

ranging nature of the allegations that one day would be inadequate to hear and give judgment in the case. Furthermore, the parties had made no attempt to prepare an agreed list of key factual allegations in advance of the hearing, so the first part of the hearing was taken up in identifying the issues. The result is that the hearing of this claim could not be completed within the original allocation on 13 April 2018 and had to go part heard to 6 July 2018. This was not satisfactory for the parties or other Tribunal users.

The issues

4. At the outset of the hearing I clarified that the Claimant asserts a breach of the implied term of mutual trust and confidence and a breach of an express term as to pay. She described the factual allegations underlying these claims as follows:

- 4.1 In June 2017, Mr Kumar, proposing to reduce the Claimant's pay unilaterally by £6,000 per annum, (paragraph 51 of the Claimant's witness statement).
- 4.2 Not addressing the Claimant's complaints about bullying by Dave Rushden, (shouting and verbal abuse) made in the period from December 2015 onwards.
- 4.3 Not adjusting the Claimant's workload despite reducing her hours.
- 4.4 Demoting the Claimant without consultation in June 2017 and without conducting any investigation or disciplinary process.
- 4.5 Not addressing the Claimant's grievances dated 28 June 2017 and 14 July 2017.
- 4.6 Not providing clear key performance indicators, (KPIs), to enable the Claimant to match 'poor performance' against anything.
- 4.7 The Claimant's team stopping reporting to her in February 2017.
- 4.8 Junior staff reviewing CCTV of the Claimant on a shared drive in the period May–July 2017, (paragraph 103 of her witness statement).

The hearing

5. The Claimant gave evidence in support of her claims and called no other witnesses. That is quite common and I draw no inferences from the number of witnesses a party calls.

6. The Respondent called two witness; Ashok Kumar, the managing director, and Suzannah Voss. Mr Kumar founded the Respondent and had worked with the Claimant for 10 years by the time of her resignation. Ms Voss joined the Respondent in January 2017 to deal with customer service and sales administration together with some *ad hoc* HR responsibilities. In April 2017 she took on more formal responsibility for HR matters.

7. I heard the evidence from the Claimant and Mr Kumar on the first hearing day and from Ms Voss on the second.

8. In addition to the evidence of these witnesses I considered the documents to which I was taken in an agreed bundle and references to page numbers in these Reasons relate to that bundle.

9. Finally, I received written submissions from both parties which they supplemented orally. At times Ms Marks used the language of whistle-blowing or harassment claims. I have reminded myself, however, that this is a claim of constructive unfair dismissal only and that it is the contractual test underlying constructive dismissal which lies at the centre of this claim.

10. Mr Healy said that, if a dismissal was established, the Respondent relied on 'some other substantial reason' as a potentially fair reason for dismissal and would argue in addition or alternatively that the Claimant was likely to have been dismissed in any event.

The legal principles

Constructive dismissal

11. An employee who claims to have been constructively dismissed must show that her employer acted in repudiatory breach of contract. Furthermore, she must show that she resigned in response to this breach and not for some other reason (although the breach need only be a reason and not the reason for her resignation). It is open to an employer to prove that the employee affirmed the contract despite the breach, perhaps by delay or taking some other step to confirm the contract.

12. In this case the Claimant relies on an alleged breach of the implied term of trust and confidence. A breach of this term occurs where an employer conducts itself without reasonable cause in a manner calculated, or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (see *Mahmud v BCCI* [1997] IRLR 462). A breach of this implied term is likely to be repudiatory. The Claimant also relies on an alleged breach or anticipatory breach of an express term relating to pay.

13. The Claimant's claim that her employer acted in breach of the implied term of trust and confidence is based on the '*last straw doctrine*' (as in '*the last straw that broke the camel's back*'). This doctrine provides that a series of acts by the employer can amount cumulatively to a breach of the implied term even though each act when looked at individually would not be serious enough to be such a breach. Inherent in this doctrine is the concept that there was one final act which led to the constructive dismissal (*the last straw*) and the nature of this was considered in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 where the Court of Appeal held that it need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of trust and confidence. If the act relied on as the final straw is entirely innocuous however then it is insufficient to activate earlier acts which may have been or may have contributed to a repudiatory breach.

14. The question whether a repudiatory breach of contract has occurred must

be judged objectively (*Buckland v Bournemouth University Higher Education Corporation* [2010] ICR 908); this requires the Tribunal to assess whether a breach of contract has occurred on the evidence before it. Neither the fact that an employee reasonably believes there to have been a breach nor that the employer believes it acted reasonably in the circumstances is determinative of this: the test is not one of 'reasonableness' but simply of whether a breach has occurred. Of course, where parties are acting reasonably it is less likely that there will have been a breach of contract when judged objectively but this is not necessarily so.

15. The Court of Appeal considered the characteristics of a repudiatory breach of contract in the case of *Tullett Prebon plc & ors v BGC Brokers LP & ors* [2011] IRLR 420. Maurice Kay LJ, who delivered the leading judgment held as follows at paragraphs 19 and 20:

"The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693, at page 698F, per Lord Denning MR, who added:

"The circumstances ... are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not" (ibid).

In other words, it is a highly context-specific question. It also falls to be analysed by reference to a legal matrix which, as I shall shortly demonstrate, is less rigid than the one for which Mr Hochhauser contends. At this stage, I simply refer to the words of Etherton LJ in the recent case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 (at paragraph 61):

"... the legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

16. I have taken this guidance into account when determining the Claimant's claim of constructive dismissal. I have reminded myself too that a breach of contract cannot be 'cured' by subsequent reasonable behaviour on the part of an employer: the right of an employee to resign in response to a repudiatory breach only ends when she has acted in a way which affirms the contract despite the breach (for example by delay). I have also noted the guidance on this topic in the decision in *Assamoi v Spirit Pub Company (Services) Ltd* [2011] UKEAT 50, which provides that there is a distinction between steps taken to prevent a matter escalating to a breach of the implied term of mutual trust and confidence and attempting to cure a breach which has already occurred.

17. The Claimant's claim turns, therefore, on the following basic questions:

17.1 When judged objectively, did the Respondent act in repudiatory breach of contract?

17.2 Did the Claimant resign because of the breach (the breach need

only be a reason for her resignation)?

- 17.3 At the time of her resignation had the Claimant lost the right to resign for this breach because of her earlier affirmation of the contract?

Unfair dismissal

18. Consideration of unfair dismissal arises only if the Claimant establishes that she was dismissed within the definition in section 95 of the Employment Rights Act 1996; 'Dismissal' includes constructive dismissal.

19. If an employee has been dismissed it is for the employer to establish the reason for dismissal and that it is a potentially fair reason within the categories set out in section 98 of the Employment Rights Act 1996. In this case the Respondent asserts that, if the Claimant was dismissed, it was for 'some other substantial reason' ("SOSR"). SOSR is a residual category of potential fair reason for dismissal separate from the named grounds in section 98(2) of the Act.

20. It is for an employer to establish a reason for dismissal that is substantial. In this case the Respondent asserts as part of its alternative case that the reason was a loss of trust and confidence in the Claimant's ability to perform her role to the required standard. This is an arguable reason amounting to SOSR but one which a Tribunal is required to approach with care because it may be no more than an attempt by the employer to circumvent a properly conducted capability or conduct dismissal or to invert the contractual test for constructive dismissal (see *Ezsias v North Glamorgan NHS Trust [2011] IRLR 550, EAT; McFarlane v Relate Avon Ltd [2010] ICR 507; and Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11*). The authorities on dismissals for SOSR based on the employer's loss of trust and confidence in an employee suggest the following approach:

- 20.1 Loss of trust should not be resorted to too readily as some form of panacea.
- 20.2 In particular, if there are specific allegations of misconduct the employer should rely primarily on those and be prepared to prove them in the normal way.
- 20.3 However, in a strong enough case an allegation of (terminal) loss of trust may come within SOSR and justify dismissal.
- 20.4 Where this is the case, it may not be enough for the employer to establish merely the fact of that loss of trust because a tribunal may (not must) look into the background to that loss to consider the fairness of the dismissal in the light of all the facts.

21. If the Tribunal is satisfied that the employer has established a potentially fair reason for dismissal, it is for the Tribunal to decide whether it was in fact fair to dismiss for that reason by applying the test of fairness contained in section 98(4) of the Act which provides as follows:

“Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- (b) shall be determined in accordance with equity and the substantial merits of the case.”*

22. There is no burden of proof on either party in respect of this test. While it is the case that the Tribunal must consider the reasonableness of the employer’s reason for dismissal when applying this test rather than substituting its own view, in the context of a dismissal for SOSR the Tribunal is entitled to consider the background to the decision when assessing this.

Findings of fact

23. I make the following findings of fact on the balance of probabilities:

24. When the Claimant joined the Respondent in 2007 as an office junior it was a small company which had been founded only the year before. Mr Kumar, the founder, is a clinical bio-chemist who had worked in the commercial sector for some years.

25. The Respondent was a success and grew over the years so that by the time of the events surrounding this claim it had 14 employees, some of whom were based outside the UK. The Claimant’s role grew with it.

26. In either 2014 or 2015, the Claimant was promoted to the role of ‘*head of operations*’. The parties disagree about the exact date of this change, but nothing turns on this in this case. The original job description for this role is at page 209. The role is described as ‘*vital*’ because of the holder’s responsibility for the day to day smooth operation of the Respondent. Specific duties included:

- 26.1 Achieving agreed budgets.
- 26.2 Monitoring KPIs for team members, suppliers and customers.
- 26.3 Working closely with the senior management team.

Daily duties included:

- 26.4 Overseeing all inward and outgoing communications.
- 26.5 Maintaining a log book of attendance.

‘Other duties’ included ensuring staff read and understood the staff handbook and managing HR resources together with the general manager.

27. Dave Rushden was the general manager. He began working for the Respondent as a consultant in 2013 and was the Respondent’s ‘*responsible*

person, a post required by statute in the pharmaceutical industry.

28. The Claimant and Mr Rushden had access to an advice service, RBS and NatWest Mentor, in respect of HR issues.

29. The Claimant had a good working relationship with Mr Kumar having been in the business pretty much from the start. For his part, Mr Kumar valued the Claimant's attention to detail, diligence and the fact that she was able to speak three languages.

30. The Claimant had a good working relationship with Mr Rushden to begin with but it is clear on the evidence that this deteriorated in or about 2015. Put simply, the Claimant's view was that Mr Rushden's attitude and approach to her was arrogant and dismissive whereas the documents show that he thought that she was an ineffective manager. Mr Kumar told me that he had to intervene on several occasions to calm matters between them because of conflict and this included admonishing Mr Rushden sometimes.

31. My impression of Mr Kumar from the evidence is that he sought to avoid or mitigate confrontation. This is generally a positive and attractive trait, but sometimes it can lead to avoidance of difficult issues which then only become worse in time. I think that is what happened in this case.

32. The Claimant went on maternity leave in February 2015. Her work was covered by Mr Kumar and Mr Rushden in her absence. She returned to work in December 2015. Her evidence is that Mr Kumar agreed to her having a part-time, flexible working pattern to enable her to meet her childcare commitments. She told me that the arrangement also reflected the fact that she often dealt with customers from the Caribbean in the evenings because of the time difference. Mr Kumar confirmed in evidence that he had agreed that the Claimant could work flexibly. Her hours were 60% of a full-time equivalent, based on two full and two half days each week. Her full-time rate of pay was £30,000 per annum, so she received £18,000 per annum pro rata.

33. 2016 was the first full year of this new working pattern. The Claimant told me that she found the new arrangements difficult because, despite the reduction in hours, there was no real reduction in workload. Mr Kumar's evidence was that he and Mr Rushden covered the head of operations role when the Claimant was not there. I am sure that there is some truth in both accounts. Given the size and relative informality of the Respondent company, I doubt that there were clear boundaries about the tasks associated with particular roles, or how these were to be shared between those covering the same role. I also have no doubt that this lack of clarity was a source of underlying tension which manifested itself in the disputes between the Claimant and Mr Rushden in 2016.

34. In January 2017, Mr Kumar recruited Ms Voss as a sales administrator and *ad hoc* HR person. I think he felt that he needed some '*hands on*' HR and personnel management rather than relying on an external provider accessed by his two senior people, the Claimant and Mr Rushden, particularly as they were not working well together. It is notable that Ms Voss' HR role expanded considerably in the months following her appointment and that this allowed Mr Kumar to step away from managing the Claimant and Mr Rushden.

35. At the end of November 2016, the Claimant, Mr Kumar and another employee, Tom Zeltins, met to discuss the sales strategy for 2017. Mr Kumar followed this up by email to his senior managers (page 41). The totality of this email chain (pages 41-46) suggests that what has been produced to me is not a single document but one which has been added and replied to on more than one occasion. While I do not think that there is anything sinister in this, it makes it difficult to tell what was originally discussed in the sales meeting and in what context. I find on the balance of probabilities that the subject header of the email tells the story, namely that this was an email about the business's sales strategy for 2017, not any one individual's sales targets. Accordingly, I do not find that this was a document intended to set individual KPIs for the Claimant as alleged by the Respondent, although it clearly sets out the work expected of her and others.

36. In December 2016, the Claimant attended a sales meeting in Riga. After this but before the Christmas holiday she was told to produce budgets for 2017. The Claimant accepts that she was late in doing so; she says that this was due to the short time scale she had been given and a pre-arranged family holiday over the Christmas period.

37. Unfortunately, the Respondent lost an important customer in December 2016.

38. Stepping back from this evidence, I infer that Mr Kumar was concerned that there was a weakening of the Respondent's performance in the market in late 2016 and this was due, at least in part, to failings in management. It would be wrong to overstate this however, or to suggest that Mr Kumar had lost confidence in the Claimant. Rather, he felt that she would benefit from some management training as her role had simply expanded with the growth of the company. I note that Mr Kumar still gave the Claimant a generous Christmas gift in 2016 and invited her on a business trip to the Cayman Islands in January 2017.

39. The first quarter of 2017 was a difficult one for the Respondent. The sales target could only be achieved by bringing forward a sale agreed in the first quarter but not due to be completed until the second. The Claimant did this with Mr Kumar's agreement and this meant that the sales team received bonuses.

40. Mr Kumar describes sales in the second quarter as '*disastrous*' and, while I have not seen specific documentary evidence of this, I have no reason to doubt his description.

41. There were also personnel problems in early 2017, with a noticeable increase in the number of staff taking sickness absence. The Claimant said that she often had to cover such absences at short notice and that this impacted on her own work. I am sure that this is true but was also necessary in a small company.

42. Other issues began to arise in the first quarter of 2017. In February 2017, Ms Voss complained that the Claimant had failed to define her role or arrange appropriate training. The Claimant told me that she felt that this was unfair as Ms Voss had been recruited by Mr Kumar without any reference to her. At about the same time, Ms Voss approached Mr Kumar with a complaint from staff that the

Claimant had been texting them about work issues in the evenings.

43. In March 2017 the Claimant and Mr Kumar's daughter, Ashton, had a day's taster-training with Nishua Kaunda, a management coach. The Claimant regarded this as a positive step and hoped to go on a management training course with Ms Kaunda as this was something she had discussed with Mr Kumar earlier in the year. Ashton Kumar was on the taster day as Mr Kumar hoped she would take over the role of general manager from Mr Rushden in due course. Ms Kaunda recommended a 12 month executive coaching programme for the Claimant, Ashton and one other member of staff who attended at a cost £7,500 each.

44. I was referred in evidence to an email from Miss Kaunda about training (pages 47-49). One passage suggests that Mr Kumar was considering the Claimant's suitability for the head of operations role in the long term. The Claimant did not see this email at the time so it cannot have been a reason for her resigning, but I find that Mr Kumar was beginning to question whether the Claimant was the right person for her job. This is not something he told her, however. I note that when discussing the Claimant in her email, Miss Kaunda touched on issues of confidence, communication, leadership and delegation.

45. Another issue which emerged in early 2017 concerned the Claimant's hours. There is no evidence to suggest that her flexible arrangement caused problems or attracted attention in 2016. So, I have asked myself why this should have changed in 2017? I suspect that the deteriorating sales environment and clashes between the Claimant and Mr Rushden had all taken their toll. One way or the other, there was unhappiness in the Claimant's team arising, at least in part, from their perception that she was able to come and go as she pleased. What these colleagues did not see was the work she did in the evenings to keep up.

46. I regard the facts I have set out so far to be no more than background information consistent with the stresses and tribulations of being a manager in a small trading company and not evidence of a repudiatory breach of contract. With that in mind, I turn to events in March, April and May of 2017.

47. In April 2017, Ms Voss, who was taking on more HR responsibilities by this time, conducted what have been referred to in this hearing as '*pastoral meetings*' with all members of staff. The notes of her meeting with the Claimant are at page 53. When Ms Voss asked the Claimant about the challenges she faced in her role in this meeting, the Claimant said,

"A challenge is management, and finding time to fulfill those duties. This is partly due to a lack of clarity on the role and responsibilities. A more defined role is needed, so it is clear what is expected in this role. There hasn't been much preparation for stepping into management, in terms of learning or tools."

48. In answer to the question, are you satisfied in your role?, the Claimant said,

"Most days yes, some days no. Some days can be stressful. Can be a 'perfectionist', so that can create a lot of the stress, but it is a weakness I

am aware of and I am working on. Would like to discuss flexi time, there is some perceived uncertainty from other staff about the working hours, there needs to be clarification.”

49. In answer to later questions the Claimant said that areas where she thought the Respondent could do better were in communication and reassurance for senior staff that they have authority and trust to make decisions independently. These comments illustrate to me that the Claimant was aware of rumblings of discontent about her hours and that she felt unsupported in that, and more generally by Mr Kumar.

50. As I have already observed Mr Kumar's management style is 'light touch' and while that had been successful when the business was in its fledgling stage, it was perhaps not what was needed now. Similarly, it probably was not sensible for him to delegate HR tasks in respect of senior employees to Ms Voss, given that she was so new to the company. That said, none of this suggests a repudiatory breach of contract but is the context of a change that Mr Kumar told me he saw in the Claimant in March and April 2017. He said that she became increasingly distant and withdrawn. He recalled one occasion when she came to him with concerns about the staff and appeared visibly distressed. He described her as *'breaking down in tears'*. He also described having to mediate between the Claimant and Mr Rushden and said that this was *'causing problems'*.

51. Accordingly, the context of the Claimant's resignation was one of significant change in a senior and-long serving employee in circumstances where she was in conflict with a fellow manager and facing discontent from more junior staff.

52. It would be wrong to suggest that Mr Kumar did nothing in response to this. He offered the Claimant assistance with her work (Ms Kaunda, the trainer, had identified that the Claimant had difficulties delegating tasks) and provided some remedial massage sessions because she was complaining of tension headaches. I find on the balance of probabilities that the Claimant found it difficult to take up the offer of support from Mr Kumar or, at least, to take it up fully because of her reluctance to delegate.

53. There was another occasion at a two-day sales strategy meeting in Bedford when the Claimant was visibly distressed. Mr Kumar says that the reasons for this were that the Claimant's team were not doing as she asked and Mr Rushden was, to use his words, *'creating unnecessary problems'*.

54. At the beginning of May 2017, the Claimant complained to Ms Voss about emails sent by Mr Rushden which she felt belittled her. Ms Voss took this up with Mr Rushden and he apologised at the time for any distress that he may have caused. However, later that month he lodged his own complaint about the Claimant contained in a long email dated 22 May 2017 (pages 68-710). He described the Claimant as a *'disruptive and damaging force'* and *'an unreasonable cost with little benefit to the team or business'*. These are extremely harsh words. He suggested that the Claimant be given an administrative role without staff reporting to her. He did not suggest that she should be made redundant or dismissed. There is no evidence that the Claimant was aware of this email at the time of her resignation.

55. The Claimant was off sick on 22 May 2017, this was unusual as she very rarely had time off work. When she returned to work on 23 May 2017, she was asked to attend a meeting with Mr Kumar and Ms Voss. The parties' accounts of this meeting differ and there are no notes to help me. The Claimant's recollection is that she explained the pressure she was under and Mr Kumar asked her to concentrate on sales rather than covering for staff off sick. Mr Kumar's evidence is that he offered to relieve the Claimant of managerial responsibility for four weeks to allow her time to recover. While the Claimant did not recall a timescale for review being mentioned, she told me that the meeting felt very supportive and I find that she was reassured by it. For example, Mr Kumar offered the massage therapy mentioned above and suggested taking extended lunch breaks.

56. I do not find that this meeting was portrayed or construed as a performance review meeting although I note that on the same day, Mr Rushden reported the Claimant as having arrived at work late.

57. One step that was taken by agreement was to change the Claimant's title to 'commercial manager'; this happened at the end of May 2017. This change is consistent with there being broad agreement for the Claimant to take a less 'hands-on' management role, at least until she felt better. What the Claimant did not know was that Mr Rushden had lodged his complaint, expressed in stinging terms, about her and her abilities.

58. The Claimant had a week's holiday in mid June 2017 returning on the 22 June 2017. First thing that day she was called into a meeting with Mr Kumar and Ms Voss. The Claimant was given no notice of what this meeting concerned. Ms Voss' notes of it are at pages 76a-76d; she told me that these were not a minute of the meeting but simply an *aide memoire*, they nevertheless read like minutes and I think that they probably are. These show that Mr Kumar raised issues in the meeting about complaints from the Claimant's team about her, lack of progress in recruiting new staff (there had been some departures in the New Year), time keeping, a compliance issue and falling sales. All of this was the context of and prelude to his proposal that the Claimant to take an alternative role at a lower salary (see below).

59. The meeting was followed up in writing by Ms Voss in a letter given to the Claimant the same day, headed, '*Performance Management – conditional temporary change to terms and conditions*' (pages 77-78). Ms Voss wrote that the meeting had been called to discuss concerns and was a follow on from the informal meeting on 23 May 2017. She set out proposed changes to the Claimant's terms and conditions as follows:

"With effect from 26 June 2017, you will no longer be required to undertake managerial duties. In light of this it is proposed that your job title be amended to Sales and Business Development.

Your salary will be amended to reflect the change in your responsibilities, with effect from 1 July 2017. The proposed salary for this position is £24,000 per annum.

All other terms and conditions remain the same.

A full review will be conducted in three months' time on

22 September 2017.

Following satisfactory reviews and evidence of significant improvement having occurred at this time, then the company anticipates that you may be able to return to your normal duties.

On the grounds there is no improvement, or repeat performance issues occur, the company may consider formal disciplinary action.”

60. The practical effect of the Respondent’s proposal was to give the Claimant one working day to consider the change (22 June 2017 was a Thursday and 26 June 2017 the following Monday).

61. Ms Voss in fact agreed to the Claimant having more time to consider the proposal and the Claimant replied refusing to accept any change to her contract and refuting allegations of poor performance in a letter dated 28 June 2017 (pages 81-82). The Claimant’s letter was thorough and carefully written. She began as follows:

“First thank you for allowing me a bit more time to reply in writing to your letter and communicating the company concern about my performance. I didn’t appreciate to be forced to accept new terms and conditions to my contract of employment at a meeting that came as a complete surprise on my return from a week holiday. The initial informal discussion you are referring to that took place on 23 May didn’t mention anything about poor performance and was a friendly offer to support me managing the team temporarily and a first attempt to address the issue of stress and work overload I have been voicing for a few months.”

62. She then went through each of the alleged performance concerns giving a reasoned response. As a result of her refusal to accept them, the changes in duties and pay were not implemented.

63. I find that the tenor of the meeting on 22 June 2017 was strongly influenced by Mr Rushden’s comments in his email of 22 May 2017. Although portrayed as temporary I also infer and find that both parties knew that if the Claimant accepted these changes there was a strong possibility they would become permanent.

64. The Claimant was signed off work for seven days by her GP on 3 July 2017. This was her second sickness absence within a few weeks after years of having an exemplary sickness record.

65. The Claimant returned to work on 11 July 2017 and was immediately asked to attend a meeting with Ms Voss. Mr Kumar was not present. Ms Voss followed up the meeting by letter that day (page 101) and this set out what had been discussed. The letter referred to the Claimant’s recent illness and alleged performance concerns. Ms Voss then talked about a proposed performance action plan as follows:

“Having taken all aspects of your letter under consideration [the Claimant’s letter of 28 June 2017], the company will work together with you to develop a personal action plan.

The personal action plan will be developed co-operatively with you, providing you with opportunity to identify training needs or areas you anticipate you will require support. The objectives that have been set for you are in line with your job description and KPIs, presented to you today. A time frame of one month has been set for review of your personal action plan, occurring on 11 August 2017, by which time the company expects to see a significant improvement in the identified areas. Any agreed training may have a separate time frame depending on the level of requirement. This will be agreed with you in person.

I hope that this clarifies the position of the company, and that the proposed personal action plan will assist and support you.”

66. Ms Voss enclosed a generic performance action plan and a set of KPIs which reflected company targets agreed the previous December (pages 108-110). These targets included a monthly and annual sales figure for 2017 and a requirement to hold sales team meetings and produce reports regularly.

67. The Claimant responded to this letter on Friday, 14 July 2017 (page 113). She refused to accept the performance action plan, saying it was based on ‘groundless accusations’. She described the KPIs as no more than the sales strategy for 2017 which had been addressed to several people and not her alone.

68. The ‘performance issues’ which underlie events were complaints about the Claimant from the sales team she managed, recruitment problems when one member of staff left and another announced her pregnancy and, above all, falling sales. I doubt that there was a single cause for these issues, but I accept the Respondent’s case that the Claimant’s management style, which was reserved and lacking in confidence, had not helped.

69. Despite this, there were mixed messages from the Respondent about the Claimant’s performance. For example, she received a substantial personal cash gift from Mr Kumar at Christmas 2016 and she received a bonus along with other members of the sales staff in April 2017.

70. The Claimant reflected on events over the weekend of 15 and 16 July 2017 and on the morning of Monday, 17 July 2017, she handed her resignation with notice to Mr Kumar (page 116). Mr Kumar told me, and I accept, that he was shocked by the Claimant’s decision and asked her to think again. The Claimant did not change her mind and at the end of that day Mr Kumar emailed to confirm that her resignation had been accepted (page 117).

71. Subsequently, agreement was reached for the Claimant to work her notice until 31 July 2017 and to spend the remainder on gardening leave.

72. In her remaining days at work the Claimant made it clear that she felt that initiating the performance process was a means of getting rid of her. Ms Voss refuted this on behalf of the Respondent.

Conclusions

73. In this section of my reasons I consider, firstly, whether each of the eight

issues identified by the Claimant was a repudiatory breach of contract when judged objectively. I then go on to consider whether those matters, which have been established, when considered cumulatively, amount to a repudiatory breach of contract under the last straw doctrine.

Issue 1 - In June 2017, Mr Kumar, proposing to reduce the Claimant's pay unilaterally by £6,000 per annum, (paragraph 51 of the Claimant's witness statement).

Issue 4 - Demoting the Claimant without consultation in June 2017 and without conducting any investigation or disciplinary process.

74. The parties agree that Mr Kumar proposed changing the Claimant's role and reducing her pay in the meeting on 22 June 2017 but did not impose these changes on her. The Claimant refused the proposal and it was not implemented. Accordingly, the allegation in *issue 4* is simply wrong factually; the Claimant was not demoted in any formal sense and there was no breach of an express term as to pay.

75. I understand, however, why the Claimant felt diminished by the proposal being made at all given her seniority in the business, length of service and the strain she had been under in recent months. Such a proposal might have the effect of undermining trust and confidence if made without cause. In this case, however, there was cause to question the Claimant's continuing effectiveness; notably, the significant relationship problems between her and her team; her poor working relationship with Mr Rushden, which remained strained despite mediation from Mr Kumar; and, of course, falling sales. The Claimant was also complaining of the physical effects of stress. In these circumstances, troubling though the implications of the proposal may have been to the Claimant, it was not one made without cause.

76. I do not find, therefore, that either *issue 1* or *4* were repudiatory breaches of contract.

Issue 2 - Not addressing the Claimant's complaints about bullying by Dave Rushden, (shouting and verbal abuse) made in the period from December 2015 onwards.

77. The evidence shows that the Claimant did not have a good working relationship with Mr Rushden. My impression is that Mr Kumar did not manage this as firmly as, perhaps, he should have done. That said, I do not find that the Claimant's complaints to Mr Kumar about Mr Rushden went unaddressed as he raised them with Mr Rushden. He also mediated between these two senior managers. Taking what proved to be ineffective action is not the same as taking no action at all. I bear in mind too, that Mr Kumar regarded Mr Rushden as vital to the Respondent's operation as the regulated person.

78. Judged objectively, therefore, I do not find that this broad allegation is established on the facts.

Issue 3 - Not adjusting the Claimant's work load despite reducing her hours.

79. The complaint that part-time workers, especially those in management

roles, end up doing the same work as their full-time colleagues in less time for less pay is a common one. Given the Claimant's seniority and the small size of the Respondent, I am sure that she ended up doing more than three fifths of her full-time job on occasions. On the other hand, she had flexibility about her hours and control over the way she worked throughout 2016 and for the early part of 2017. If there was a breach of contract in this new way of working, it would have manifested itself in late 2015 or early 2016 in my judgment. In those circumstances I would find that the Claimant affirmed the contract despite any such breach by continuing to work throughout 2016. I say 'if', however, as I do not really have solid evidence of the Claimant's workload before and after the agreed changes to her hours. One way or the other, therefore, this allegation is not established on the evidence as a repudiatory breach of contract.

Issue 5 - Not addressing the Claimant's grievances dated 28 June 2017 and 14 July 2017.

80. I do not think that either of these letters can properly be construed as a grievance. Rather, they were the Claimant's responses to earlier letters from Ms Voss. Ms Voss responded to the Claimant's letter of 28 June 2017 in her own of the 11 July 2017 and this was discussed at a meeting that day following the Claimant's return from sickness absence (page 101). The letter dated 14 July 2017 was presented one working day before the Claimant's resignation so there would have been no time for the Respondent to deal with any grievance contained in it in any event.

81. I do not find that this allegation is established on the facts.

Issue 6 - Not providing clear key performance indicators, (KPIs), to enable the Claimant to match 'poor performance' against anything.

82. I agree with the Claimant that there was a lack of clarity about her role and what was expected of her (KPIs). This is something she raised in the pastoral meeting in April 2017. I find that she was unsure about the boundaries of her role. The introduction of the performance action plan, together with KPIs, was part of the Respondent's attempt to address this (although it also reflected genuine performance concerns). I think that the execution was heavy-handed; I was struck by the fact that Mr Kumar left this task to Ms Voss, a very new employee and one who herself had only recently complained to the Claimant about not being given a clearly defined role. I have nevertheless asked myself how else could the issue of performance be raised? At some point an employer must mention the issue to address it. This may be distressing for an employee and could even undermine their trust and confidence in their employer, but it would not be an act done in breach of contract if done with cause.

83. On the facts of this case, the Claimant had been involved in setting the general strategy of the company in December 2016 so was aware of its objectives for 2017. These were reiterated as personal targets under cover of 11 July 2017. In this context I find that the Claimant was aware in broad terms of what was expected of her, so the factual basis of this allegation is made out.

Issue 7 - The Claimant's team stopping reporting to her in February 2017.

84. There was no formal change in reporting lines in February 2017 but I find

on the evidence that the Claimant's sales team began looking to Mr Rushden for leadership instead of the Claimant at about this time. I simply cannot tell the extent, if any, to which Mr Rushden deliberately attempted to undermine the Claimant's relationship with her team but I am sure that this change arose in part from a lack of clarity in the Claimant's and Mr Rushden's roles. Another reason was the team's general unhappiness with the Claimant's leadership style. This all evidences the fact that something needed to be done to improve management within the Respondent.

85. In these circumstances, and distressing as her team's reaction to her may have been for the Claimant, I do not find that this phenomenon can be described as a repudiatory breach of contract. I find that the Respondent's plan was aimed at reengaging the Claimant with her sales team through regular meetings and a focus on sales targets.

Issue 8 - Junior staff reviewing CCTV of the Claimant on a shared drive in the period May–July 2017, (paragraph 103 of her witness statement).

86. The Claimant first raised this issue in a meeting on 2 August 2017 just as she had started gardening leave. It appears that Mr Rushden and/or a member of the sales team had left footage of the Claimant arriving at and leaving work on a server accessible to all. It also appears that the Claimant had not seen this footage herself but had been told about it. I suspect the footage was there to make a point about poor time keeping (or what was perceived to be the Claimant's poor time-keeping). There is no evidence that the Claimant raised this footage as an issue with Mr Kumar or Ms Voss before 2 August 2017, nor is there evidence that they were aware of the film or where it was located before this meeting.

87. I think it more probable than not that this video was posted on an open server to undermine the Claimant or encourage her team's dissatisfaction with her. In these circumstances, and judged objectively, I find that this is treatment which would undermine trust and confidence. I do not find, however, that this treatment was causative of the Claimant's resignation as she only learned of it after she had resigned.

88. For these reasons I do not find that any of the identified issues amounted to a repudiatory breach of contract in its own right.

The last straw doctrine

89. I have stepped back to consider whether the cumulative effect of the Claimant's treatment could be said to have amounted to a breach of the implied term of trust and confidence under the last straw doctrine.

90. I find that the final stages in events were handled by the Respondent in a heavy-handed way having regard to the Claimant's seniority, length of service and recent ill-health. For example, the Claimant was given no advance warning of the issues to be discussed in the meetings on 23 May, 22 June and 11 July 2017. The first of these meetings appeared supportive and sympathetic, not the informal performance review portrayed by the Respondent's witnesses, but things moved quickly and without warning to a proposal to reduce responsibilities and pay and, when that was refused, to formal performance management. The

latter carried an underlying threat of disciplinary action. The meeting on 11 July 2017 was the first occasion when the Claimant was given individual KPIs and was told that her performance against them was to be reviewed within a month. When judged objectively I find that none of these matters amounted individually to a repudiatory breach of contract, but the peremptory way in which they were handled by the Respondent had the cumulative effect of undermining the Claimant's trust and confidence in her employer. I accept that the Claimant's performance needed to be addressed but this should have been done in a way which identified shortcomings clearly and set realistic, achievable objectives so allowing her a reasonable opportunity to improve. The proposals to reduce pay and threat of disciplinary action made with little or no warning is not consistent with this approach. The Respondent's peremptory approach was not with cause.

91. I find, therefore, that the manner in which the Respondent introduced, or sought to introduce, contractual changes and performance management amounted to a repudiatory breach of contract under the last straw doctrine. The last straw was the performance action plan combined with a threat of disciplinary action. This was not an innocuous act in my judgment having regard to the Claimant's length of service and seniority. The Claimant resigned in response to that breach. I find on the balance of probabilities, therefore, that she was constructively dismissed.

Some other substantial reason

92. The Respondent argued in the alternative that, if there were a dismissal, it was for a substantial reason, namely performance concerns. It acknowledged that any such dismissal would be procedurally unfair.

93. I accept the Respondent's case that its reason for treating the Claimant in the way that it did was concern about her performance, the wider context being declining sales performance and difficulties with her team. This is the stuff of a capability dismissal and not the residual category of '*some other substantial reason*'. The Respondent's approach fell short of a fair capability process due to the absence of fair warning, clear and achievable targets for improvement and sufficient time in which to improve. In reaching the view I have had regard to the size and administrative resources of the Respondent. So, while I find that the Respondent had a potentially fair reason for dismissal (though not the one asserted), I do not find that dismissal on this ground was fair either procedurally or substantively.

94. I cannot ignore, however, the real difficulties the Respondent, a small company, was facing. I find that, had it gone about matters fairly and in a more considered way, there was a significant chance that the Claimant would either have resigned in circumstances not amounting to a dismissal or been dismissed fairly. I place the prospects of this at 50% in the period from 11 October 2017 which is four months after the proposal for performance management was first broached.

95. Accordingly, I find that the Claimant was constructively and unfairly dismissed and that, but for her constructive dismissal, she would have remained employed until the 11 October 2017 and that there was a 50% chance that she would have remained employed in the period after that.

96. The remedy to which the Claimant is entitled will be decided at a hearing on 5 October 2018.

Employment Judge Foxwell

Date: 9 August 2018

Judgment sent to the parties on
5 September 2018

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For the Tribunal office