EMPLOYMENT TRIBUNALS

Claimant: Mrs J Cooper

Respondent: Vur Village Trading No 1 Limited

Heard at: Manchester **On:** 23 and 24 November 2020

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: Mr M McMullen
Respondent: Ms J Sabba, solicitor

JUDGMENT

The judgment of the Tribunal is that the claimant was not unfairly dismissed and her claim for unfair dismissal does not succeed.

REASONS

Introduction

1. The claimant was employed by the respondent as a sales and service advisor from 10 April 2017 until 19 September 2019. The claimant resigned at a meeting on 19 September 2019. The claimant alleges constructive unfair dismissal.

Claims and Issues

2. At the start of the hearing the Tribunal identified the issues to be determined. The claimant's representative explained the basis upon which the constructive dismissal claim was being argued. Having identified the issues, the parties agreed that they were the issues to be determined. The issues were as confirmed at paragraphs 3-7 below.

3. Was the claimant dismissed? Applying section 95(1)(c) of the Employment Rights Act 1996, that is did the claimant terminate the contract of employment in

circumstances in which she was entitled to terminate it without notice by reason of the respondent's conduct? That breaks down into the following:

a. Was there a fundamental breach of the claimant's contract of employment? The claimant relies upon a breach of the duty of trust and confidence and/or a breach of the respondent's duty of care.

b. Did the claimant resign in response to the breach?

4. If the claimant was dismissed, was the principal reason for her dismissal a fair one? The respondent relies upon conduct.

5. If the claimant was dismissed for a fair reason, was the dismissal fair in accordance with section 98(4) of the Employment Rights Act 1996, that is in the circumstances did the respondent act reasonably in treating it as sufficient reason for dismissing the claimant and in accordance with equity and the substantial merits of the case.

6. If the dismissal was unfair, what adjustment, if any, should be made to the compensatory award to reflect the fact that the claimant would still have been dismissed had a fair and reasonable procedure been followed (*Polkey*)?

7. Contributory fault and any appropriate reduction would need to be considered.

8. It was agreed that (save for the issues at paragraph 6 and 7) any issues of remedy and what the claimant should be awarded, would only be heard once the liability issues had been determined and if the claimant succeeded in her claim.

Procedure

9. The claimant was represented at the hearing by Mr McMullen, her father (who had no previous experience of conducting an Employment Tribunal hearing). Ms Sabba, solicitor, represented the respondent at the hearing.

10. The hearing was conducted remotely by CVP video technology. Both representatives and all witnesses attended remotely. Members of the public were able to attend (remotely).

11. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 127 pages, with the witness statements also included at the back of the bundle. At the start of the hearing the claimant's representative raised his concern about potential confusion around the numbering of the bundle (which had two sets of numbers as a result of the Tribunal's requests about the numbering of paginated bundles), and this was addressed during the hearing by the parties and the Tribunal endeavouring to ensure that everyone knew exactly which document and page was being referred to on each occasion.

12. Witness statements had been prepared and exchanged for the claimant and Ms D Whalon (for the respondent). After exchange, the claimant had prepared a supplemental witness statement. The respondent did not object to the Tribunal also

considering that supplemental statement as part of the claimant's evidence. In considering the content of the supplemental statement the Tribunal did take into account the fact that it had been prepared after sight of Ms Whalon's statement.

13. At the start of the hearing the Tribunal read the witness statements and the documents in the bundle which were referred to in those statements. Only those documents, and any referred to be the parties in cross-examination, were read and considered by the Tribunal.

14. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal and being re-examined by her representative. It was explained to the claimant that during her evidence breaks could be taken at any time at her request, and additional breaks were taken during the evidence at the suggestion of the Tribunal in the light of the claimant's anxiety (and following this being requested/explained by her representative at the start of the hearing).

15. Ms D Whalon, contact centre supervisor (and at the relevant time contact centre team leader), gave evidence for the respondent, was cross examined by the claimant, and was asked questions by the Tribunal.

16. After the evidence was heard, each of the parties was given the opportunity to make submissions. The respondent's representative relied upon both written submissions and oral submissions. Those written submissions were provided to the Tribunal shortly before the submissions were delivered. The claimant's representative relied upon oral submissions only.

17. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below.

18. The Tribunal was grateful to both representatives for the manner in which the hearing was conducted.

Facts

19. The respondent operates 30 hotels and leisure clubs in the UK. The claimant worked for the respondent from 10 April 2017 as a sales and service advisor, as part of the customer services team based at the respondent's head office in Warrington. This role, in summary, involved the claimant working as part of a team in a call centre who received calls from hotel guests, leisure club members, and prospective guests.

20. There was no dispute that, during her employment, the claimant had hit her targets for call quality, had been one of the top earners every quarter, and had applied for a supervisor position on two occasions.

21. When an agent, such as the claimant, made a booking which resulted in an overnight stay, they were paid commission. No commission was paid for dealing with any other types of call, such as: booking spa treatments; making a restaurant reservation; dealing with invoice issues; or responding to complaints. If a call was taken and dropped or discontinued, that agent would move into the queue to take the

next call. Accordingly, if an agent dropped calls which were not made to book an overnight stay, that agent would increase their chances of receiving commission from a subsequent overnight stay call, and would decrease their colleagues' chances of commission because they would be more likely to pick up the non-commission call which had previously been dropped – when the caller phoned back. Obviously, such a practice would also have an adverse impact on customer satisfaction.

Documents

22. The claimant had a contract of employment which she signed at the start of her employment and she also signed to say she had received the staff handbook. The contract makes reference to disciplinary rules (44). The discipline policy (109) explains that there is no statutory right to be accompanied at investigatory meetings (110) and similarly no statutory right for notice to be given to attend an investigation meeting. The Tribunal was also shown a document that records that an employee could access an Employee Assistance Programme, if they had certain concerns including stress and anxiety, and the service would offer up to eight face to face counselling sessions per employee per year (115, albeit that the claimant's evidence was that she was unable to speak to the EAP provider as, when she called and left a message, they rang her back when she was working and unable to take calls).

Previous matters and OH report

23. The claimant had one appraisal during her time with the respondent. The handbook describes such appraisals as occurring once a year. There was no record of the claimant being advised that she needed to improve her performance, nor was there any record of the claimant being counselled about issues with call-handling or informed about what was expected of her.

24. It was not in dispute that the claimant had a good relationship with her manager, Ms Whalon, and had previously felt able to discuss issues with her, such as her anxiety. The claimant had previously thanked Ms Whalon for the way she had responded on an occasion to the claimant's anxiety and the claimant had given her a gift as a result.

25. The Tribunal was provided with an occupational health report dated 14 February 2019 regarding the claimant (74), which had been obtained by the respondent and had been seen by Ms Whalon. The report had been obtained after the claimant had attended a disciplinary hearing on 15 January 2019 which had been triggered by the claimant being absent from work on three occasions in a six-month period. That report explained that: the claimant was diagnosed with anxiety at 16 years old, but had managed her anxiety well over the years; in a period prior to February 2019, events which were not work-related had (understandably) had an impact upon the claimant's mental health; and the claimant was suffering from anxiety and was mentally run down. It recommended face to face counselling.

26. In a section headed "*Management Advice*", the report said the following: *"Jenny is fit for her role as a Sales & Service Advisor in a job she enjoys. She feels well supported by management and is comfortable approaching her manager, should she feel necessary. It is hoped that, now she has been placed on medication and*

with additional counselling support, her anxiety will lessen. There is no reason to believe she shouldn't be able to render regular and sufficient service. Jenny would, in my opinion, not be considered to have a disability for the provisions of the Equality Act".

27. The claimant had been informed about the disciplinary hearing on 15 January 2019 in advance, and was therefore able to prepare for the meeting. It is clear from the claimant's own evidence that she found the process difficult. Her representative contrasted: the fact that the claimant was given advance information and invited to the 15 January meeting; with the subsequent investigatory meeting explained below.

The disciplinary issue

28. The claimant had a period of annual leave of eight days, returning on Thursday 19 September 2019. During the claimant's absence, the respondent says that another agent approached Ms Woods, the customer service manager, and raised with her the allegation that the claimant was dropping calls. Four agents were spoken to by Ms Woods and Ms Whalon. Ms Whalon's evidence was that these were the four people who sat the closest to the claimant, and one of them was the person who raised the issue.

29. The notes taken of the interviews, and recorded as a *"coffee chat"* (75-85), were somewhat cursory and badly prepared. None of the statements were signed by the relevant witness, something that Ms Whalon accepted in evidence was an error which she could not explain. The names of two of the witnesses were only included as hand written amendments, with another witness' name being crossed out. One statement (80) clearly started part way through and is obviously incomplete. One issue noted during the course of cross examination was that one of the statements (81) records a colleague of the claimant complaining about the claimant refusing to return to the call floor when she was in the kitchen with another named employee. Ms Whalon's evidence was that the other employee was awaiting an ambulance on that occasion. The Tribunal could not understand why another employee would criticise the claimant for remaining with someone waiting for an ambulance, nor could it understand why that was included in the statement without challenge (when Ms Whalon was clearly aware of what had occurred). Ms Whalon's evidence was that these statements did contain what Ms Woods and herself were told by those they spoke to when they were investigating.

30. After speaking to the other agents, Ms Woods reviewed the call records of the claimant. The respondent's case was that this showed a number of dropped calls. The claimant, in her evidence to the Tribunal, disputed that she dropped calls at all.

31. The Tribunal was shown a spreadsheet (91) which recorded a large number of very brief calls on a limited number of dates. No transcripts of any of these calls were provided. Whilst Ms Whalon's statement referred to there being a number of dropped calls over a six-month period, there was no record available which showed those calls, outside the extract showing the dropped calls over the short period. Ms Whalon's evidence was that Ms Woods prepared this A3 sheet with this information and that Ms Whalon listened to approximately half of the calls herself. Her conclusion was that it seemed to her that the claimant was cherry-picking calls (that

is dropping the calls which would not lead to commission, to increase her chances of picking up calls which led to commission). It was the respondent's case that it therefore appeared that the claimant was deliberately prioritising calls which were potentially financially beneficial for her.

19 September investigatory meeting

32. Both parties agreed that the claimant, upon her return from annual leave on 19 September 2019, was asked to attend an investigatory meeting to discuss the respondent's concerns. The claimant was not informed about this meeting in advance. The claimant was not given the opportunity to be accompanied at this meeting. The claimant in her evidence complained that she was not given anything which would have enabled her to take notes.

33. Ms Whalon's evidence was that it was Ms Woods' meeting, which she had been asked to attend, and therefore there was no real evidence before the Tribunal about what consideration was given to these procedure matters from the primary decision-maker. The process followed did accord with that outlined in the respondent's procedures as explained above. Ms Whalon's evidence was that it was the same process that would have been followed for anyone else.

34. Ms Whalon's evidence was also that she considered that if she had given notice of the meeting to the claimant, that would not have resulted in any reduction in the claimant's anxiety, but rather would have increased it (in the period during which she was awaiting the meeting). Her view was that had the claimant been provided with a little information about what was about to be discussed, it would have exacerbated her anxiety (not reduced or avoided it). That contrasted with the meeting in which the claimant's absence had been discussed the previous January, when what was to be explored could be explained in advance.

35. It is clear that no consideration whatsoever was given by Ms Whalon to the claimant being accompanied at the meeting, save for following standard practice. No thought was given as to whether a right to be accompanied should be afforded in the light of the claimant's anxiety.

36. The Tribunal was provided with a typed note of the meeting (86-90). As was acknowledged by the respondent, those notes were clearly not verbatim. The meeting started at 10.10 am and was adjourned at 10.45 am. After a break of half an hour, the meeting recommenced at 11.15 am and ended shortly thereafter (although no time is recorded). Ms Whalon's evidence was that the notes were an accurate reflection of the meeting, albeit incomplete (as is always the case with notes which are not verbatim) and they were incorrectly dated.

37. The claimant's evidence about the meeting and the accuracy of the notes was not entirely consistent. Some elements, such as an early exchange recorded in the notes at the foot of page 86, were acknowledged in the claimant's witness statement to be what had occurred. In other elements, she disputed that the notes were accurate. She provided a very specific account of what she said occurred later in the meeting in particular in the supplementary witness statement she prepared on 26 March 2020, which differs from what is said in Ms Whalon's statement (and was

written by the claimant in response to it). However, when answering questions in the Tribunal hearing about what she remembered, the claimant's evidence was that she could not recall very much at all.

38. The claimant was very honest in her evidence in the Tribunal hearing. She admitted that she had a very limited recollection of what had occurred in the meeting. The claimant admitted that her anxiety meant she could not recall what was said, particularly later in the meeting. As one example, in answering a question asked in cross-examination, the claimant said, *"I can't remember leaving or getting home that day, I honestly can't remember what was said"*.

39. The claimant's representative contended that the claimant's recollection was clear about the start of the meeting, but it became less clear as she became more anxious as a result of the way the meeting was conducted and what was explained to her.

40. The claimant did recall the start of the meeting. Her evidence was that Ms Woods was quite shouty and not very nice. When asked to clarify this, the claimant confirmed that she was not saying that Ms Woods shouted at her, but rather that the way that she was asking questions was (the claimant felt) quite nasty and was like a raised voice. The claimant also explained in evidence that she had found it difficult, when it was explained to her that what was being investigated was potentially gross misconduct. It is clear from the way in which she gave evidence, that the claimant finds it difficult to face situations which involve any conflict or difference of opinion whatsoever.

41. Ms Whalon's evidence was that the claimant was offered the opportunity to hear the recordings of the calls in the meeting, and to read the statements that had been taken, but the claimant said that she did not wish to do so. The notes of the meeting clearly record the claimant as saying she did not wish to listen to the calls. The answer provided, followed a reference to both notes and statements in a question asked, but there is no record in the notes of the claimant explicitly stating that she did not wish to see the statements. The Tribunal finds that the call recordings were available for the claimant to hear, but she expressly stated that she did not want to hear them. The statements were not something which the claimant expressly stated she did not want to see.

42. An issue in dispute at the Tribunal hearing was whether or not the claimant admitted to dropping calls (on at least one occasion) in the meeting. The notes record her doing so. Ms Whalon's evidence was that she did so. The claimant denied that she did so, explaining that she would not have admitted doing so, because she didn't. In the light of the inconsistency between the claimant's denial of what she said in the meeting, and the claimant's evidence about her lack of recollection about what occurred, the Tribunal prefers Ms Whalon's evidence on this issue (as corroborated by the notes). The Tribunal also finds that, by the time this was said by the claimant, her distress meant that she was either not fully aware of exactly what she was saying, or at least was saying what she thought might bring the meeting to an end without necessarily meaning it.

43. The notes (88) record that the claimant first raised resignation and said, *"to be honest I just want to resign"*. This is recorded as being said prior to the adjournment, something Ms Whalon confirmed as being the case in her evidence. Following the return from the adjournment, the notes record that the claimant repeated this on at least two occasions, even after Ms Woods and Ms Whalon had tried to encourage her not to do so and to await the outcome of the process. The notes record (90) that the claimant was asked *"Are you 110% you want to resign today?"* and the claimant replied, *"Yes I want to go now".*

44. The claimant in answering questions put in cross examination initially agreed she first raised resignation, but later said she did not. In answer to an issue raised in re-examination, she contended that she would not use the word resign she would have said quit. However, when answering questions put to her, the claimant also gave a full and very cogent explanation about why she did not want to continue to work for a company which had made these allegations against her, and alongside other employees who had made such allegations.

45. The Tribunal finds that the claimant did herself raise resignation first (whatever word she used) and did repeat that she wished to resign (or quit) after the respondent's attendees questioned her about whether she wished to do so.

46. After the meeting adjourned, the claimant was left in a room on her own for half an hour. Ms Whalon's evidence was that they had not intended for it to take so long, but they had issues in contacting their HR adviser. It is clear from the claimant's evidence that she found this period on her own in a room to be particularly difficult. The Tribunal can entirely understand why this was the case, in the light of her anxiety and what she had just been told.

47. Following the adjournment, the claimant was informed that *"this is now classed as gross misconduct"*. The Tribunal finds that the words said were those recorded in the notes (89) and not those included in Ms Whalon's witness statement (which were "*we explained that the matter could be classed as gross misconduct*"), as the notes were made at the time and are very clear about what was said. When asked about the difference, Ms Whalon was unable to recall which was more accurate. The way this was expressed (as recorded in the notes) clearly had a suggestion that the outcome was determined. However, and irrespective of exactly what was said, this statement was made only after the claimant had already herself proposed resigning prior to the adjournment. Shortly after the statement and in the same meeting, it was also emphasised to the claimant that going to a disciplinary hearing does not always means that there was a single outcome and she would have the chance to put her points across. That is, it was explained that the outcome was not determined. The notes record the claimant as replying, *"No, I just want to resign"* (89).

48. The Tribunal heard evidence from Ms Whalon that the claimant was told in the meeting (after the adjournment) that HR had said that she had 24 hours in which to withdraw her resignation, although this was not recorded in the notes. The claimant disputes this. Nothing material turns on this issue, as it was in any event the claimant's evidence that she did not wish to withdraw her resignation.

49. The Tribunal does not find Ms Whalon's evidence about the meeting to be entirely reliable. Ms Whalon in her witness statement recorded how the claimant had asked to collect her stuff after the meeting and was then escorted from the building. However, in her evidence in answer to questions, Ms Whalon acknowledged that the claimant's evidence on this had been correct and in fact: the claimant had asked Ms Whalon to collect her belongings for her; and as the claimant had asked Ms Whalon not to escort her from the building, Ms Whalon had not done so.

50. Nonetheless, Ms Whalon's evidence that the notes were basically an accurate record of the meeting (albeit incomplete), was clear. She explained that she had personally compiled the notes immediately after the meeting, based upon handwritten notes made by herself and Ms Woods (which were subsequently destroyed). Clearly the notes are not a full record, reflecting as they do a relatively lengthy meeting in only a few pages. Where there is any material dispute about what occurred in the meeting, the Tribunal prefers the account recorded in the notes themselves as confirmed as accurate by Ms Whalon, in preference to the claimant's own evidence (or that of Ms Whalon). This decision has been reached in the light of the claimant's own evidence about her recollection of the meeting, particularly at its later stages, as is recorded in paragraph 38 above.

51. The Tribunal does not find any evidence that the respondent wished to remove the claimant from her employment. The Tribunal does not find any evidence to support the statement made in the claimant's supplementary statement that Ms Whalon's evidence was "*a continuation of the lies and omissions that resulted in me being stitched up*". The Tribunal accepts Ms Whalon's evidence that she did not wish the claimant to leave, and indeed that she herself found the meeting difficult. The Tribunal accepts that there was no underlying reason why the respondent would wish the claimant to leave or would endeavour to create a situation which led to her resignation.

The resignation and subsequent events

52. It is not in dispute that the claimant signed the resignation letter (97). The claimant cannot recall doing so, but agreed the details and signature were hers. The wording used was not the claimant's own sort of wording, but Ms Whalon's evidence was that she had been asked what the claimant should say and had told her. The letter says:

> *"Dear who it may concern,*
>
> *Would like to resign from my position of sales & service advisor, with immediate effect."*

53. The resignation was accepted by letter shortly after that day. Perhaps regrettably, the letter in response (98) did not repeat the opportunity to withdraw the resignation if it had been made in the heat of the moment. Ms Whalon's evidence was that she used a template letter which she completed, and therefore she did not include any statement about retracting the resignation. In any event, the claimant's evidence was that she did not wish to withdraw her resignation. The claimant's

evidence was that she had gone home and cried and was in bed for a number of days as a result of the meeting.

54. A few weeks later (shortly before 10 October 2019) the claimant endeavoured to phone HR and, after not succeeding in making contact, wrote a letter (100). This occurred after the claimant spoke to her father. The letter and the telephone calls were not a request to withdraw her resignation (indeed no such request was ever made), but was an attempt to gain a greater understanding about what had been alleged and to obtain documents and notes relating to it. The letter was a subject access request.

55. The respondent provided a response on 16 October 2019 (101). Two further letters were sent by the claimant on 15 and 28 November 2019 (102-103). Those letters requested the handwritten notes taken at the time (that had been destroyed). In the submissions made on her behalf, the claimant's representative questioned the destruction of such notes and contended that the destruction did not accord with the duty of care. However, the claimant only became aware that the notes had been destroyed when she received the letter of 16 October 2019, that is long after she had resigned and long after any possibility that the respondent was obliged to allow her to retract her resignation made in the heat of the moment, had ceased.

The Law

56. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, as defined by Section 95. Section 95(1)(c) provides that an employee is dismissed by her employer if:

> **"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

57. The principles behind such a constructive dismissal were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat herself as constructively dismissed only 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. In that case Lord Denning said (at 226B):

> "**the conduct must … be sufficiently serious to entitle him to leave at once**"

The duty of trust and confidence

58. One term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation 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."**

59. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way:

> **"The conduct must, of course, 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. That requires one to look at all the circumstances."**

60. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

61. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15** the EAT put the matter this way:

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee)**

> **must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.”**

62. The respondent relied upon the Judgment in **Gogay v Hertfordshire County Council [2000] IRLR 703** in which Hale LJ said the following:

> “**It is now well settled that there is a mutual obligation implied in every contract of employment, not, without reasonable and proper cause, to conduct oneself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.**”

After quoting from the Malik Judgment (see above) she went on to say

> “**Lord Steyn emphasised, .. that the obligation applies 'only where there is “no reasonable and proper cause” for the employer's conduct, and then only if the conduct is calculated to destroy or *seriously* damage the relationship ...' Miss Sinclair, for the local authority, argues that the breach must be such as to indicate that the perpetrator no longer wishes to be bound by the contract: … This is to confuse the question of whether the term has been broken with whether such a breach entitles the employee to treat it as a repudiation of the contract. It is quite clear that the term may be broken even though the employer does not intend to bring the employment relationship to an end**”

63. The respondent correctly submitted that the test as to whether an employer has conducted itself in a way which is calculated to, or likely to, seriously damage the relationship of trust and confidence is a high test.

Duty of care

64. The claimant also relied upon the duty of care. Any employer is under a common law duty to have regard to the safety of its employees and must take such steps as are reasonable to ensure the safety of its employees. That includes providing a safe place of work and protecting employees from unnecessary risk of injury. As well as an employer being subject to this common law duty and to similar obligations under the Health and Safety at Work etc Act 1974, it might reasonably be argued that such obligations are implied into any employee’s contract of employment. Whether or not such an implied term exists independently, in any event where an employer breaches the duty of care it is highly likely (if not certain) that such a breach will also be a breach of the implied duty of trust and confidence.

Heat of the moment resignations and special circumstances

65. The general rule is that unambiguous words of resignation may be taken at their face value by an employer. However, while this is normally the case, in special circumstances a Tribunal is entitled to decide that there was no resignation, despite appearances to the contrary. That is, that unambiguous words of resignation spoken in the heat of the moment may not amount to a resignation (see for example **Sovereign House Security Services Ltd v Savage [1989] IRLR 115** and **Kwik-Fit**

(GB) Ltd v Lineham [1992] ICR 183). Where special circumstances arise (such as where words were spoken in the heat of the moment), apparently unambiguous words can be considered in the light of the surrounding circumstances so that a prudent employer will allow a reasonable period of time to elapse before accepting a supposed resignation.

Fair dismissal

66. In this case the employer also argues that if the claimant was dismissed (which it denies), that dismissal was in any event fair by reason of conduct.

67. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for misconduct. If the respondent fails to persuade the Tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed her for that reason, the dismissal will be unfair. If the respondent does persuade the Tribunal that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. The Tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent’s size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

68. In conduct cases, when considering the question of reasonableness, the Tribunal is required to have regard to the test outlined in **British Home Stores v Burchell [1980] ICR 303**. The three elements of the test are:

(1) Did the employer have a genuine belief that the employee was guilty of misconduct?

(2) Did the employer have reasonable grounds for that belief?

(3) Did the employer carry out a reasonable investigation in all the circumstances?

69. The additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach.

70. It is important that the tribunal does not substitute its own view for that of the respondent, **London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220 .**

The ACAS code

71. The ACAS code of practice on disciplinary and grievance procedures sets out the basic approach which all employers should take when dealing with disciplinary situations in the workplace. It emphasises that fairness and transparency are

promoted by using the rules and procedures outlined. The code outlines that, in some cases, the necessary investigations require the holding of an investigatory meeting with the employee before proceeding to a disciplinary hearing. In the section on allowing accompaniment, the code is clear that the statutory right applies to the disciplinary meeting which may result in the relevant sanction – it does not apply to the investigatory meeting (although there is nothing in the code which says it is not something which can be offered).

Other issues

72. The issues in the claim also required consideration of **Polkey** and contributory fault, however in the light of the findings below it has not been necessary to consider those issues and therefore the law as it applies to those issues is not re-produced in this Judgment.

Conclusions – applying the law to the facts

73. The first question which the Tribunal needs to determine, is whether the claimant was dismissed, as explained in the List of Issues in paragraph 3 above. Whilst the evidence heard by the Tribunal was often addressed as if this was an unfair dismissal case which had resulted in the claimant's dismissal, as the claimant had chosen to resign at the investigatory meeting conducted on 19 September 2019 the first question was whether she was dismissed.

74. As addressed in the legal section above, such a dismissal requires a fundamental breach of contract by the employer. That is the conduct must be likely to destroy or seriously damage the degree of trust and confidence. The strength of the term is highlighted by the cases referred to above.

75. The respondent submitted that confronting an employee about alleged wrongdoing at an investigatory hearing cannot be a breach of contract, per se. The Tribunal agrees with that submission. It is important that an employer is mindful to treat the accused employee appropriately and with respect, and the way in which such a confrontation is conducted can, of course, be a breach of the duty of trust and confidence, but doing so where there is genuinely believed to be a misconduct case to answer cannot, of itself, be a breach.

76. The respondent's case was that the claimant did not avail herself of the opportunity of attending a disciplinary hearing. The respondent highlighted that the claimant would have been able to attend with a clear head and with a companion for support. The respondent's position was that the claimant essentially truncated the disciplinary process. Those submissions are not in dispute. The respondent also submitted that the claimant did so because she had accepted that she had dropped calls and knew she had done so, something which certainly was in dispute.

77. It is important to highlight that, following the claimant's resignation, the disciplinary process was not completed. The investigation was clearly still at an early stage. The claimant would have had an opportunity to raise issues about the evidence collated and to try to respond to the respondent's allegations, had she wished to do so.

78. Much of the time undertaken in the cross examination of Ms Whalon involved the claimant's representative challenging the materials provided by the respondent and relied upon by it in investigating the issues raised. The matters included questions about: the call records; what the call records showed; whether there were other reasons or explanations for the dropping of calls; what was said in the statements; the lack of involvement by the claimant's line manager; the assertion that it had been going on for six months when the records only recorded 19 days in July and August; and the fact that the vast majority of the calls recorded showed no, or a short, duration. All of these points were those which the claimant would have been able to raise as part of any disciplinary hearing within the respondent's internal procedures, had it taken place. It is perhaps unfortunate that it did not. The Tribunal understands the frustrations expressed by the claimant's representative in the Tribunal hearing, but, in the light of the fact that the internal process ceased when the claimant resigned, the Tribunal is simply not in position to reach any findings on the claimant's representative's arguments that the allegations had not been sufficiently proven. As confirmed at paragraph 51 above, the Tribunal does not find that there was any ulterior motive behind the investigatory meeting, the respondent's attendees were genuinely investigating what they believed to be potential misconduct.

79. At the end of his submissions, the claimant's representative was given the opportunity to explain what he believed were the breaches of the duty of care which potentially applied to the respondent's treatment of the claimant. The claimant's representative strongly emphasised the claimant's history of anxiety and the report that the respondent had received (74) which explained that history of anxiety. Accordingly, the particular potential fundamental breaches as they were contended and the Tribunal's conclusions are as follows:

(1) The claimant's representative particularly emphasised the fact that the claimant was not given advance notice of the investigatory meeting, in contrast to the previous disciplinary hearing held in respect of her absence. The Tribunal does not find that asking the claimant to attend an investigatory meeting without advance notice, was a fundamental breach of contract. The nature of an investigatory meeting is that it is more frequently one with limited notice; a disciplinary hearing would have been the opportunity for the claimant to have thought about and prepared her defence to the issues and allegations. The respondent acted in accordance with its procedures and the ACAS code, and the Tribunal does not find that the respondent was obliged to vary those procedures, in the light of what is said in the Occupational Health report as cited above. It was not a breach of either the duty of trust and confidence or of the duty of care, not to inform the claimant in advance. Indeed, the Tribunal also believes there is some merit in the reason given by Ms Whalon (recorded at paragraph 34) as to why advance notice might have had an adverse impact for the claimant if she been told about the meeting in advance.

(2) The claimant's representative alleged that the failure to retain notes was a breach of the duty of trust and confidence and/or a breach of the duty of care. The Tribunal agrees that it would have been better if the original

handwritten notes had been retained. However, the failure to do so was not a breach of contract and certainly was not a fundamental breach. In any event, this occurred long after the claimant resigned and therefore was not her reason for doing so.

(3) The Tribunal does not find the meeting was conducted in a particularly aggressive or inappropriate way. The Tribunal does not find that the way in which Ms Whalon and/or Ms Woods conducted the meeting was of itself a breach of the duty of trust and confidence or a breach of the duty of care. Clearly, if the claimant had been shouted at and treated aggressively, such conduct could/would of itself have amounted to a fundamental breach. However, the Tribunal accepts that the way in which the meeting was conducted as recorded in the notes (and confirmed by Ms Whalon), was not a fundamental breach. Indeed, even on the basis of the claimant's evidence in the Tribunal hearing itself about why she was upset about what was said and the manner in which it was said, the conduct she describes was not a fundamental breach of contract, where the respondent’s attendees were exploring with the claimant some serious allegations.

(4) The Tribunal also does not find that any of the other elements of the meeting such as explaining to the claimant that it was potential gross misconduct, having an adjournment when the claimant was left alone for half an hour, or ultimately accepting the resignation letter, were of themselves a fundamental breach of contract. Clearly: it would have been better if the claimant had not have been left alone for half an hour; the phrasing used by Ms Whalon on her return to the meeting recorded in the notes and addressed at paragraph 47 above was not ideal; and it might have been sensible to allow the claimant to be accompanied at the meeting even if that fell outside the respondent’s usual procedure. However, none of these matters (either individually or collectively) amount to a fundamental breach of contract (applying the law as it is explained above, in particular as it applies to the duty of trust and confidence).

80. Having reached the conclusion that there was no such fundamental breach of contract and therefore no dismissal, the Tribunal does not need to reach a decision on any other issue (as outlined in paragraphs 4-7). It is also not necessary for the Tribunal to determine whether or not the claimant committed the misconduct alleged, that is dropped-calls.

81. As highlighted in the legal section above, where an employee resigns in the heat of the moment that can be a special circumstance where even unambiguous words of resignation should not be treated as a resignation and/or can be withdrawn. This case involved not only the claimant repeating unambiguous words of resignation but also signing a letter. At no point did the claimant ever endeavour to withdraw her resignation, and she was very clear in her evidence to the Tribunal that she did not wish to do so in the light of the allegations made. On that basis, any issues around a heat of the moment resignation or special circumstances, do not

arise and certainly do not need to be considered in the light of the claimant's decision to resign.

82. As explained, many of the challenges made by the claimant's representative to the evidence collated by the respondent could have appropriately been aired at a disciplinary hearing. The nature of this case is that the claimant resigned at such an early stage that those issues were never aired or addressed. Nonetheless, because the Tribunal has concluded that the claimant resigned and was not dismissed in accordance with section 95(1)(c) of the Employment Rights Act 1996, the Tribunal cannot and does not need to go on and determine the other issues.

Summary

83. For the reasons explained above, the claimant has not succeeded in her unfair dismissal claim.

Employment Judge Phil Allen

14 December 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
15 December 2020

FOR THE TRIBUNAL OFFICE

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