RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms C Redmond**

Respondent: **Westminster Homecare Limited**

Heard at: **East London Hearing Centre**

On: **11 January 2017**

Before: **Employment Judge Brown**

Representation

Claimant: Ms M Landy, Solicitor
Respondent: Mr M Delaney, Solicitor

JUDGMENT

The judgment of the Tribunal is that:-

1. The Respondent constructively unfairly dismissed the Claimant.

2. The Respondent wrongfully dismissed the Claimant because the Claimant was entitled to resign without notice by reason of the Respondent's conduct.

3. It is 30% likely that the Claimant would have resigned in any event, in circumstances in which she would not have been constructively unfairly dismissed.

4. The Claimant's compensatory award should accordingly be reduced by 30%.

5. The Respondent shall pay the Claimant £2,245.32 notice pay.

6. The Respondent shall pay the Claimant a grand total of £5,319.63 in compensation for unfair dismissal, comprising a basic award of £2,495.70 and a compensatory award of £2,823.93.

REASONS

Preliminary

1 The Claimant brought complaints of constructive unfair dismissal and wrongful dismissal for failure to pay notice pay against the Respondent, her former employer.

2 The parties had agreed the issues to be decided at the final hearing. These were:

Constructive Unfair Dismissal – s95(1)(c) Employment Rights Act 1996 "(ERA")

3 Did the Respondent act in fundamental breach of the contract of employment?

4 If so, was the breach sufficiently serious to justify the Claimant resigning?

5 Did the alleged fundamental breach of contract result in the Claimant's resignation in response to those breaches? The Claimant relies on the following treatment as set out in the resignation letter dated 11 July 2016 namely:

(a) On 20 April 2016 Sharon Popps told the Claimant that she had two options: (i) face disciplinary proceedings and ultimately be dismissed; or (ii) accept demotion to the role of senior care worker.

(b) The Claimant was issues with an open ended performance management plan on the 25 April 2016:

(i) During a meeting on 13 May 2016 the Claimant advised the Respondent she was unhappy with the plan. As the Claimant had childcare to accommodate she had to terminate the meeting early and this was perceived by the Respondent as an act of insubordination.

(ii) Furthermore, during this meeting the Claimant was advised by Sharon Popps that Trevor Gates was asking her to justify the continued existence of the Claimant's role of Quality Monitoring Officer as this was "not working".

(iii) The Claimant avers that the way in which her grievance was handled was both unfair and the last straw in a series of events which have not been fairly and partially dealt with.

(iv) The manner in which Sharon Popps spoke to the Claimant and dealt with her upon her return from suspension, such as referring to the Claimant as "she" instead of by name and only speaking to her in front of her co-workers and ignoring her when alone caused the

Clamant to fell ostracised and that she was being treated less favourably to the extent that the working relationship had broken down.

(v) Did the foregoing events/acts occur?

(vi) If so did the foregoing events/acts amount to a fundamental breach or breaches of contract?

6 Did the Claimant delay in resigning in response to the alleged fundamental breach of contract?

7 If the Employment Tribunal finds that the Claimant has been constructively dismissed, was her dismissal unfair with regard to *s 98 Employment Rights Act 1996* and what is the appropriate remedy having regard to the Respondents conduct?

Notice Pay

8 Is the Claimant entitled to her notice pay as a result of her wrongful dismissal?

Compensation

9 If the Claimant succeeds what is the appropriate remedy?

10 What compensation should the Tribunal award? And should any compensation be reduced by virtue of the Claimant's conduct?

11 I heard evidence from the Claimant and from Lorraine Bennett, former Deputy Branch Manager on her behalf. For the Respondent, I heard evidence from Sharon Popps, Branch Manager; Yousuf Hingah, Operations Support Manager and Grievance Hearing Manager; and Nikisha Goulding, Operations Manager and Grievance Appeal Manager.

12 There was a bundle of documents. Both parties made written and oral submissions. I reserved my decision on both liability and remedy.

Findings of Fact

13 The Claimant was employed from 26 March 2007. Her employment was transferred to the Respondent by a TUPE transfer in about 2013. On 8 October 2012 the Claimant was promoted to the post of Quality Monitoring Officer. The Claimant worked 30 hours a week.

14 The Respondent provides domiciliary care to clients in the community. The Claimant was employed in the Respondent's Chelmsford office. Sharon Popps was the Branch Manager of the Chelmsford Office at the relevant times and Lorraine Bennett was the Deputy Branch Manager. Prior to the issues in this case, the Claimant had a clean disciplinary record.

15 In the Claimant's position as Quality Monitoring Officer, she was responsible for assessing and overseeing senior care workers attached to the Chelmsford branch, who were working in the field with clients and overseeing Field Care Supervisors attached to the branch. As part of this oversight, the Claimant was responsible for providing weekly reports to Ms Popps, showing the statistics for the Chelmsford branch compliance requirements. These reports would advise Ms Popps of the number of outstanding supervisions of care workers and Field Care Supervisors, outstanding staff appraisals, outstanding risk assessments on service users' homes and outstanding reviews of care packages.

16 The Claimant was also responsible for visiting service users and undertaking their care needs assessments and risk assessments, to ensure that both care workers and service users were safe.

17 By late 2015 Ms Popps had become concerned that there was a high number of outstanding risk assessments and staff appraisals. The weekly report dated 4 October 2015 (page 124) showed that there were 178 outstanding risk assessments and care package reviews.

18 On 5 October 2015 Ms Popps discussed overdue risk assessments and appraisals with the Claimant. She told her that these matters need to be addressed. The Claimant said that she had difficulty persuading care workers to come into the office for appraisals. Ms Popps agreed that Ms Popps, herself, would ask them to come in.

19 On 18 October Ms Popps spoke to the Claimant again, expressing her concern that 115 risk assessments were still outstanding (page 6 and page 125).

20 Failure to undertake risk assessments of service users can put the Respondent in breach of CQC Regulations. It can also put service users and care workers at risk.

21 The number of outstanding risk assessment and reviews fell steadily through October, November and December 2015. However, by 8 February 2016, the number of outstanding risk assessments had risen again to 116, page 138. On 8 February 2016 Ms Popps spoke to the Claimant about the risk assessments which were out of date and told her that she needed to go out into the field, to conduct the risk assessments herself, along with Field Care Supervisors.

22 On 14 March 2016 Ms Popps spoke to the Claimant about risk assessments. There were 87 outstanding risk assessments at that date. Ms Popps again told the Claimant that she would need to go out into the field, to conduct risk assessments herself. The Claimant agreed that she would.

23 On 12 April 2016 Ms Popps and the Claimant spoke again about outstanding risk assessments. There were 135 risk assessments which were outstanding. The Claimant agreed that she would need to go out into the field, to conduct these herself. Ms Popps told her that she would need to be out of the office for a few days each week, because so many risk assessments were out of date.

24 On 20 April 2016 Ms Popps had a one to one meeting with the Claimant, pages

10 – 12. Ms Popps said that the meeting was to discuss the Claimant's job role. She produced a list of jobs that the Claimant was not doing. The Claimant said that she felt that she was drowning in work and that there was a lot of typing outstanding. Ms Popps told the Claimant that Trevor Gates, Deputy Director of Operations for the Respondent, had asked Ms Popps to justify the Claimant's role. She commented that Trevor Gates had said that the Claimant's role was not working and this had been the same for the past six months. Ms Popps said that she had evidence that the Claimant was always out of date with her tasks and was not fulfilling her job role. Ms Popps said that this could lead to disciplinary action, which could end in dismissal.

25 The Claimant asked Ms Popps what Ms Popps wanted the Claimant to do. Ms Popps said that, personally, she thought the Claimant should be working as a Field Care Supervisor, not based in the office. Ms Popps said that the Claimant would work the same hours, for £8 per hour. She said that the Field Care Supervisor's role was quality monitoring, like the Claimant's current role, but would not involve managing a team.

26 There was a dispute of facts between the parties as to whether, in this meeting, Ms Popps had said that the Claimant *would* or *could* be dismissed following disciplinary action. Ms Bennett's notes record that Ms Popps said that the Claimant could be dismissed. Ms Bennett also agreed in evidence that it was likely that Ms Popps had said that the Claimant could, rather than would, be dismissed.

27 I decided that Ms Popps said that the Claimant *could* be dismissed following disciplinary action.

28 On 22 April 2016 the Claimant emailed Ms Popps, asking that, following their conversation on 20 April, "…please could you put my two options for my future at the company in writing. When it comes to the job role option given please include the title, hours, rate of pay, type of contract, frequency of pay and how I would claim my pay and expenses." Page 17.

29 On 25 April 2016 the Claimant met Ms Popps again. Ms Popps asked the Claimant whether she had had a think. The Claimant responded that she did not want the Filed Care Supervisor role and wanted to be taken through a disciplinary process. Ms Popps said that she would need to start putting an investigation together and the matter might not go down a disciplinary route, page 18.

30 After that meeting ended, Ms Popps spoke to her manager, Mr Gates. Mr Gates suggested that Ms Popps start a performance management process for the Claimant and devise a performance improvement plan for her. Ms Popps asked the Claimant to come back to the meeting. She told her that the company was going to use a performance management plan. She said that it would set targets for the Claimant to meet each week. Ms Popps said that, as soon as the targets were not met, then the matter would go straight to a disciplinary process. Ms Popps said that the process could be advantageous for the Claimant and for the Respondent: the Claimant would get support and the Respondent would ensure that the Claimant was performing her job. The Claimant asked what evidence the company had against her already. Ms Popps said that the evidence was contained in the weekly KPIs (key performance indicators), showing that the risk assessment reports were behind.

31 The Claimant and Ms Popps met again on 13 May 2016, to discuss the proposed performance plan. The meeting lasted from 2.20pm to about 3.15pm, when the Claimant needed to leave to collect her Primary School aged children. The Claimant queried a requirement on the performance plan for her carry out typing. The Claimant asked various questions about the duties that were contained in the plan. She said that she was not happy with the requirement to type reports. Ms Popps said that the Claimant was required to type up the reports and assessments when she completed them. Ms Popps said that tying had always been part of the Claimant's role, but that Ms Popps had brought in typing support, because the office was so behind in preparing reports. At the end of the meeting the Claimant said that she needed to go to collect her children. Ms Popps asked her to take a copy of the performance action plan with her. The Claimant declined to do so.

32 The Claimant and Ms Popps met once more on 18 May 2016. Ms Popps said that they needed to work together to get back on track. She said that she was worried that the Claimant was not taking matters on board. Ms Popps said that, at the previous meeting, the Claimant had disagreed with the performance plan and had left the meeting to pick up her children, refusing to take performance action plan with her. The Claimant disagreed that this is what had happened. The Claimant said that she was not going to follow the performance action plan. Ms Popps said that she did not have a choice. The Claimant said that she wanted to be disciplined instead. Ms Popps said that they should would work with the performance action plan and move forward; the Claimant said that she did not see how they could and she wanted to be disciplined. Ms Popps offered the Claimant the performance action plan again the Claimant said that she would not take it and that she wanted to be disciplined.

33 Ms Popps suspended the Claimant. She told the Employment Tribunal that the Claimant had stood up and raised her voice at the end of the meeting, refusing to take the performance action plan. Ms Popps said that she considered that the Claimant's behaviour was threatening, was inappropriate and uncooperative and that she decided to suspend the Claimant because the Claimant had become disruptive.

34 On 19 May 2016 Ms Popps wrote to the Claimant, saying that, following their meeting that day, where the Claimant displayed inappropriate and uncooperative behaviour and failure to engage with Ms Popps, the Respondent was under a duty to investigate the matter. She said that the Respondent was therefore suspending the Claimant with pay, pending the result of the investigation. Ms Popps said that suspension did not constitute disciplinary action. She said that disciplinary action would not necessarily result from the investigation.

35 On the same day, the Claimant submitted a grievance to Trevor Gates. In it, she said that, in a meeting on 20 April 2016 in relation to her work performance, she had been given two options: the first was an option of disciplinary and dismissal; the second was taking a position which amounted to demotion. She said that there had been a second meeting on 25 April for the Claimant could tell her manager which option the Claimant had decided to accept. The Claimant said that she indicated that she chosen the disciplinary route in that meeting and her manager had told her that she would carry out an investigation. The Claimant said that, 30 minutes later, the manager had told her that she had changed her mind and was now going to manage the Claimant weekly, so that the first time the Claimant did not achieve her goals, that would be evidence against the Claimant, which would lead to disciplinary and dismissal action.

36 The Claimant further said that, at a meeting on 13 May 2016, she had refused to take a management plan because she did not agree with it. She said that, at a meeting on 18 May, the Claimant told her manager that she wanted to be subject to a disciplinary process, that she had refused to take the plan again, and that this had resulted in her suspension pending further investigation. The Claimant said that she had tried to come to a mutually agreeable plan, but that none of the Claimant's views were accepted by her manager. She said that the whole process had had a great effect on her professionally and personally and had made her feel like she was under a microscope. She said that she felt that everything had been dealt with in a threatening and underhand way.

37 The Claimant was invited to a grievance hearing on 26 May 2016. The hearing was chaired by Yousuf Hingah. The Claimant, again, said that she did not agree with having to type plans and books. She said that her job role could change but that she did not think it was fair that typing had been added to her responsibilities at that point. The Claimant said that she felt that Ms Popps was putting more responsibilities on the Claimant and the Claimant was, therefore, not going to be able to achieve the performance action goals. The Claimant said that her manager had said that there would be weekly meetings and the first week she did not meet one of her aims, this would be used as evidence for a disciplinary and dismissal process.

38 On 3 June 2016 Mr Hingha wrote to the Claimant, telling her of the grievance outcome. Mr Hingha said that he had spoken to Ms Popps, who said that the Claimant had taken the meeting of the 20 April out of context. Mr Hingha said that Ms Popps had apologised for holding two meetings on 25 April, but had explained that the second meeting was necessary because she had received clarification from Trevor Gates that it was appropriate to put the Claimant on a performance action plan. Mr Hingha said that Ms Popps was entitled, as the Claimant's line manager, to request the Claimant to follow a performance plan. Mr Hingha said that failure to meet targets in such a plan could result in disciplinary action. Mr Hingha said that, with regard to the meeting of 13 May 2016, when the Claimant discussed the details of the performance action plan, Mr Hingha himself had asked what aspects of the plan the Claimant did not agree with. He said that the Claimant had mentioned only typing. He said that the Claimant had admitted that she did not look at the plan properly because she was enraged following previous meetings where her poor performance had been discussed.

39 With regard to the meeting on 18 May, Mr Hingha said that the Claimant had raised her voice and was aggressive and defensive. He said that, at the meeting, Ms Popps had said that disciplinary action could result if the Claimant's performance did not improve. Mr Hingha acknowledged the pressure that had been placed on the Claimant, but said that he had disagreed with a lot of what the Claimant had said. Mr Hingha said that the Claimant's role within the branch was an important one and that the Claimant could not choose what she wanted to do when it suited her. He said that a typist had been employed on a temporary basis, to help with the backlog of typing related administration, but this did not mean that the Claimant could refuse to do tying herself. Mr Hingha said that the Claimant would benefit from additional training on the company's performance and capability process and investigation and disciplinary process as well, as its complaint process. He said that a performance plan did not necessarily mean that the Claimant would be disciplined or dismissed; supervisions were there to ensure that standards of work were communicated and maintained. He also said that, where standard of work had been discussed before and were not being maintained, the next step would

be to address this under a performance plan. The employee's option in those circumstances was not to refuse this, but to agree and work with it.

40 Mr Hingha partially upheld the Claimant's grievance. He said that there had been a breach in confidentiality, because the Claimant had been told of what had been said in a meeting between Ms Popps, Ms Bennett and Mr Gates (it appears that Ms Bennett told the Claimant about this meeting and what was said during it).

41 Mr Hingha recommended that the company start the process again, review the work performance plan and agree, with the Claimant's input, how the Claimant could improve performance areas and work together with Ms Popps. Mr Hingha said that it was no one's intention to terminate the Claimant's employment and that the Claimant had the right to appeal against the Respondent's decision.

42 On 15 June 2016 the Claimant sent a grievance appeal letter to the Respondent. She said, amongst other things, that it was not reasonable for Sharon Popps to steer her into a formal performance management process. The Claimant repeated her assertion that Ms Popps had said, in the meeting on 20 April, that the Claimant could either accept demotion to the role of Senior Care Worker, or would be dismissed. She said that telling her that she would be demoted was a breach of contract. The Claimant that said, in order to conduct a fair and reasonable performance review, the Respondent would need clearly to set out the objectives that she must achieve. She said that no fair or reasonable procedure had been followed and that there was no clear or accurate timetable for review. She said there was no clarity about the expectations of the performance plan. She also said that Ms Popps had failed to give a fair reasonable and transparent objectives, with a clear timescales, in relation to the performance targets. The letter said that, in light of the Claimant's previous 9 years good service, Ms Popps' comment that the Claimant would be taken down a disciplinary route and dismissed was unjustified, in that there were no allegations of gross misconduct which would justify such an assertion. She said that any finding of poor performance would not justify sanction of dismissal.

43 The grievance appeal was heard by Kisha Golding on 24 June 2016. Ms Golding questioned the Claimant about why she had asked for a settlement payment through solicitors. The Claimant explained that she had sought help because she needed advice and she had been threatened by Ms Popps. Ms Golding asked the Claimant why she was disputing that typing up care plans was part of the Claimant's duties. The Claimant said that she had not been expected to type before and adding such duties at this stage would be unfair. Ms Golding said that she had been in the industry for a very long time and had never met anybody who did not type up their own risk assessments. Ms Golding said that one purpose of a performance plan is to get employees to do their jobs effectively. The Claimant asked that Ms Golding uphold the Claimant's complaint that Ms Popps threatened her. She said that, in the 20 April meeting, Ms Popps said that she had evidence to discipline and dismiss the Claimant.

44 The Claimant attended a meeting with Yousuf Hingha and Ms Popps on 28 June, to discuss a performance plan. The Claimant asked what the timeline would be on various requirements in the performance plan. Mr Hingha said that the time lines would be agreed and they would need to be realistic and fair, so that they could be measured.

45 The Claimant asked for how long the action plan would be in place; whether it

would be indefinite, or would last 6 months, or another time. Mr Hingha said that no improvement plan was indefinite and that he would check and come back to the Claimant.

46 The Claimant returned to work on 29 June 2016. On 28 June 2016 she emailed Mr Hingha, saying that she reserved her position and would return to work under protest until her grievance appeal was finalised.

47 Ms Golding sent the outcome of the grievance appeal meeting to the Claimant on 8 July 2016. Ms Golding said that the original grievance decision stood and that she hoped the Claimant could return to work and move forward. Ms Golding said that a performance plan was used as a tool to improve performance and increase productivity, not to discipline and dismiss employees. Ms Golding said that she was sorry that the Claimant had had a negative experience so far with the performance plan, but that Ms Popps had assured Ms Golding that Ms Popps was willing to support the Claimant and work with her to improve performance. Ms Golding said that Ms Popps had not intended to threaten the Claimant: she had merely suggested that the Claimant take a step down to a Senior Care Worker role. Ms Golding said that Ms Popps had told the Claimant in the meeting on 20 April that a failure to improve could result in a disciplinary, which could lead to dismissal. Ms Golding's conclusion was that Ms Popps was right to begin performance management proceedings because the Claimant had failed to improve her performance as requested. Ms Golding told that Claimant that the company was not trying to dispose of the Claimant's role, but that Mr Gates, as Operations Manager, was right to question whether the Claimant's role was working and to introduce changes to it when required.

48 Mr Yousuf did not respond to the Claimant with a time line for the performance improvement plan before her resignation.

49 On 11 July 2016 the Claimant sent a letter of resignation, saying that her employment had become untenable. She said that, following the events outlined in her grievance, the handling of her grievance and subsequent appeal, it had become increasingly difficult to continue her employment in the company. She said that the following events, which she said led to the submission of her grievance, amounted to a repudiatory breach of employment causing a breakdown in the employment relationship:

49.1 On 20 April 2016 Ms Popps telling her that she had two options, one to face disciplinary proceedings and ultimately be dismissed or to accept demotion to the role of Senior Care Worker. The Claimant said that she believed that this constituted an anticipatory breach of contract.

49.2 Steering the Claimant into a performance management programme and trying to manage her out of employment. The Claimant said that was issued with an open ended performance plan on 25 April 2016.

49.3 Penalising the Claimant for leaving the 13 May meeting to pick up her children, by suspending her on 18 May.

49.4 On 18 May Sharon Popps telling the Claimant that Trevor Gates was asking Ms Popps to justify the continued existence of the Claimant's role and that the Claimant's role was not working.

49.5 The handling of her grievance and her appeal, which the Claimant said were unfair and constituted the last straw in a series of events in which the Claimant had not been fairly dealt with.

49.6 In her return to work interview, Ms Popps referring to the Claimant as "she," instead of by her name. The Claimant said that she had felt ostracised and treated less favourably by Ms Popps.

50 The Claimant told the Employment Tribunal that Ms Popps had referred to her as "she" on one occasion. She also said that, while Ms Popps had been friendly to her and was apparently working well with her in front of other people, on one occasion, when the Claimant had been near Ms Popps' office Ms Popps had come out of the office and, rather than greet the Claimant, had averted her eyes.

51 In evidence to the Tribunal, Ms Popps said that she had believed that the working relationship had been very good on the Claimant's return to work. She said that she may have had things on her mind when she came out of her office door on the occasion the Claimant mentioned. Ms Popps said that she did not ignore anyone.

52 Ms Popps could not remember referring to the Claimant as "she". She said that it is likely that both the Claimant and Ms Popps had referred to the other, occasionally, as "she," as part of normal conversation.

53 I decided that, in general, the working relationship between Ms Popps and the Claimant had been good when the Claimant returned to the office. I decided that the Claimant may well have misunderstood Ms Popps actions on one occasion when Ms Popps walked out of the door of her office. I decided that Ms Popps may have referred to the Claimant as "she", as part of normal conversation. I accepted Ms Popps' evidence that this was normal and natural.

Relevant Law

54 *S94 Employment Rights Act 1996* states that an employee has the right not to be unfairly dismissed by his employer. In order to bring a claim of unfair dismissal, the employee must have been dismissed.

55 By *s95(1)(c) ERA 1996*, an employee is dismissed by his employer if the employee terminates the contract under which he is employed, in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is known as constructive dismissal.

56 In order to be entitled to terminate his contract and claim constructive dismissal, the employee must show the following:

56.1 The employer has committed a repudiatory breach of contract. Every breach of the implied term of trust and confidence is a repudiatory breach, Morrow v Safeway Stores [2002] IRLR 9;

56.2 The employee has left because of the breach, Walker v Josiah Wedgewood

& Sons Ltd [1978] ICR 744;

56.3 The employee has not waived the breach- in other words; the employee must not delay his resignation too long, or indicate acceptance of the changed nature of the employment.

57 The evidential burden is on the Claimant. Guidance in the *Western Excavating (ECC Limited) v Sharp* [1978] ICR 221 case requires the Claimant to demonstrate that, first the Respondent has committed a repudiatory breach of his contract, second that he had left because of that breach and third, that he has not waived that breach.

Nature of Repudiatory Breach

58 In order to establish constructive dismissal based on a repudiatory breach of the implied term of trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, *Baldwin v Brighton and Hove City Council* [2007] ICR 680, and *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606.

59 The question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by the range of reasonable responses test. The test is an objective one, a breach occurs when the proscribed conduct takes place.

60 To reach a finding that the employer has breached the implied term of trust and confidence requires a significant breach of contract, demonstrating that the employer's intention is to abandon or refuse to perform the employment contract, Maurice Kay LJ in *Tullett Prebon v BGC* [2011] IRLR 420, CA, para 20.

61 A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal, following a "last straw" incident, even though the last straw by itself does not amount to a breach of contract, *Lewis v Motorworld Garages Limited* [1986] ICR 157.

62 In *Omilajuv Waltham Forest BC* [2005] ICR 481, CA, the Court of Appeal said that the act constituting the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do. Nevertheless, the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer.

63 Once a repudiatory breach has occurred, it is not capable of being remedied so as to preclude acceptance. The wronged party has a choice of whether to treat the breach as terminal. However, the wronged party cannot ordinarily expect to continue with the contract for very long without being considered to have affirmed the breach, *Buckland* per Sedley LJ, at paragraph [44].

64 In *Chindove v William Morrisons Supermarkets Plc* [2014] UKEAT 0201/13/2603 the EAT said, regarding the question of whether delay in resignation amounted to an affirmation of contract, at [26], ".. 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 within 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 on context. Part of that context is the employee's position… deciding to resign is, for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim..".

Resignation in Response to Breach

65 In *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859, [2004] IRLR 703, CA the Court of Appeal held that what was necessary was that the employee resigned in response, at least in part, to the fundamental breach by the employer; as Keene LJ put it:

''The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer.''

66 In *Wright v North Ayrshire Council* [2014] IRLR 4, EAT, Langstaff P said that once a repudiatory breach of the employment contract by the employer has been established in relation to a constructive dismissal claim, the correct approach, where there was more than one reason why an employee left a job, was to examine whether any of them was a response to the breach. If the breach played a part in the resignation, then the employee has been constructively dismissed. However, Langstaff P also said that where, there is a variety of reasons for a resignation, but only one of them is a response to repudiatory conduct, a tribunal may wish to evaluate whether in any event the claimant would have left employment and adjust an award accordingly.

Reasonableness – *s98(4) ERA 1996*

67 If the Claimant establishes that he has been dismissed, the ET goes on to consider whether the Respondent has shown a potentially fair reason for the dismissal and, if so whether the dismissal was in fact fair under *s98(4) ERA 1996*. In considering *s98(4)* the ET applies a neutral burden of proof. It is not for the Employment Tribunal to substitute its own decision for that of the employer.

ACAS Code of Practice 1 Discipline and Grievances at Work

68 The *ACAS Code of Practice 1 Discipline and Grievances at Work* provides, at paragraphs [19] – [23]:

" [19] Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.

[20] If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.

[21] A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning. …

[23] Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence".

Polkey

69 If the Tribunal determines that the dismissal is unfair the Tribunal may go on to consider the percentage chance that the employee would have been fairly dismissed , *Polkey v AE Dayton Services Limited* [1988] ICR 142.

70 In *Gover v Propertycare Limited* [2006] ICR 1073, the Court of Appeal held that the *Polkey* principle does not only apply to cases where the employer has a valid reason for dismissal but has acted unfairly in its mode of reliance on that reason, so that any fair dismissal would have to be for exactly the same reason. Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred or at some later date.

71 By *s122(2) ERA* 1996, where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the Tribunal shall make such a reduction. By *s123(6) ERA 1996*, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. *Optikinetics Limited v Whooley* [1999] ICR 984: it is obligatory to reduce the compensatory award where there is a finding of contributory fault. The reduction may be 100% - *W Devis & Sons Limited v Atkins* [1977] ICR 662.

72 In *Nelson v BBC (No 2)* [1980] ICR 110, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

(a) The relevant action must be culpable and blameworthy

(b) It must actually have caused or contributed to the dismissal

(c) It must be just and equitable to reduce the award by the proportion specified.

73 It is open to a Tribunal to make deductions both for *Polkey* and contributory fault. The proper approach of tribunals in these circumstances is first to assess the loss sustained by the employee in accordance with *s123(1) ERA 1996*, which will include any percentage deduction to reflect the chance that he would have been dismissed in any event. The tribunal should then make the deduction for contributory fault, *Rao v Civil Aviation Authority* [1994] ICR 495. However, in deciding the extent of the employee's contributory conduct and the amount by which it would be just and equitable to reduce the award for that reason under *s123(6),* the tribunal should bear in mind that it has already made a deduction under *s123(1) ERA 1996*.

Discussion and Decision

74 On the evidence, I found that the Claimant resigned for the reasons set out in her letter of resignation. These reasons were consistent with the matters she had been complaining of during the grievance process and grievance appeal process.

Breach of Duty of Trust and Confidence

75 I therefore considered whether these matters, whether individually, or collectively, amounted to a fundamental breach of contract, justifying the Claimant's resignation without notice. I reminded myself that, to establish a breach of the implied term of trust and confidence, the Claimant was required to show that the Respondent had, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them.

76 I concluded that the Respondent had acted in a number of respects, whether considered separately or together, without proper cause, which were calculated or likely to seriously damage the relationship of trust and confidence. These were:

76.1 On 20 April 2016, telling the Claimant that she could be subject to disciplinary action which could end in dismissal. The ACAS Code of Practice at paragraphs [19] – [23] indicate that a first act of misconduct will normally result in a written warning; and that matters of misconduct which have a serious or harmful effect on the organisation can result in a final written warning for a first offence. The Code indicates that acts of gross misconduct are those which may call for dismissal without notice for a first offence. I consider that Ms Popps behaved oppressively by stating that a disciplinary process could end in dismissal, when the matters alleged were not stated to be matters of gross misconduct and the Claimant had not even been subject to a first written warning at that stage. Stating that dismissal was a possibility in these circumstances inevitably seriously damaged the relationship of trust and confidence. Ms Popps was telling the Claimant she could be dismissed for matters which could not reasonably result in dismissal for a first offence.

76.2 On 25 April 2016 Ms Popps telling the Claimant that she would be subject to an open-ended performance management plan, and that the first time the Claimant did not meet her targets she would be immediately subjected to disciplinary proceedings. I consider that it was wholly unreasonable and oppressive to tell the Claimant that she would be subject to performance management without setting any limit to the period of such performance management. This, again, would inevitably seriously damage the relationship of trust and confidence, leading an employee to feel that their work was subject to unending scrutiny. Furthermore, the threat that any failure to comply with targets would lead to immediate disciplinary proceedings was, once more, oppressive and unreasonable. There would be many circumstances in which disciplinary proceedings would be unfair; for example, if the Claimant had otherwise met her targets for a considerable period of time; or where the Claimant had narrowly missed one target, but was otherwise complying with the performance management plan. Ms Popps' threat gave the Claimant no reassurance that the performance management plan would be operated fairly.

76.3 The Respondent's failure ever to give the Claimant time limits for the performance management plan, despite Mr Hinga agreeing with the Claimant that a performance management plan should not be indefinite, and despite him undertaking to inform her about time lines for performance.

77 I consider that the Respondent did not have reasonable or proper cause for acting in these ways. While was clearly reasonable for the Respondent to seek to manage the Claimant's performance when she had fallen behind with risk assessments for many months, nevertheless the Respondent could easily have conducted that performance management in a fair and reasonable manner from the outset, giving targets for performance over a defined, and not open-ended period of time. There was no need to tell the Claimant that a first breach would result in disciplinary action. A fair manager would have told the Claimant only that a failure to reach the performance targets *could* result in disciplinary action. When disciplinary action was mentioned, a fair manager would have made clear that the Claimant could be subject to formal written warnings, before dismissal.

78 I concluded that the other matters of which the Claimant complained did not, whether collectively or separately, contribute to a breach of trust and confidence:

78.1 Ms Popps' suggestion that the Claimant move to another role, which did not involve management, was reasonable and had proper cause because the Claimant had not, for many months, been fulfilling the requirements of her management role. The Claimant was not required to be demoted, the possibility was suggested to her.

78.2 I find that the Claimant was not, in fact, penalised for leaving the meeting on 13 May 2016 to collect her children. Ms Popps later suspended the Claimant because of the Claimant's conduct in the meeting of 18 May, when the Claimant raised her voice and stood up in a way which Ms Popps found intimidating.

78.3 I find that the Respondent had reasonable and proper cause for telling the Claimant that her role was not working and had to be justified. The Claimant had failed to carry out the requirements of her role over many months. Her failure to carry out risk assessments on service users was a serious matter, which entailed risks to service users and care workers visiting them. Where an employee is not carrying out their role and important tasks are not being done, it is reasonable for an employer to consider whether job roles need to be reorganised, so that work is carried out properly.

78.4 I decided that the grievance and grievance appeal were conducted fairly. Both Mr Hingha and Ms Golding addressed the Claimant's matters of grievance in detail and proposed solutions. I accepted that their findings were their honest and true conclusions on the facts as they found them. I consider that it was a reasonable outcome for the grievance to propose that the performance management process be started again, with the Claimant being consulted and areas for improvement agreed.

78.5 I have found that Sharon Popps' behaviour towards the Claimant, on the Claimant's return to work was normal and natural. There was a good working relationship. The Claimant misconstrued Ms Popps' conduct on one occasion.

Resignation in Response to Breach

79 Applying *Nottinghamshire County Council v Meikle* and *Wright v North Ayrshire Council*, I considered that the Claimant did resign in response, at least in part, to fundamental breaches of contract by the employer. I have accepted that she resigned for the reasons set out in her letter of resignation. However, I have also decided that some of the matters on which she relied did not amount, collectively, or separately, to a breach of the duty of trust and confidence. I conclude that this should be considered in relation to *Polkey*, below.

Affirmation

80 The Respondent contended that the Claimant delayed in resigning and affirmed the breach. However, the Respondent's failure to set time limits for the performance plan, or an end date for it, lasted until the date of resignation. The Claimant had asked for time limits and for an indication of how long the plan would be in place at the meeting on 28 June 2016. She thereby indicated that she did not accept an indefinite performance management plan and did not affirm the breach. Despite its undertakings, the Respondent never provided time limits and an end date. The Claimant resigned shortly afterwards. She did not affirm her contract.

Wrongful Dismissal

81 Accordingly, I find that the Claimant was constructively dismissed. She resigned without notice in response to a fundamental breach of contract and did not affirm the breach.

82 The Claimant was entitled to resign without notice and is entitled to be paid her notice pay.

Fairness of Dismissal – *s98(4) ERA 1996*

83 I consider that, even if the Respondent had a fair reason for its actions (the Claimant's conduct in her failure to carry out her job duties), the Respondent did not act fairly. It was outside the range of reasonable responses of a reasonable employer for the Respondent to: seek to impose an open ended performance improvement plan; say the Claimant could be dismissed for matters which could not reasonably warrant dismissal for a first offence; tell the Claimant that she would be immediately disciplined for any failure to meet performance targets; and to fail to provide time limits and an end date for the performance plan even after the Claimant returned to work.

Polkey

84 As I have indicated, I consider that the Claimant resigned, partly in response to fundamental breaches on contract and partly is response to matters which were not breaches of contract.

85 On the evidence before me, I did conclude that the Claimant was, to a degree, resistant to any form of performance management. She did not seek to cooperate with the Respondent during meetings on 13 and 18 May. The Claimant repeatedly insisted on being disciplined when performance management was discussed with her. She did not appear to accept that her line manager was entitled to manage her performance. The Claimant also unreasonably misinterpreted Ms Popps' behaviour towards her when the Claimant returned to work.

86 I considered, therefore, that there was some likelihood that the Claimant would have resigned in any event, even if the Respondent had followed a fair performance management procedure.

87 In assessing the likelihood that the Claimant would have resigned in any event, I took into account that the Respondent committed fundamental breaches of contract at the outset of the process, seriously damaging the relationship of trust and confidence. The Claimant's lack of cooperation thereafter is likely to have been influenced, to some extent, by that.

88 On all the facts, I considered that it was 30% likely that the Claimant would have resigned in any event, even in response to a fair performance management programme.

89 I did not consider that the Claimant had contributed to or caused her dismissal. I

Remedy

90 The parties agreed that the Claimant was paid £277.31 gross and £249.48 net per week.

91 The Claimant was employed for 9 complete years.

92 She is entitled to a basic award for unfair dismissal of £2,495.79.

93 She is entitled to 9 weeks notice pay, pursuant to *s86 ERA 1996.*

94 The Claimant secured alternative employment as Community Care worker from 17 September 2016 at £170 per month, or £42.50 per week, and as a school dinner lady from 26 September 2016 at £283.40 per month, or £70.85 per week.

95 I have not been told of any other change in the Claimant's earnings.

96 The Respondent contended that the Claimant ought to have been able to secure alternative work at a similar rate of pay to that she was receiving with the respondent within a short period of time. It contended that the Indeed website, for example, has hundreds of jobs the Claimant could have done in the same sector with similar pay.

97 The Claimant said that she had registered with the Indeed website and had applied for numerous jobs, undertaking telephone interviews, but that none could offer the hours she worked at the Respondent – 9am – 3pm. She worked these hours due to her childcare responsibilities; paying for childcare was prohibitively expensive. Her telephone interviews included interviews for a job as a Senior Carer for Independent People, a Quality Assurance role in Romford and a Night Care Worker in Peverel care home. The Claimant had investigated the possibility of bank work at Broomfield Hospital, but had discovered that she would have to work 30 day shifts before being able to undertake night work. She said that her job search continued.

98 The Claimant did not dispute that many jobs were advertised as being available in the care sector in her locality. It was put to her in cross examination that, for example, care jobs in Wickford were being advertised at £16,800 per annum with flexible hours. The Claimant said that, when she was looking for work, she was not able to find work for hours starting at 9am and finishing at 3pm.

99 I concluded that the Claimant had made reasonable efforts to mitigate her loss. I accepted that her job search was continuing. I decided that she ought to recover her loss of earnings until the date of the promulgation of this decision.

100 However, the Claimant did not dispute that a large number of jobs continued to be advertised in the care sector and that some advertised flexible hours. I decided that, while the Claimant should recover her full loss to the date of promulgation of judgment, 6 March 2017, she should not recover future loss beyond that date. That would be very nearly 8 months since the end of her employment and I considered that that was sufficient time for the Claimant to have obtained work between 9am and 3pm at the same rate of pay as she was receiving with the Respondent.

101 I therefore awarded the Claimant a compensatory award for unfair dismissal calculated as follows.

102 Loss of earnings: 34 weeks x £249.38 = £8,478.92, less ((24 x £42.50 = £1,020) +

(23 x £70.85 = £1,629.55) = £2,649.55) = £5,829.37 loss of earnings. To that needs to be added £450 loss of statutory rights, giving a total of £6,279.37.

103 Notice pay of £2,245.32 needs also to be deducted.

104 That leaves £4,034.05 compensatory award before the *Polkey* deduction.

105 Applying a *Polkey* deduction of 30%, the total for the compensatory award is £2,823.93.

106 The Respondent shall pay the Claimant a grand total of £5,319.63 in compensation for unfair dismissal and £2,245.32 notice pay.

Employment Judge Brown

03 March 2017