EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Y Mason	**v**	**Northamptonshire Police**
Heard at:	Bury St Edmunds	**On**: 5, 6, 7, 8 & 9 March 2018
Before:	Employment Judge Laidler	

Appearances
For the Claimant: In person.
For the Respondent: Mr J Allsop, Counsel.

JUDGMENT

1. The claimant resigned and was not dismissed, and therefore her claim of constructive unfair dismissal must fail and is dismissed.

2. The claimant and/or her representative acted unreasonably in the bringing of the proceedings and/or the way that the proceedings have been conducted and/or the claim had no reasonable prospects of success within the meaning of Rule 76 Employment Tribunal Rules 2013.

3. The claimant is ordered to pay £10,000 towards the respondent's costs incurred.

REASONS

1. The ET1 in this matter was received on the 9 March 2017 in which the claimant brought a complaint of constructive unfair dismissal. In its response the respondent denied the claim.

2. **Issues**

The following are the issues agreed between the parties for determination by this tribunal:

1. Did the Respondent conduct itself as alleged at §63 [18-19] of the Particulars of Claim:

   (a) Was the Claimant kept in the dark as to exactly what she was accused of despite asking for clarity on numerous occasions?

   (b) Were there errors in the investigation as to key dates and facts which should have been clarified at a much earlier phase in the investigation?

   (c) Was there an intolerably delay in the investigation, and if so how long was such delay?

   (d) Was the investigation meeting that took place on 9th June 2016 unnecessarily heavy handed and oppressive?

   (e) Did Mr Barsby pre-judge his investigation?

   (f) Did the Respondent breach its own disciplinary procedures and those laid out in the ACAS Code of Practice?

2. If issue 1 is determined in favour of the Claimant:

   (a) Was the Respondent's conduct in the way that it 'handled its investigation' §59 [18], in the circumstances, repudiatory of the implied term of trust and confidence?

   (b) If so, did the Claimant leave in response to the alleged breach?

   (c) Did the Claimant delay too long in terminating the contract in respect of the alleged breach?

3. If the Claimant was unfairly dismissed, should any compensation be reduced on account of:

   (a) Contributory conduct;

   (b) Polkey;

   (c) Otherwise, on a just and equitable basis.

4. Has the Claimant failed to mitigate her losses?

5. In the event that the Claimant succeeds and taking all things into account, what should the claimant's remedy be?

3. The claimant had solicitors when she issued the claim up to the commencement of this hearing. Those solicitors have continued to assist her. They sent written submissions with regard to new documents that the respondent wished to place in the bundle and Submissions on behalf of the Claimant on the merits. They then assisted the claimant with adding to those submissions once all the evidence had been heard. It also appeared that the claimant came with a list of questions for cross examination of the respondent's witnesses that those solicitors had assisted her with.

4. Unfortunately, the Judge had to point out to the claimant that she was often making a long statement rather than putting a question to the witness which challenged the witnesses evidence. The claimant was reminded that the tribunal had read her witness statement which stood as her evidence. She was encouraged in breaks to review her line of questioning. The claimant in the end asked very few questions and did not always cover the relevant issues with the witnesses which the Judge then needed to put to them. Even though the claimant was a litigant in person the tribunal has had to take note of the fact that certain matters which were believed to be in issue were never put by the claimant to the respondent's witnesses.

5. There were some issues with the claimant's credibility. She stated in paragraph two of her witness statement that she had an excellent personnel record. This led to the respondent seeking to adduce new documents which showed that in fact the claimant had in 2013 and again in 2014 received management action. The claimant was not prepared to accept that her witness statement was therefore misleading. The tribunal is satisfied that that paragraph was misleading in that even though it was only management action it was in relation to matters of concern to the respondent, and does certainly not imply an excellent record as the claimant suggested.

6. The claimant also sought to add in her oral evidence matters that had never been raised before, one was the suggestion that when she was asked to go to the investigatory meeting she had found someone to attend with her but they were not allowed to come as there was a conflict of interest. That is a suggestion that her right to be accompanied was in some way interfered with and is a serious allegation that had not been raised at the time, in her ET1 or in her witness statement. It added to concerns about her credibility, and further points will be made in the findings of fact below. On the contrary the tribunal found the respondent's witnesses to have given their evidence in a very clear and honest manner, and where there is conflict between that of the respondent and the claimant the evidence of the respondent's witnesses is to be preferred.

Findings of Fact

7. The tribunal heard from the claimant and the following on behalf of the respondent:

   Detective Superintendent Mark Behan
   Detective Sergeant Anthony Barsby
   Detective Inspector Mark Brayfield
   Sarah Peart, Business Manager

   Carol Hever, Head of Human Resources produced a witness statement but as it mainly dealt with the grievance raised by the claimant post termination, she was not called.

   It also had two lever arch files of documents running to in excess of 900 pages (as documents had been added). From the evidence heard the tribunal finds the following facts.

8. The claimant commenced employment with the respondent in 2002 until her resignation on 7 September 2016. In the statement of particulars in the tribunal bundle, the claimant's role was described as Information Assurance Manager which the tribunal understands was a role within the Professional Standards Department (PSD). At the time of her resignation the claimant was on a salary of £35,000 so was clearly in a senior and managerial role.

9. Detective Superintendent Mark Behan had been head of PSD since February 2016. There is no dispute that the relevant policy that applied to the claimant was seen at page 853 of the bundle, namely the Police Staff Misconduct Policy. To a large extent it mirrors the Police Conduct Regulations 2012.

   Clause 8

   8 Investigation

   8.1 If a matter has been assessed as either misconduct or gross misconduct, then the Professional Standards Department will appoint a person to investigate the matter. The investigator should be a person who has the appropriate level of knowledge, skills and experience to plan and manage the investigation.

   8.2 A misconduct investigation will be proportionate to the nature and gravity of the allegations.

   8.3 The purpose of the investigation is to:-

   - Gather evidence to establish the facts and circumstances of the alleged misconduct or gross misconduct.

- Assist the Appropriate Authority to establish whether there is a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer.

8.4 The investigator will as soon as reasonably practicable after being appointed, cause the individual to be given written notice of the allegation which will set out the following information:-

- Inform the individual that there is to be an investigation of his or her potential breach of the Standards of Professional Behaviour and inform the individual of the name of the investigator who will investigate the matter.

- Describe the conduct that is the subject of the investigation and how the conduct is alleged to have fallen below the Standards of Professional Behaviour.

- Inform the individual concerned of the force's assessment of whether the conduct alleged, if proved, would amount to misconduct or gross misconduct.

- Inform the individual of whether, if the case were to be referred to misconduct proceedings, those proceedings would be a misconduct meeting or misconduct hearing.

- Inform the individual that if the likely form of any misconduct proceedings changes the individual will be notified of this together with the reasons for that change.

- Inform the individual of his or her right to seek advice from his or her trade union or a work place colleague who the individual may choose to act as his or her representative.

Clause 9

9 Investigation Interview/Written Response

9.6 The investigator will, at least 10 working days in advance of the interview, provide the individual concerned with such information as the investigator considers appropriate in the circumstances of the case to enable the individual concerned to prepare for the interview.

9.7 Documentary evidence shall be subject to the harm test and will not be supplied to the individual concerned if the investigator considers that preventing disclosure is necessary.

9.8 The investigator will notify the individual of the progress of the investigation at least every 4 weeks commencing from the date of service of the notice of investigation.

10. The other relevant policy was the Notifiable Association Policy. This provided at Clause 2:

Procedure for Individuals and Supervisors

2.1 An association is considered notifiable when a member of staff…considers an association that they have with an individual, a group or an organisation is likely to, or has the potential to:

- Compromise them
- Compromise the operations and activity of Northamptonshire Police
- Compromise the reputation of Northamptonshire Police.

…
There is no definitive list but some activities with the potential to compromise an individual or the organisation include:

- Being seen by members of the public in the social company of a person or persons known within a local area to have convictions or to be suspected of unlawful activities.

2.4 Failure to disclose or report a known or suspected inappropriate or notifiable association may amount to a breach of the Code of Ethics and the Standards of Professional Behaviour and result in disciplinary proceedings being taken against the employee.

…
2.9 Where a member of staff becomes aware of an association between another member of staff and an individual, group or organisation, which may be inappropriate, then they should report this to a manager or to the Detective Sergeant or Inspector in the Counter Corruption Unit. If the individual feels they cannot report this in the above manner then they can report the matter in confidence or anonymously via bad apple to the Professional Standards Department.

11. On 2 June 2016 the claimant was served with notice and a lawful order. The three allegations in the notice were:

Allegation 1

It is alleged that on the 3rd of May 2015, whilst off duty, you and a friend PC Anna Chanel Morris, met with a male called SS in a pub in Northampton. This meeting was later discussed with a mutual friend PC Sally Thomas, where you confirmed that you knew S was a criminal with convictions. You later discussed this matter with PC Anna Morris.

As the Force lead for vetting, knowing that S was a criminal, you failed to report this relationships and association to the Professional Standards Department and failed to ensure that PC Morris submitted a notifiable association form.

Allegation 2

It is also alleged that between the 22nd December 2015 and May 2016 you have discussed with Colin Hill, matters concerning the ongoing professional standards investigation, regarding your son Oli MASON.

Being the Northants Force lead for vetting, you failed to report to the Counter Corruption Unit or the Head of professional standards the fact that an employee within Northamptonshire Police, namely Colin Hill was conducting enquiries which could discredit a key witness involved in the criminal investigation against your son.

Allegation 3

On the 1st June 2016 you sent an email to Colin Hill which could be perceived as being threatening to his Northamptonshire Police email address.

If proven these allegations will be contrary to the Police Staff Standards of professional behaviour namely honesty and integrity, Discreditable Conduct, Instructions, Work and responsibilities and challenging and reporting improper conduct and authority respect and courtesy.

The notice concluded that if proven the conduct had been assessed as Gross Misconduct.

12. In the instruction which accompanied this the claimant was required not to discuss the case. It also explained that notices had been served on PC Anna Morris on 4 March 2016, PC Sally Thomas on 8 April 2016, and 9 May 2016 on Colin Hill. That showed to the claimant the background to the allegations, and the background is relevant to these proceedings.

13. In December 2015 Oliver Mason, son of the claimant was a special constable and police staff member. Information came to PSD that he had accessed highly confidential medical information about an applicant to the service which was unlawfully disclosed to another member of staff. He was criminally investigated and prosecuted under the Data Protection Act 1998 and Computer Misuse Act 1988. He was convicted in July 2016 of three offences and sentenced to 100 hours of community service. Reliance was placed on the evidence of a Georgia Pack who had reported that Mr Mason had given her confidential information relating to an applicant to the service. The information was of a highly sensitive nature. It came to the attention of PSD that a member of police staff Colin Hill was trying to contact Miss Pack to talk about the prosecution of Mr Mason. He

also spoke to a colleague of hers at her place of work. Mr Hill was in a relationship with the claimant at the time.

14. In April 2016 Colin Hill had asked to see Detective Sergeant Barsby in relation to Oliver Mason's case and DS Barsby prepared a report of that meeting seen in the bundle at page 666. There were subsequent interviews with a Zoe Pickering (page 319) and Samantha Hogarth (page 323). DS Barsby explained in paragraph 18 of his witness statement how there were reasonable grounds to believe that Colin Hill had attempted to pervert the course of justice and a criminal investigation commenced.

15. The respondent had information on Colin Hill's phone that on 16 March he had contacted a Matt Sprake a photographer formally of the Metropolitan Police who had been discredited as part of the Leveson Enquiry. Colin Hill texted him at 17:21 hours stating that he "might have a story for you mate". Also, the same night Mr Hill had a lengthy phone call with someone from the claimant's phone. He then spoke to Mr Sprake the following morning. Colin Hill was interviewed under caution on 9 May 2016, there appeared to be clear evidence of an underhand attempt to inappropriately discredit the witness to the benefit of Oliver Mason.

16. On the 1 June 2016 Mr Hill contacted his Trade Union representative Nick Grey with regard to an email he received from the claimant that he perceived as threatening. The claimant stated:

    'I have instructed a solicitor for Oli so unless you want me to message Sarah or Nicola or for my solicitor to contact any one of you direct I'd appreciate it if you would get in touch'

    This was reference to Colin Hill's wife and daughter.

17. The other matter that the respondent was investigating was that relating to PC Anna Morris. It had received an anonymous report in 2015 that she had been in a relationship with a local criminal known to be a drug dealer referred to as "S". An investigation was commenced, managed by Detective Inspector Brayfield when in December 2015 PC Morris submitted a report purporting to comply with the terms of the notifiable association policy. Various interviews were conducted, including that of PC Morris on 16 March 2016. She stated that both PC Sally Thomas and the claimant were aware of the relationship and that she had invited "S" to come to a pub where she was meeting the claimant and Sally Thomas.

18. PC Thomas was interviewed on 20 April 2016 and said that she had reported to the claimant that "S" was a person known to police as a local criminal suggesting that she had discharged her obligation to report suspected inappropriate conduct. She stated at the interview that she spoke to the claimant. She said that Anna had asked her to speak to the claimant as 'she knows about the form'. She stated 'I went in and spoke to her [the claimant] and she said 'tell her that she's gonna that she needs to do the form. And I said 'well, you tell her cause I've done my bit as far as

I'm concerned I think she should do the form now, I've told her about the form.'

19. PC Thomas then stated that 'the night after Yvonne spoke to Anna at the gym about it because we all go to the same gym'. There was further reference later in the interview to PC Thomas seeing the claimant speaking to Anna in the changing room 'so I know that that's what they were talking about well I say I know I'm pretty sure that that's what they were talking about'.

20. The respondent became aware of text messages that the claimant had had with Anna Morris on 13 December, and they came to light just before PC Morris submitted what the respondent considered to be a misleading notification form. DS Barsby acknowledged in his witness statement (paragraph 31) that they were not conclusive but possibly an interpretation was that at the time of the conversation the claimant was already aware of a relationship with "S". He considered the tenor of her advice lacked the urgency which might have been expected from her in her role. DCI Behan explained (witness statement paragraph 32) that "S" was already known to them as he had been investigated as had those of an organised criminal group. He had previously been in prison.

21. In February 2016 the claimant was seconded to the National Crime Agency for six months. Sarah Peart is a business manager in PSD. Part of her role is to carry out initial assessments of complaints and/or misconduct referrals. She will decide based on information passed to her whether the conduct if proved would amount to misconduct, gross misconduct or neither. She carried out initial assessments not only into the claimant but Colin Hill, Oliver Mason and Sally Thomas.

22. On 31 March 2016 she made the assessment that the claimant's conduct about knowing of the Morris relationship required management action. In May 2016 however this was reassessed by her in the light of PC Thomas' interview. The claimant had potentially failed to disclose information about a friend associating and having a secret relationship with a person who she should have notified the respondent of, which if proven could amount to gross misconduct.

23. On 1 June 2016 DCI Behan rang the claimant to advise her about the outstanding misconduct investigation, that these related to her and that it would be necessary for her to attend for an interview in relation to them. He states in his witness statement at paragraph 26 that without prompting the claimant said to him "Was I supposed to disclose that to you. I couldn't do that to Anna." He made a statement recording that comment dated 6 June 2016.

24. In cross examination the claimant said that she could not remember if she had said that on that call, but did not deny it. She did not challenge DCI Behan on this when she cross examined him, and the tribunal is

satisfied that the respondent was entitled to take that comment as an admission by the claimant.

25. Notice was served on the claimant and on 3 June 2016 the claimant requested further information, some of this was procedural and some asking for further detail. DI Brayfield replied on the same day stating that details would be provided at the interview. Whilst he did not agree with the claimant's assessment that DC Melling having been involved in the proceedings against her son had a conflict of interest in now dealing with her case, he agreed that he and DS Barsby would conduct the claimant's interview and not DC Melling. DS Barsby's evidence was that he wanted to test the claimant's evidence against that of Colin Hill and PC Thomas, and would have been prejudiced in doing that if he had disclosed everything to the claimant. The tribunal accepts that was a legitimate stance for the respondent to take at this stage of its investigation.

26. The claimant prepared a document dated 6 June which is a written response to the allegations. It is five pages long. The claimant made no mention in her witness statement to this tribunal of this. She stated in cross examination she did not know if she ever sent it. Then she said that she produced it before her interview. DS Barsby refers to receiving it at (paragraph 37).

27. The document is detailed and deals with each allegation in turn, and the tribunal accepts that it shows that contrary to the claimant's pleaded case that the allegations were vague and that she did not understand what she was being accused of, in fact she understood completely. It is particularly noted that in relation to allegation 2 which was stated that "between 22 December 2015 and May 2016 you have discussed with Colin Hill" matters with regard to her son's case, the claimant was able to address this allegation, and in particular stated "I cannot report what I didn't know and just because he phoned me on 16 March late in the evening after apparently attempting to contact a journalistic photographer by text in the morning and afternoon does not preclude that he told me had done this." It is therefore the claimant that provided the date of 16 March at that stage and not the respondent. In cross examination the claimant said she could not answer where she had got that date from, and did not know why she had mentioned it. She then conceded that she was fully aware by the interview of the key points and factors to be put to her. This exchange in cross examination again went to discredit the claimant's evidence. This is a document dated by her the 6 June to which she made no reference in her witness statement and in which she was well able to state her position with regard to each of the allegations yet she has persisted in the claim that the allegations were too vague.

28. After this exchange in cross examination however the claimant stated she was kept in the dark as to the evidence to support the allegations. The tribunal is satisfied that is a very different point. The fact that the claimant did not agree she had done what she was accused of and that she wished

to see further evidence did not make the allegations vague. She knew what they were.

29. The claimant was interviewed on 9 June 2016. There was an error in the documents on the date but this was corrected. Various times of changing the tapes are recorded in the minutes as follows:

Started 12.05 to 12.49 =	44 mins
New tape – 12.52 – 13.38 =	46 mins
New tape – 13.43 – 14.18 =	35 mins
New tape – 14.30 – 14.41 =	11 mins

30. It appears from these times that from start to finish the interview lasted just over two and a half hours, not the three and a half hours that the claimant alleged. This was put to the claimant in cross examination and she seemed to accept it. When her submissions were presented with new paragraphs added with the assistance of her solicitors (who had not heard the evidence) she suggested for the first time that these minutes were inaccurate, stating that the timings were wrong and that "the respondent's minutes cannot be relied upon". This is another serious suggestion that had never been made before. The claimant never asked for an adjournment to obtain someone to accompany her, a postponement of the hearing or additional breaks. The tribunal accepts the minutes as accurate as are the timings in them.

31. The tribunal does not propose to cite all of the detail that is contained in these extensive minutes. It is clear though that the claimant understood the allegations against her and there is absolutely no evidence of any overbearing or oppressive conduct on the part of the investigating officers conducting the meeting. It was never put in correspondence after the meeting that it was conducted in an inappropriate manner. The claimant has shown that she was well able to raise matters of concern by email and never mentioned this and neither did her solicitor. The first time there was any suggestion was in the claimant's grievance when it was stated that the meeting was more akin to a police interview, the same wording as used in the ET1.

32. The claimant alleged for the first time in cross examination that it should not have been conducted by police officers, but rather police staff. She did not put that to any of the respondent's witnesses. At page 460 of the interview the claimant can be seen to have acknowledged that she should have notified PSD. She tried to suggest in cross examination that was being taken out of context and was not an admission. The tribunal is satisfied it was not unreasonable for the respondent to take that as an admission by the claimant.

33. On 10 June 2016 the claimant requested further information about the dates and times of calls and texts made by Colin Hill. This was replied to on page 520E by DI Brayfield stating his responses in the body of the original email. He accepted the claimant could not have spoken to Sally

Thomas in her office on Monday 4 May as it was a bank holiday, and agreed that they would speak to Sally Thomas again to clarify the date she was alleging. He also accepted he had been wrong to say that Colin Hill met the photographer on the 17th and accepted that it was in fact Oliver Mason that he met. He gave further clarification in an email of the 14 June. He explained that the accusation stood as Colin has sent two texts to the photographer on the 16th and attempted to call him twice. He later spent 20 minutes on the phone to the claimant and then spoke to the photographer the next day:

> '…We said in interview that therefore, having attempted to call the photographer on the 16th, he then called you to discuss and having discussed it with you he spoke to the photographer the next day. You deny this, you agree that you spoke but this was about concerns for Oli and Colin did not discuss this with you. You state below that the call was about the new guitar. The guitar was bought on the 17th. Your phone call at 21.45 was on the 16th so this cannot be correct'.

34. He made it clear however to the claimant that the allegation still stood. The claimant relies upon these emails to allege DS Barsby had prejudged the matter. This was never put to him in terms by the claimant in cross examination, and the Judge had to put the allegation to him. He was very clear in his evidence, which the tribunal accepts that it was not within his remit to make any decisions. He put forward his views but they were then independently assessed. He felt that there was clear evidence of the claimant speaking to Colin Hill at the relevant time he was attempting to pervert the course of justice. The tribunal accepts that this is the purpose of an investigation, it is to obtain the facts. DS Barsby acknowledged that there had been these two mistakes, Sally Thomas was re-interviewed and he was not prejudging anything.

35. On 20 June 2016 the claimant requested an update and a transcript, and DI Brayfield replied that he expected the investigation would be completed within 3-4 weeks. The claimant had to request another update by email of 7 July, and the respondent accepts in these proceedings that it should have given the claimant more regular updates.

36. By email of 7 July DI Brayfield explained that the report was being finalised and would then go to Steve Woliter for a decision as to whether the claimant would face disciplinary action. There was clarification about the photographer and Mr Hill, and DS Barsby accepted that he was wrong about Mr Hill meeting the photographer. However, it "could be inferred that you must have spoken to Hill about this course of action". The email however restates the allegations and emphasised that these were accusations and that the outcome could be very different.

37. The investigation report into Colin Hill and the claimant was finalised by DC David Melling on 22 July 2016. This concluded that Colin Hill had a case to answer for Gross Misconduct and Misconduct. In relation to the

claimant the investigating officer concluded that there was a case to answer for gross misconduct in relation to the allegation that she had discussed with Colin Hill matters relating to the ongoing investigation regarding her son and her email to Hill of the 1 June 2016 which could be perceived as threatening.

38. The investigator's report in relation to PC Thomas and the claimant was concluded on 26 July 2016. The recommendation of the investigating officer was that the claimant 'has a case to answer for Honesty and Integrity, Instructions, Discreditable Conduct and Challenging and Reporting Improper Conduct - gross misconduct'.

39. On 1 September DS Barsby wrote to the claimant confirming he had spoken to Sarah Peart that morning and that the recommendation was that the case go to a misconduct hearing. He stated he had "no idea of dates and times etc" but to let him know if he could help in any way. It was unfortunate that he dealt with dates and times in those words, but the claimant never did contact him to find out more or contact Sarah Peart as mentioned in the email.

40. The claimant emailed Caroline Gallacher of HR who had to reply that it was not an HR matter but to contact Sarah Peart. That was the second time the claimant was given her name but she did not contact her. In cross examination the claimant said she assumed that Sarah would not have known the dates and times either as it was only a week from Mr Barsby's letter to her. The claimant accepted however she could have contacted Sarah Peart. She was adamant it was not Caroline Gallacher's email that led her to resign. It was put to the claimant that she knew that the usual parameters for such an investigation was six months and that hers had only been three months from June to the September. Her response was that it did not make it correct for a member of staff who had been with the respondent for fourteen years.

41. The tribunal accepts the evidence of Sarah Peart, which was not challenged by the claimant, that the claimant would have met her and Mark Behan and the rest of the PSD Management Team on a monthly basis for management meetings. At those meetings Sarah Peart would have reported on key performance indicators in relation to complaints and misconduct investigations. It was a standard part of such meetings to monitor how many investigations were completed within 120 working days (6 months). The target was that around 90% of investigations should be completed within that timescale. It is therefore accepted that the claimant would have been aware that 6 months was the standard for completion of investigations but that not all were completed within that period.

42. The claimant resigned by letter of 7 September 2016 to Mr Behan. She stated:

> 'I am disgusted in the way in which I have been treated throughout this whole process. The delay has been unbearable and I am deeply concerned that there is still no end in sight, despite the fact

> that there is clearly no case against me. I have been made physically ill by this whole unpleasant affair, and you obviously have absolutely no regard to my feelings and long service. You leave me with no choice but to tender my resignation with immediate effect, 8th September (next working day) and I hereby give three months notice as required in my contract.
>
> I will be making a claim for constructive unfair dismissal and will give full detail of my complaint in due course.'

43. Various matters occurred after but the tribunal is satisfied they can have no bearing on this decision which is about the claimant's reason for resigning.

The relevant law

44. The test in Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, still remains the test in a constructive dismissal case, in which Lord Denning stated:

> 'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.'

45. The tribunal does not take issue with any of the legal propositions set out in the respondent's submissions. It is now well settled that the fundamental breach may be of the implied term of mutual trust and confidence. In Mahmud v Bank of Credit and Commerce International SA [1997] [IRLR 462 HL it was stated that the employer must not;

> "Without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

46. A summary of relevant legal propositions was set out in London Borough of Waltham Forest v Omilaju [2005] IRLR 35:

> The following basic propositions of law can be derived from the authorities:

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27.

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, 464 (Lord Nicholls) and 468 (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, 350. The very essence of the breach of the implied term is that it is 'calculated or likely to destroy or seriously damage the relationship' (emphasis added).

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at p.464, the conduct relied on as constituting the breach must 'impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer' (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para. [480] in Harvey on Industrial Relations and Employment Law:

   '[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.'

47. The authorities make it clear that 'in order to establish a breach of the implied term, it is sufficient for a claimant to show conduct by a respondent which, **objectively considered**, is likely to seriously undermine the necessary trust and confidence in the employment relationship' (Baldwin v Brighton & Hove City Council [2007] IRLR 232. (emphasis added)

48. The claimant relies upon West Sussex County Council v Austin UKEAT/0034/14. In that case the claimant was sent home from work due

to an allegation of harassment having been made against him. He was suspended. After various interviews including that of the claimant and complainant the claimant was informed that the allegations against him was 'sexual harassment by yourself towards a colleague, which had led to loss of management trust'. The claimant was certified unfit to work and did not return. A disciplinary hearing for the 2 March 2012 was rescheduled to the 11 May 2012 but the claimant stated he was unfit to attend and requested it be postponed until after the 12 June when according to medical advice he would be fit to attend. The respondent refused to postpone or reschedule the meeting. The claimant resigned on 10 May 2012. On the facts the tribunal found that there was a failing to particularise the allegations to the Claimant. The Claimant had alleged he had been 'kept in the dark'. The tribunal found that the detail of the allegations was never provided to the Claimant prior to the investigation. There was no reason why the Claimant could not have been informed of the identity of the complainant prior to the investigation meeting. It found that the failure to name her was a breach of the Respondent's own policy. It further found that there was no evidence that the Respondent addressed the issue of the impact of suspension on the Claimant's medical condition and that it did not review the suspension once it was in place. The policy had been breached as the Claimant was suspended over the telephone. Other breaches of the Respondent's policy were found.

49. The claimant alleges breaches of the ACAS Code of Practice: Disciplinary & Grievance Procedures (2015). In particular she asserts a breach of the following provisions:

Paragraph 2 – Fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations…

Paragraph 4 – that said whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- Employers and employees should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.

Paragraph 9 – If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence which may include any witness statements with the notification.

Conclusions

50. The tribunal has concluded that there was no breach of any express or implied term of the contract entitling the claimant to resign yet claim constructive dismissal. The claimant was not kept in the dark as to what she was accused of. She was well aware of the accusations as demonstrated by her document of 6 June and answers at interview. It was not unreasonable, nor a breach of any term of the contract express or implied for the respondent at the investigatory stage to not disclose all the witness evidence it had obtained, particularly where as in this case there were a number of investigations proceeding and some of them potentially criminal as well as misconduct.

51. Dealing with the particular matters relied upon by the claimant, were there errors? There were two matters that were corrected. The claimant's case in evidence seems to be that they should have been corrected before any allegations were put to her. That though was the purpose of an investigation and when the errors were discovered they were corrected quite properly.

52. Was there intolerable delay? There was not when so many factors were involved, and it was clear as would have been known to the claimant that the respondent was working within usual parameters.

53. Was the investigation meeting heavy handed and oppressive? There is no evidence that it was and the claimant never suggested this at the time.

54. Did DS Barsby pre-judge his investigation? No, he did not, he corrected two errors but stated what he would still make inferences. That was open to him as the investigator, he was not the decision maker, the matter was then sent for assessment. The claimant would still have been able to defend herself at a disciplinary hearing.

55. Did the respondent breach its own procedures or the ACAS Code? The only matter the respondent could be said to be remiss on was not keeping the claimant up to date as required. This did not amount to a fundamental breach of the contract in all of the circumstances of this case. There was no breach of the ACAS Code. The paragraphs relied upon by the claimant relate to the disciplinary hearing itself and not the investigation meeting.

56. The claimant appears to have treated the investigation stage as if it were the disciplinary hearing itself. She accepted that the respondent had the right to investigate and that is what it did. As stated the aspects of the ACAS Code relied upon relate to the disciplinary hearing, that stage had not been reached. The case law is clear that the claimant must resign in response to a fundamental breach of contract, evidencing that the respondent no longer sought to abide by the terms of the contract. There was none in this case.

57. The reliance upon the case of West Sussex County Council v Austin UKEAT/0034/14 is misplaced. As with many employment tribunal cases it is a case on its own facts. They are significantly different to the facts in this case and no principles can be taken from it that apply to the case before this tribunal. It follows that the claimant resigned and was not dismissed and the claim of unfair dismissal must fail and is dismissed.

RESPONDENT'S COSTS APPLICATION

58. The tribunal's decision on liability having been given the respondent applied for its costs on the basis that there had been unreasonable conduct within the provisions of rule 76(1)(a) and further that the proceedings had no reasonable prospects of success.

59. There had been an erroneous view taken of the Austin case in comparing it to the procedure and facts of this case. The matters relied upon appeared to have been 'cut and paste' from the Austin decision but could not amount to a fundamental breach on the facts of this case. The claimant has had solicitors throughout. It should have been apparent from the grievance outcome or the response to these proceedings that the conduct was unreasonable and the bringing of the proceedings wasted a great deal of public resources.

60. Given the tribunals findings, it is clear that there is a broad basis for assessing all of the costs as being incurred unnecessarily. It is obvious that that is the effect the unreasonable conduct has had. The respondent applies for all of its costs incurred. A cost schedule totalling £22,582.95 was handed up, but the respondent limited its application to £20,000 which the tribunal has power under the Rules to award by way of summary assessment.

61. It was submitted on behalf of the respondent that the claimant should not be considered as a true litigant person as she has had the assistance of solicitors from the outset and they continued to help her up to and including the submissions.

62. In view of the time the claimant was given an extended lunch adjournment to consider the position and she clearly spoke to Mr Clements the solicitor who had been acting for her as further submissions on costs were received from him. This ran to twelve paragraphs but had attached to it copies of various emails headed 'without prejudice save as to costs' from which it could be seen that the claimant's solicitors were attempting to reach a compromise but no proposals were put forward by the respondent. These emails were submitted as it was argued that the claimant had made every effort to reach a settlement by agreement at very early stages of the claims "all of which were stonewalled by the respondent". It was argued that the fact the claimant made every effort to reach a settlement "Is far from poor conduct on her part". It was submitted that the respondent had not made any "costs threats throughout these proceedings".

63. Further, it was submitted the claimant was not experienced in the art of cross examination and was not trained in or accustomed to giving evidence. There is not an exhaustive list of what can and cannot constitute a breach of the implied term of mutual trust and confidence, and this "depends upon a tribunal's findings of fact based on the evidence given at trial and the tribunals interpretation of the facts submitted". The fact the tribunal had found against the claimant did not mean that her conduct came within the Rules giving the tribunal a discretion to award the respondent it's costs.

64. The claimant had little to add orally to these submissions. She maintained the position that she had throughout the hearing that the respondent had got some of its facts wrong with regards to dates and timings, and that there was no evidence to support what she had been accused of. She had been accused of something that she had not done. The fundamental breach was that they did not have the evidence to support what they were accusing her of.

65. With regards to means the claimant explained that she was living on her own and that she took home £2,400 a month from her new employment. All that money went on mortgage and household bills. Her children are still living at home. She has a car that is eight years old. She has £3,000 left over from a mortgage taken out to do repairs on the house which she retains for emergencies. She believes the house to be worth £350,000 and there is a mortgage of £55,000.

66. For the respondent it was argued that there appears to be substantial equity in the claimant's property which can be taken into account. The written submissions from the claimant's solicitors do not go to the point. He is trying to say he tried to settle and that there was some without prejudice discussions early on. That is the nature of litigation. It was before witness statements and evidence were exchanged. The advice that the claimant had from her solicitor she is fixed with.

The tribunal's conclusions on costs

67. The Judge enquired when the paginated bundle was received and it appears that was the 1 December 2017, with witness statements exchanged on 21 February 2018. The ET1 was received on the 26 April 2017. The matter had been listed for 31 July and 1 August 2017 but was postponed for five days and re-listed for 5 September 2017 put postponed again and relisted for this hearing.

68. None of the allegations set out in the list of issues were going on the facts to amount to fundamental breach of the claimant's contract, either singularly or taken together. It is of particular concern to the tribunal that some of the terminology, for example being "kept in the dark" seems to have been taken direct from the case of Austin where the facts were significantly different.

69. The Rules refer to the party or representative acting unreasonably. The claimant says she was advised this amounted to constructive dismissal and she is fixed with the advice given by the solicitors who although not here have supported her throughout. There appears to have been no thorough consideration of the legal tests for establishing a case of constructive dismissal once the documentary and witness evidence was received in this case.

70. Whilst accepting that costs do not automatically follow the event the grounds upon which a costs order can be made certainly do exist in this case. The tribunal relies on the conclusions it has reached which show that neither taken alone or cumulatively could any of the issues relied upon amount to a fundamental breach of the implied term of trust and confidence. The case identified in the issues had no reasonable prospects and it was unreasonable to pursue it.

71. The claimant's means may be taken into account and she does have some savings and equity in her property, and is working. The respondent is a public authority that has been put to the costs of defending a claim with no reasonable prospects.

72. The claimant is ordered to pay £10,000 which is half of the amount that the respondent is claiming which at least covers the respondent's counsel's fees for this hearing.

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Employment Judge Laidler

Date: 29 March 2018

Sent to the parties on: .....

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For the Tribunal Office