apparent to her that a male trainee with fewer responsibilities was being paid double what the claimant was being paid.”

- (ii) This was about one specific example and the respondent admitted that due to that new member of staff, who was male, being situated at a desk with high commission opportunities that he did earn more than some more

established employees, which is why the respondent gave the claimant a £2,000 salary rise and a reduction in targets.

- (iii) I find there was no breach of contract here. The claimant was being paid her contractual pay. This was an individual situation which was an anomaly. It was not due to the sex of the individuals involved but to the potential earnings of the different desks. The claimant did not ask to move to a desk with higher commission opportunities. Further, the matter was rectified immediately and, as the claimant never raised it further at the time, to the claimant's satisfaction.
- (iv) The allegation that the disclosure of pay information was leaked by Colette Holden, these were all matters which were not raised in her pleaded claim however dealing with them I find it is not a breach of contract for the pay information to be leaked to the claimant by Colette Holden: that may have been a breach in respect of Colette Holden's duty as an employee to her employer but not vis a vis the claimant
- (v) In respect of Nick Bailey's comments the claimant did not set these out in her witness statement and her account of what was said was unreliable. Accordingly I find that there was a comment from Mr Bailey but that it was innocuous and the claimant has exaggerated what was said creating an unjustified sense of grievance.
- (vi) However, even if my description of innocuous is wrong things quickly moved on and the matter resolved by giving the claimant a pay rise. Therefore if these comments were a breach of contract the claimant has affirmed the contract by accepting the pay rise and remaining in work. She has delayed far too long in respect of this matter.

(2) Attendance outside the office on client visits – June 2015

There was no breach of contract here. The respondent was well within their contractual rights to ask the claimant to make sure she advised her manager of where she was, and whilst it is true that the claimant was dealing with a difficult topic she has never raised this as part of the breach.. From the evidence it appears Jody Hitchen dealt with this in a reasonable manner. The claimant accepted it was a reasonable request in cross examination.

(3) Accused of being the instigator of an incident with her colleague – September/October 2015

- (i) It was accepted by the respondent that the meeting with the claimant to discuss this incident could have been handled better. The claimant accepted her unreasonable behaviour and accepted a verbal warning she received, which Ms Hacking also received. However, in the meeting to discuss this she took objection to being accused of being the instigator of the incident. She did raise her concern in a written grievance presented some six weeks later on 24 November which was dealt with under the respondent's grievance procedure, and as far as can be established it was dealt with to the claimant's satisfaction. She did not appeal it or take any further action.
 - (ii) Regarding whether there has been a breach of the implied term of trust and confidence, while it could be a breach for an individual to be accused in this manner, the matter was dealt with through the grievance procedure and the claimant accepted this. Accordingly I find the claimant affirmed the contract following this incident by accepting the outcome of the grievance procedure, making no further complaint and delaying so long before resigning .
- (4) Breach of confidentiality, absence and pregnancy – June/July 2015
- (i) The claimant referred to another issue in respect of this which is being ridiculed by colleagues when she returned from sickness absence in 2015, suggesting that she was not actually absent because of sickness. However, the claimant provided no evidence of what her colleagues had done and never complained about this, neither could she establish that any disclosure had been made about her sickness absence to members of staff. Therefore I cannot accept that factually there was a breach of contract. If there was, the claimant affirmed by continuing to work and making no complaint.
 - (ii) In respect of the breach of confidentiality regarding the claimant's absence for pregnancy, I do accept the evidence of the claimant here. It was argued that there was no breach of confidentiality as Colette Holden only raised this with the claimant and the claimant did not complain that she had passed on the information, either about the pregnancy or the termination, to any other member of staff. Further, this was between two employees and went no further.
 - (iii) However Ms Holden had the information in relation to payroll and not as anyone tasked with the claimant's welfare and therefore it was a matter which was confidential and she had no 'right' to raise it with the

claimant even if the reason in her eyes was benign. How misplaced this was can be seen from the outcome. Accordingly I do find this was a fundamental breach of contract, it was without proper cause and it was something which led to a justified sense of grievance.

- (iv) The fact that it was between two employees does not bar the event from being a breach of the implied term of trust and confidence and given the deeply personal nature of the information I find this was a fundamental breach..
- (v) However the claimant delayed too long before resigning and continued to work without any protest. It was not the effective cause of her resignation.

There was no further issue then until January 2016 which is dealt with below.

(5) Working hours – January 2016

- (i) The outcome of the claimant's protesting about the change in her hours was that her hours reverted to 7.30am to 4.00pm and there was no evidence that she actually did work a different working pattern for any significant period of time.
- (ii) It does appear that the claimant was working 7.30am to 4.00pm and was then asked to vary her working hours. However, I do not see this as a breach of contract as the claimant's contractual hours were 9.00am to 5.30pm in any event therefore 7.30am to 4.00pm was an agreed variation which the respondent, in January 2016, realised was not suiting the business. Accordingly they sought to vary the hours again. The claimant complained and her hours reverted back to the previous variation. Therefore if there was a breach it was not a fundamental breach as the hours were different from those originally agreed in any event and had been changed at the claimant's request.
- (iii) It was not a fundamental breach as the matter was very quickly resolved to the claimant's satisfaction and no further issue was raised about this at the time. There is nothing fundamentally wrong with the respondent attempting to change hours to fit business needs and ultimately this can lead to disciplinary action if an individual refuses. However, clearly this did not happen here.

(6) Incident on 1 March

- (i) I find that both individuals were at fault here. The claimant was not called a liar by Colette Holden. Colette Holden

pointed out that she had told the claimant about doing this before, and I accept that was the situation as it seems on the balance of probabilities inherently unlikely she would go to Mr Bailey to tell him there was a problem if she had failed to alert the claimant to this as an issue. I did not find the claimant's evidence very convincing in respect of that. I accept also from the collateral evidence that the claimant acted aggressively and raised her voice, and used inappropriate language.

- (ii) Consequently the respondent's behaviour cannot be a breach of the implied term of trust and confidence as the claimant provoke a confrontation and used bad language towards Mr Bailey, whilst initially Mr Bailey and Ms Holden started off in a completely reasonable manner. They did allow themselves to be upset by the claimant and retaliated to a certain extent towards the end of the exchange. However, in those circumstances I would refer to the **Niblett** case and say that the claimant was equally blameworthy in this incident and therefore there is no breach of the implied term of trust and confidence.

(7) Meeting with Jane Scott on 7 April 2016

- (i) The claimant's complaints in respect of this meeting were that Jane Scott presented the meeting as "a coffee and a chat" and did not inform the claimant of the presence of Keeley Lord, HR consultant, who interrogated her in the meeting. There was no evidence that Keeley Lord interrogated the claimant. The comment made in Ms Scott's absence disclosed no fundamental breach of contract.
- (ii) The claimant did not put in cross examination to Ms Scott what was inaccurate about the minutes, nor in the cross examination of herself was she able to identify anything that was actually said which was not in the minutes. Consequently there was no evidence of any oppressive treatment in the meeting.
- (iii) . The information the claimant provided about the mobile phone, which later became the basis of the disciplinary action against her, was no different today from what it had been at the time. She had no further mitigation of this issue to offer. She was anxious at the time to pay the money back and accept responsibility.
- (iv) The claimant was advised that she would be discussing the mobile phone so she knew that. Regarding discussing the 1st March incident and no statement being taken – there

was no need as no disciplinary action in respect of this was going to be taken.

- (v) Whilst I accept that it would have been fairer to advise the claimant in advance of Keeley Lord's presence or introduce her more formally on the day and give the claimant the option in terms of not continuing, the claimant did not protest about Keeley's Lord's presence there.
- (vi) Having said that the situation was not ideal, it is insufficient to form a breach of the implied term of trust and confidence. An employer is not required to provide this detail unless there was some reason why Ms Lord was likely to be considered oppressive to the claimant – which was not the case.
- (vii) There was nothing elicited from that meeting which has changed or which appears oppressive. The claimant would have the opportunity if she had engaged with the disciplinary process of providing any further information. However, there was no further information in any event. The claimant agreed that she had run up this bill and offered an explanation as to why she had accidentally done this and the position was the same by the time of the tribunal.
- (viii) Accordingly I find there was no fundamental breach of the implied term by asking the claimant questions about March 1st or by having Keeley Lord present.

Course of conduct and final straw

76. Regarding whether the claimant can claim a course of conduct ending with a last straw on 7th April I find that taken as a whole the claimant's issues were resolved to her satisfaction at the time upto the 1st March, that she was at fault in relation to that event and that therefore there can be no breach of the implied term of trust and confidence.

77. Regarding confidentiality there was one incident regarding the pregnancy issue which I have found was a fundamental breach. However it was not raised at the time and the claimant delayed too long before resigning in relation to that. Indeed it was not a stand alone cause of her resignation, neither did it contribute to a course of conduct which led to her resignation.

78. Regarding the last straw this does not have to be a breach but it was not sufficient to meet the Omilaju test. I base this on the fact the claimant did not complain about this meeting until after she found out disciplinary proceedings were to be taken therefore I do not believe she genuinely felt the respondent had acted wrongly at the time. Nor in my findings had they. Whilst not advising that Keeley Lord would be there was not ideal it was not conduct which contributed in any way to a justified sense of grievance. If I am wrong

on that there was no course of conduct to which this could have been a last straw.

79. Regarding the effective cause of the claimant's resignation - considering the chronology, it appears the claimant resigned when she was put under some pressure to provide medical consent so that her employer could find out the reasons for her absence and handle her sickness absence. The claimant also knew that she would at some point have to attend a disciplinary hearing regarding the mobile phone.

80. I find that the claimant resigned because of her employer was pressing her for medical consent and because a disciplinary would have taken place regarding the mobile phone, rather than any of the alleged breaches. I rely on the fact that the claimant did not complain about the 7th April meeting until after she knew a disciplinary would be held regarding the telephone. When the disciplinary was put off after she complained she only resigned after she was asked for her consent to her medical records being disclosed. Whilst it was a short timescale it was a significant one in my view.

81. Accordingly the claimant's claim of constructive unfair dismissal is dismissed.

82. If I am wrong on this then I accept that the claimant was highly likely to be dismissed for running up what was a massive mobile phone bill on the respondent's phone. It is highly unlikely her explanation would be accepted having done exactly the same thing before and having been told clearly not to do this again and it is highly unlikely she would have taken the risk of running up such a massive bill on her own phone; after all the amount represented around a quarter of her net annual basic income .

83. It would have been within the band of reasonable responses for the respondent to have dismissed the claimant for this .Accordingly a Polkey reduction would have been appropriate. The likelihood of dismissal I find would have been 90%.

84. Again if I am wrong on this and dismissal would have been unfair I consider the claimant's conduct in relation to the mobile phone would meet the Nelson test and contributory conduct would have been 100%.

Employment Judge Feeney

Date 19th September 2017

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON 21/9/17

FOR THE TRIBUNAL OFFICE