Case Number: 2300285/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
Sitting alone

BETWEEN:

Mrs J Potter **Claimant**

AND

Hawkridge & Company LLP **Respondent**

ON: **12 and 13 April 2021**

Appearances:

For the Claimant: **Mr J Duffy, Counsel**
For the Respondent: **Mrs M Sharp, In-house advocate**

JUDGMENT ON LIABILITY

The Claimant's claim of unfair dismissal under s 95(1)(c) Employment Rights Act 1996 ("ERA") succeeds.

Reasons

Introduction

1. By a claim form presented on 2019 the Claimant brought claims of constructive unfair dismissal which was resisted by the Respondent.

2. At the hearing the Claimant gave evidence on her own behalf and had no other witnesses. The Respondent's evidence was given by two solicitors, Mark Hawkridge, who at the time of the hearing was the firm's senior partner and Tristan Alder, who was the firm's managing partner. All witnesses had provided written statements that I read before hearing the oral evidence. There was a bundle of documents of 415 pages, many of them relevant to the Claimant's evidence of mitigation of her losses. References to page numbers in these reasons are references to page numbers in that bundle.

3. I make the findings of fact that follow on a balance of probabilities based on the witness evidence I read and heard, and the documentary evidence presented to me. I have not made findings on every matter that was in dispute between the parties and have focused on the matters it is necessary for me to decide to resolve the agreed issues, which are set out later in these reasons.

4. Part way through his evidence to the Tribunal Mr Hawkridge, a Solicitor of the Senior Courts and an officer of the court, admitted that the apparently contemporaneous notes of meetings between him and the Claimant in early September 2019 had in fact been typed at a later date, were "a sham" and that he had "added" material to them when they were typed. Leaving aside the issues raised by an officer of the court producing evidence to an Employment Tribunal in that manner, this admission seriously undermined the credibility of Mr Hawkridge's evidence. As a result, where there were disputes of fact between Mr Hawkridge and the Claimant I have largely, though not uncritically, accepted the Claimant's version of events and have treated the Respondent's notes at pages 63-65 with considerable scepticism. I have taken account of the fact that Mr Alder's evidence sometimes supported that of Mr Hawkridge and that notably he confirmed that the content of the notes at pages 63-65 was accurate even if the manner of their production was misleading. However I was also conscious that Mr Alder's evidence was affected by what I perceived to be divided loyalties – he had had a good working relationship with the Claimant and did not always support Mr Hawkridge's decisions, but he was also a partner in the business. I found that this affected the coherence of his evidence and thus the extent to which I felt able to rely on it.

The legal framework

5. Section 95 (1) (c) ERA provides for an employee to treat themselves as "constructively dismissed" in certain circumstances. The section states:

> **(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) F1. . . , only if)—**
>
> **……..**
>
> **(c) 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.**

6. Lord Denning in *Western Excavating (ECC) Ltd v Sharp [1978] Q.B. 761* set

out the relevant test as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

Also relevant is the implied term of trust and confidence. Under this term, the employer must not, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the mutual trust and confidence between employer and employee. The distinction between a breach of trust and confidence and unreasonable conduct on the part of an employer, while real, is often a narrow one.

7. The following elements are needed to establish constructive dismissal:
    a. Repudiatory breach on the part of the employer. This may be an actual breach or anticipatory breach, and can also arise from a series of acts rather than a single one, but must be sufficiently serious to justify the employee resigning.
    b. An election by the employee to accept the breach and treat the contract as at an end. The employee must resign in response to the breach.
    c. The employee must not delay too long in accepting the breach, as it is always open to an innocent party to "waive" the breach and treat the contract as continuing (affirmation) (subject to any damages claim that they may have).

8. In *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978* the Court of Appeal listed five questions that it should be sufficient to ask to determine whether an employee was constructively dismissed:

    a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
    b. Has he or she affirmed the contract since that act?
    c. If not, was that act (or omission) by itself a repudiatory breach of contract?
    d. If not, was it nevertheless a part (applying the approach explained in *Waltham Forest v Omilaju [2004] EWCA Civ 1493*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)
    e. Did the employee resign in response (or partly in response) to that breach?

9. Mr Duffy also referred me to the following authorities: *Woods v W M Car services [1981] IRLR 347, Goold v McConnell [1995] IRLR 516, Land Securities Trillium v Thornley [2005] IRLR 765, Air_Canada_v._Lee [1978]*

IRLR 392 and *Coleman v Baldwin [1977] IRLR 342*.

The issues

10. The parties had agreed before the hearing that the issues that the Tribunal needed to decide were as follows:

    a. Whether or not the following amounted to a fundamental breach of the Claimant's contract of employment amounting to a repudiation of that contract:

        i. Did the Respondent substantially increase the Claimants duties from or around17 May 2019?
        ii. Did the Respondent make a unilateral decision to take away the Claimants duties following her letter dated 21 September 2019?
        iii. Did the Respondents decision to move the Claimant from the Litigation Department to the Conveyancing Department amount to a removal of her role?
        iv. Did the Respondent require the Claimant to perform an entirely new role in the Conveyancing Department?
        v. Did the Claimant have experience in the role of PA to the Conveyancing Department, and if not was adequate training offered by the Respondent?
        vi. Did the Respondent's actions to employ an alternative employee in the role of support staff in the Litigation Department replace the Claimant in her role?
        vii. Did the Respondent fail to deal with the Claimants complaints?

    b. Should the Tribunal find in part or at all that the Respondent was in breach of the Claimant's contract of employment, was that breach fundamental, amounting to a repudiation of the contract?

    c. Further or in the alternative, whether the Respondent was in fundamental breach of the implied term of mutual trust and confidence amounting to a repudiation of the contract of employment?

    d. If the Respondent did commit a fundamental breach of the Claimant's contract of employment amounting to a repudiation of that contract, did the Claimant resign in Response to such breach?

    e. If the Claimant was constructively dismissed, what was the reason or principal reason for her dismissal and is it a potentially fair reason within section 98 (1)(b)&(2) of the Employment Rights Act 1996 ('ERA')?

    f. Was any such dismissal fair within the meaning of ERA s98(4)?

Findings of fact

11. The Claimant was employed by the Respondent for almost 25 years at the

time of her dismissal. That is by any standards a remarkable length of service and it is very sad that the Claimant's long period of employment has ended in this dispute.

12. The Respondent is a small firm of solicitors whose main work streams are conveyancing, private client and litigation. The Claimant's employment began in 1994 and throughout the period of her employment she worked in the litigation department. The Claimant signed a contract in 2010 which described her job as Personal Assistant / IT Administrator & Trainer / Recruitment Assistant and although that provision of the contract did not specify that she worked in litigation, that was what happened in practice. It also contained a clause that said 'In addition to the duties which this job normally entails the Employee may from time to time be required to undertake additional or other duties as necessary to meet the needs of the Employer's business'.

13. At the time of the Claimant's resignation, which took effect on 31 October 2019, the Respondent employed 5 fee earners, and 6 support staff. The Claimant had a considerable number of responsibilities including audio/copy typing, composing correspondence and documentation, liaising with clients both in person and by telephone, ensuring appointments, meetings, Court dates and limitation periods were diarised, attending Court if required, photocopying and filing, typing confidential correspondence, attending monthly management meetings, office manager duties, holiday/sickness records, recruitment of support staff including dealing with CVs, training staff on the DPS system, assisting with the accounts department by maintaining records of payments received and paid into the bank, setting up TTs and BACS payments for completions and other payments out of both client and office account, dealing with minor IT problems and problems with the photocopier, receiving and allocating all email enquiries received either direct by email or via the company website and dealing with incorrectly addressed emails. Due to her long service and being regarded as a person of good standing she was also a signatory on the firm's client and office accounts.

14. This list of tasks was largely supported by the job description that began at page 135. The Respondent did not challenge the Claimant's evidence about her role, although it suggested that some of the listed tasks were not time consuming or were not carried out on a daily basis, which the Claimant accepted. I find as a fact that at the time of her resignation the Claimant's role had developed into a varied and wide ranging one, which is consistent with her long experience in the business. I also observe that the nature of a support role of the kind carried out by the Claimant is likely to evolve over time as business practices and technology develop. It is also my experience that support tasks of the nature of those carried out by the Claimant can be time consuming to an extent not always understood by colleagues. I accept the Claimant's evidence that she was busy with a wide range of tasks in addition to supporting Mr Alder, including elements of banking, email management, maintaining the DPS system and a paper diary of deadlines, recording holiday and sickness for payroll purposes and dealing with elements of recruitment and compliance. I find that she carried a high level of responsibility for matters that are important in a solicitor's practice, that she worked outside normal

office hours on a fairly regular basis, normally without additional pay and that she therefore had limited capacity to take on new tasks.

15. With effect from May 2019 the Claimant's role in covering aspects of the accounts function increased as the relevant postholder was absent on long term sick leave. The Claimant accepted that some of the accounts functions were outsourced during this period, but I find as a fact that some of the tasks that had fallen to the account holder fell to the Claimant during the postholder's absence, thus increasing her workload to an extent that was not adequately acknowledged by the Respondent at the time or in its evidence to the Tribunal.

16. There was also a dispute of fact about the extent to which Mr Hawkridge began to take steps to ameliorate the Claimant's workload. I find as a fact that no tasks were taken from the Claimant until after her letter to the Respondent of 21 September 2019.

17. Also in May 2019 the Claimant was asked to cover the work of an additional fee earner, Mr Gillett, as well as that of Mr Alder who was the solicitor for whom she did most of her work as a PA in the litigation department. Mr Gillett was a consultant to the firm, appointed early in 2019 in an attempt to boost the department's revenues. The Claimant had a number of concerns about Mr Gillett's working practices, which arose in the early part of his engagement. It was Mr Alder's view that the Claimant did not like Mr Gillett and was reluctant to undertake his work partly for that reason. I have decided that I do not need to make detailed findings on that specific issue for the purposes of this case. What is more relevant is that the Claimant was concerned about whether she would manage the typing work for Mr Gillett on top of her existing workload. The Claimant was not asked to cover Mr Gillett's typing until on or around 17 May 2019, even though he had joined the firm some months earlier. Mr Hawkridge gave evidence that he had been assured by Mr Alder that the Claimant would have time to carry out Mr Gillett's work, the amount of which he said was in any event limited (three to four hours per week) because Mr Gillett only came to the office once a week.

18. I note at this point that three to four hours of work amounts, in effect, to an additional half day of work and is therefore a substantial addition to a busy weekly workload. Mr Hawkridge accepted in cross examination that the extent to which the Claimant was already busy and occupied could not be judged from time recording figures in the litigation department, which were low at the time. I find that Mr Hawkridge's decision to allocate the additional typing work to the Claimant was based on Mr Alder's assurances about her capacity and his perception that she was already highly paid and therefore, by implication ought to be as fully occupied as possible on fee earning related activities. When the Claimant tried on 17 May to raise her concerns about the additional work with Mr Hawkridge and alluded to all the other additional tasks for which she was responsible, he said "Well that is why you get the big money". Nevertheless despite the difficulties I find as a fact that the Claimant did for some weeks do some of the typing work for Mr Gillett in addition to her other work.

19. The situation changed again in June 2019, when Mr Alder was taken seriously ill whilst on holiday and was absent from the office for several weeks before returning on a phased basis. During this time the Claimant covered some of the work of the department in order to ensure deadlines were met and sought the input of Mr Hawkridge where necessary. I accept the Respondent's evidence that some of Mr Alder's work was done by other fee earners – that is to be expected in a solicitor's practice when a fee earner is absent. Mr Alder's absence did however mean that the Claimant had to put aside some other tasks as she was inevitably busier than usual. She did not cover Mr Gillett's work during this period but resumed it as best she could during Mr Alder's phased return to the office.

20. The Claimant had a holiday booked in July 2019. Just before she went on holiday a secretary from the conveyancing department handed in her notice. The Claimant placed an advertisement for a new secretary with the website "Indeed". This went live on 10 July.

21. There was considerable dispute between the parties as to what happened after this advertisement was placed and the extent to which the Claimant was consulted about events. For the reasons set out in paragraph 4, I have largely preferred the Claimant's account. The Claimant's evidence was that on 2 September 2019 one of the applicants for the role attended for a second interview. Later that day Mr Hawkridge asked the Claimant for her template letter of employment. This surprised the Claimant and caused her to query the request as she was the person who ordinarily sent out appointment letters. She found Mr Hawkridge's explanation, which was that another fee earner was dealing with the appointment process, puzzling as it was a departure from the norm, which was to involve the Claimant fully, including at the interview stage. Nevertheless, she complied with the request by email on 2 September (page 143).

22. I find as a fact that contrary to Mr Hawkridge's initial evidence and his witness statement there was no meeting between him and the Claimant on 2 September. On that day there was a however a second interview between the candidate for the conveyancing role and two fee earners in the firm, including the head of conveyancing. At some point Mr Alder joined the interview and it was put to the candidate that although she was not suitable for the conveyancing role there was a role available in the litigation department if she would be interested in it. The candidate had two years' experience working in the court system. The candidate said that she was interested and was offered and accepted the role later that day (it was put to the Claimant in cross examination and she agreed that the acceptance was at page 143a although that page was missing from the bundle provided to me). I therefore also find as a fact, contrary to Mr Hawkridge's witness statement, that the job was offered to the candidate before any meeting or discussion took place with the Claimant about a change of role.

23. The first discussion with the Claimant about the situation took place on 4 September. Mr Hawkridge and Mr Alder were present. Again for the reasons

given in paragraph 4 I have preferred the Claimant's account of the meeting. It evidently and unsurprisingly came as a shock to the Claimant to discover that the Respondent had in mind that she should move into a role in the conveyancing department and that the new recruit with limited experience should take up a post in litigation, where the Claimant had been working for 25 years. Mr Hawkridge told the Claimant that there would be no change to her terms and conditions and that the move had not been prompted by any deterioration in her performance. I note that there is no evidence in any event that any performance concerns had ever been raised with the Claimant and nothing to corroborate the suggestion that her performance had been discussed between the partners, despite what Mr Alder suggests in his witness statement.

24. The Claimant queried the logic of the change, given that she had no conveyancing experience and the new recruit's litigation experience was limited. It would, she said, involve retraining two members of staff rather than one and would make no difference to the firm's overall overheads. Mr Hawkridge again referred to the level of the Claimant's salary, saying that it would be an easier overhead to bear in a more profitable part of the firm and that as she had knowledge of the DPS system and would be offered training, the transition would be an easy one for her and would be of benefit to both her and the firm. This did not reassure the Claimant.

25. The Claimant was very upset when she went home that evening and discussed the situation at length with her husband. She resolved on reflection to accept the situation and not, as she saw it at the time, to allow herself to be pushed out of the firm before she was ready. The day after the meeting there was an exchange of messages between the Claimant and Mr Alder (page 101) that confirms this. Mr Alder asked the Claimant how she was feeling. The Claimant replied "I do hope the bundle is okay and I was not really in the right frame of mind for that type of task. Prince Moo [a reference to another partner in the firm] seems pretty upbeat about the change! Although I still think it is a dreadful waste of 45 years of Litigation experience after a heart to heart with Ashley I am just going to make the best of a shit and totally illogical situation. If the aim was to push me into leaving it has not worked! I will email over stuff as it is done." Mr Alder replied "It's ridiculous and makes no sense to me. Seems to be pandering to Andrew for some reason."

26. In cross examination Mr Hawkridge was pressed as to his reasons for deciding to move the Claimant from litigation to conveyancing, which he initially maintained was a decision driven by financial considerations. He did not accept that he was manipulating events to make the Claimant leave the firm of her own accord and thus save on her salary, but his argument that the reason for the decision was the respective profitability of the two departments did not stand up to scrutiny and was not borne out by the figures at pages 80-81. He also changed position during his evidence and began to argue that the reason for the change was the need to bolster the skillset in the conveyancing department with someone experienced who knew the systems and was a better fit than the person they recruited. He then said both reasons contributed to the decision. The impression left by this evidence was that the rationale for

the decision was chaotic, but that there was no underlying motive to make the situation so uncomfortable for the Claimant that she would resign.

27. The Claimant continued to feel undermined by the situation however and on 18 September, having found that it was affecting her health, she sought a further meeting with Mr Hawkridge. Mr Hawkridge reiterated that the decision had been driven by financial considerations. It was suggested in the Respondent's evidence that at the meeting the Claimant had said that if Mr Hawkridge was prepared to close the litigation department down, she would accept the role in the conveyancing department. I find that either this misrepresents what the Claimant said, or Mr Hawkridge misunderstood her meaning. What I find she meant to say was that if the litigation department had been closed down she would have had no choice but to take the role in conveyancing. She did not however put it to Mr Hawkridge that she ought to close the department down. What she went on to explain to Mr Hawkridge was that what she was finding very difficult to accept was the thought of someone other than herself occupying the place in the litigation department that she herself had occupied for 25 years. The layout of the offices meant that she would have no choice but to witness this on a daily basis. She also again queried the logic of creating a situation in which two people rather than one had to be trained to undertake new roles. Mr Hawkridge did not address these points at the meeting.

28. The Claimant elaborated on her feelings about her situation in cross examination. She acknowledged that she would have retained the job title of PA, but envisaged that her daily tasks would have been more like those of a junior typist. She would have felt relatively deskilled and that would have affected her view of herself in the role and in the firm. I find that a number of concerns were operating on the Claimant's mind – the loss of a role in the department which she knew very well and had worked in relatively happily for a very long time for a principal with whom she had a strong and established working relationship, the anticipated hurt associated with seeing someone else performing that role and her fear of being in a role in which she did not have the skills to perform confidently and at a level of competence that she had been used to.

29. A further meeting between the Claimant and Mr Hawkridge took place on 20 September. Mr Hawkridge attempted to reassure the Claimant that she would be given the training that she needed to perform the role in conveyancing. The Claimant was however upset by other remarks he made during that meeting and followed it up on 21 September with the letter at pages 66-67. In it she objected to the fact that Mr Hawkridge had referred to her as "just a secretary" and reminded him of the other roles that she performed and the fact that she recorded chargeable hours. She also alluded to the fact that she felt unfairly treated by comparison with other members of staff in relation to matters such as ill health absences and reiterated her concerns about being ill equipped to work in conveyancing. She ended her letter:

I will come into the office next weekend to move my stuff to Anita's old desk and I understand from Tristan that I will be working for him up until I go on holiday. I have

informed you how I feel about the changes and how they have already affected my health and wellbeing. I been advised that I need to inform you that I will be "working under protest" during the new person's trial period.

30. The Respondent did not respond to the letter. Mr Hawkridge and Mr Alder considered it, but took the position that the letter did not amount to a grievance and did not require a response. On more than one occasion in cross examination Mr Hawkridge referred to the letter as "a whinge". He said that he thought the situation would work itself out. The Respondent pointed to the fact that the firm has a grievance procedure and that the Claimant had made no explicit reference to it. The Claimant said that she would have expected the Respondent to realise that the letter was a grievance, that it required a response and that it was obvious that it was a very upsetting and emotional time for her.

31. The Respondent also alluded in its witness evidence to the Claimant's trial period in the new role. I find as a fact based on the Claimant's evidence (she said that no trial period was offered) and the lack of any contemporaneous evidence, that the Claimant was not offered a trial period in the conveyancing department.

32. The relationship between the Claimant and Mr Hawkridge deteriorated after the letter of 21 September and there was little communication between them. Mr Alder's department was not performing well and he himself was still suffering with ill health, and he was not therefore able to argue for better treatment for the Claimant. I find as a fact that he was only peripherally involved with the decisions affecting the Claimant and remained partly disengaged from the business because of his health issues. The Claimant's unchallenged evidence was that Mr Alder did not support Mr Hawkridge's decision to move her out of litigation and felt that it would make matters more difficult for him having an inexperienced PA, but he was not able to influence the decision. There was evidence of discussions between Mr Hawkridge and Mr Alder, notably in the wake of the Claimant's letter of 21 September, but as I have already recorded, I find the evidence of exactly what was said by whom and on what date to be unreliable. It is clear however that the Respondent decided not to treat the Claimant's letter as a grievance and to provide no written response.

33. The Claimant attended work on 2 October, the day on which the new recruit also started in her role. She found this more than she was able to tolerate and she handed in her notice that day, agreeing to work to the end of a four-week notice period. Her letter stated as follows.

Please accept this letter as my 4 weeks' notice of termination of employment with Hawkridge & Company with my leaving date being 31st October 2019. I am very sad to be writing this letter after 25 years with H & Co but I am a Litigation PA and as you have taken that role away from me my resignation will come as no surprise to you (as I sure you knew it would come down to this when you embarked on this path).

In addition to my October wages I am due 2 days holiday pay. Holiday entitlement up to 31st October 2019 works out at 21 days. From the 21 days I will have taken 19 days by the end of October (I am on holiday next week) making days owed 2. As you know I

have had no days off sick in 2019.

34. The Claimant informed Mr Alder that she had had the offer of three jobs at the time of her resignation. This was not in fact the case and none of the jobs for which she had interviews materialised. The Claimant seemed keen not to cause Mr Alder concern by appearing to resign with nothing to go to. I accept that this was her reason for representing that she was going straight to new employment. It was plainly not the case however that she was resigning because she had another concrete job offer and she remained out of work at the time of the hearing.

35. Mr Hawkridge said that having resigned, he thought the Claimant might retract her resignation. The Claimant gave evidence that had the decision to move her out of the litigation department been reversed, she would have retracted her resignation and remained in the Respondent's employment.

Submissions

36. I received helpful submissions form both advocates. On behalf of the Respondent Mrs Sharp submitted that:

    a. the Claimant's contract provided for flexibility in the tasks that she undertook and that the request that she assist Mr Gillett was merely an exercise of that flexibility clause;
    b. the Claimant's role in the organisation was that of a personal assistant and that it was not specific to litigation. When her role changed in September 2019 nothing was really changing but the department in which she worked. She resisted the Claimant's suggestion that she would have in effect have been in the role of a junior typist. She pointed to the evidence of Mr Hawkridge and Mr Alder to the effect that the roles were largely the same and that the Claimant would have been provided with any of the training that she needed to carry out the role effectively;
    c. None of the other aspects of the Claimant's role would have been removed;
    d. The Claimant did not moreover seek a written response to her grievance and the important elements of the grievance had been addressed in meetings between Mr Hawkridge and the Claimant;
    e. If there had been a breach of the Claimant's contract it was not a repudiatory breach and there was no breach of the implied term of trust and confidence in this case. The implied term, she said, is only breached where is no reasonable and proper cause for the employer's conduct and the conduct is calculated to destroy or seriously damage the employment relationship. She said that the business needs of the practise amounted to reasonable and proper cause in this case. The relationship was still functioning and the Respondent wanted the Claimant to stay. Mr Alder was upset at her leaving and was trying to persuade her otherwise.
    f. The Claimant had not resigned in response to a breach of the implied term. She had accepted the move initially and acknowledged that she

would not longer have had to do Mr Gillett's work if she moved. She had also acknowledged that if the litigation department had closed she would have had no choice but to move to conveyancing. What appeared to exercise her most was the thought of someone else sitting in the place that she had previously occupied.

g. If the Claimant was constructively dismissed the Respondent had a potentially fair reason under section 98(1)(b) ERA – the business rationale behind the move was capable of being a substantial reason of the kind that would justify the dismissal of an employee occupying the position which the Claimant held. The treatment of the Claimant overall was reasonable within he meaning of s98(4) ERA.

37. Mr Duffy began by referring me to the test in *Western Excavating v Sharp.* In this case The Claimant relied on the loss of the litigation role and the prospect of seeing someone else sitting at the desk she had occupied for 25 years as repudiatory breaches of her contract entitling her to resign.

38. He relied on *Air Canada v Lee* as a case confirming that the Claimant is entitled to a reasonable period of time before committing to resigning from employment. The Claimant delayed from 4 September to 2 October - a reasonable period in the circumstances. He also submitted that the Claimant did not undermine her statutory entitlement by giving notice (I agree that this is expressly contemplated by the statute) and it was reasonable for the Claimant to give notice, given the importance of her role in the organisation. The Claimant's letter of 21 September was a clear protest at the circumstances and involved no waiver of any breach or any waiver of rights. The case of *Coleman v Baldwin* also involved a situation in which there was a change of duties and specifically the part of the job that was most important to the Claimant. In this case moving the Claimant to the conveyancing department unilaterally changed the whole nature of the Claimant's job and her role and uprooted the whole contract. The case of *Land Securities v Trillium* also involved a flexibility clause but established that a flexibility clause does not entitle an employer to fundamentally change the nature of an employee's duties. In the Claimant's case the duties of the conveyancing and litigation departments were fundamentally different. The Claimant had been working in litigation for 25 years. The move fell outside the scope of the flexibility provision. The EAT held in *Land Securities* that the commercial rationale behind a change does not necessarily extinguish the impact on the employee.

39. Alternatively this was a case in which the implied term had been breached. The Claimant would on the evidence have required a considerable period of training in the role. It was illogical for the Respondent to argue that the roles were very similar, but not be open to putting the new recruit into the conveyancing role. It had not acknowledged the importance of the change of the nature of the work or the principal. The Respondent was not entitled to upend the Claimant's job entirely as it had done.

40. *Goold v McConnell* establishes that there is an implied duty on an employer to deal with a grievance. The Respondent clearly did not comply with that duty – a significant breach in and of itself. As for the fairness of the Respondent's

conduct, Mr Hawkridge was inconsistent in his evidence on the business rationale, thus casting doubt on the Respondent's true reason. Mr Duffy submitted that the true reason was to push the Claimant into a corner – and that is not a fair reason under s98 ERA. Furthermore the process adopted was deficient. There was no consultation or discussion before the decision, which was taken unilaterally before the Claimant had any idea about what was being discussed.

Conclusions on the issues

41. I conclude as follows on the agreed issues. As for the alleged repudiatory breaches of the Claimant's contract I consider first whether the Respondent substantially increased the Claimant's duties from or around 17 May 2019, I find that there were changes made to the Claimant's workload at that time in that she was required to assume additional banking and accounts related duties and additional typing for Mr Gillett. However I find that those requirements fell within the scope of the flexibility provision within the Claimant's contract of employment and thus did not amount to a breach of the terms of the contract, or in the alternative that if there were a breach of the implied term on the part of the Respondent by reason of the way in which those additional duties were imposed, I find that the Claimant waived that breach by continuing to undertake those duties without explicitly protesting. If she did protest then she did not present the tribunal with clear evidence to that effect and there is no evidence that she undertook those duties whilst reserving her rights.

42. As to whether the Respondent repudiated the contract by making a unilateral decision to take away some of the Claimant's duties following her letter dated 21 September 2019 the Claimant did not persuade me that that was the case. There was some evidence that from that point onwards Mr Hawkridge redistributed some of the Claimant's work, but it seems to me that that was a natural consequence of his understanding (for a short period) that the Claimant was going to be moving into the conveyancing role and it could be construed as a measure on Mr Hawkridge's part aimed at ensuring that the Claimant's workload was not excessive whilst she made the transition. It is understandable that the Claimant would have been suspicious of Mr Hawkridge's motives in the wake of the Respondent's unilateral decision to move her to a different department, but I do not find evidence of a repudiatory breach of contract in the removal of some of the Claimant's duties after she sent the letter. I acknowledge that the changes felt hostile to Claimant as they appeared to be related to the complaints that she had raised in her letter. But on balance I find that the Respondent was acting within the express terms of the Claimant's contract. Although quite clearly communication between the Claimant and Mr Hawkridge was in the process of breaking down and decisions could and should have been better communicated, in the specific context of the business reorganisation that was being put into effect, a redistribution of some of the Claimant's duties mounted to reasonable and proper cause for the Respondent's actions. Furthermore, the Claimant did not resign in response to any reallocation of her duties. Her resignation came later and for other reasons.

43. It seems to me that the crux of the Claimant's case that she was constructively dismissed by the Respondent was the Respondent's unilateral decision in September 2019 to give the Claimant's long held role of litigation PA to a new recruit and to move the Claimant to the conveyancing department. Having considered the authorities and the parties' submissions I have concluded that this decision did amount to a repudiatory breach of the Claimant's contract of employment. Whilst the test of whether there has been a breach of an express or implied term of a contract is objective and not subjective, in my judgment the objective facts of this case are that the Claimant was employed as a litigation PA. Her length of service – 25 years – is a material fact in support of that contention. A person who has been doing a job for 25 years becomes identified with that job both as a matter of self-perception and in terms of the way that person is seen and treated by others within the business. They also become expert at what they do and accustomed to being identified with that high level of competence. In the context of a solicitors' practice, the skill sets involved in supporting litigation teams and conveyancing teams are significantly different. I heard and considered the evidence of Mr Hawkridge and Mr Alder to the contrary, but in my judgment they underestimated the differences. Also relevant was the disruption of the Claimant's working relationship with her principal, Mr Alder and the fact that the Claimant, who was used to being turned to by others for her knowledge and expertise, was suddenly going to require a good deal of training to get up to speed in the new role. Clearly there was a subjective element to this and the Claimant was very unhappy at the change, but objectively, in my judgment the Respondent was depriving the Claimant of her role. This was a small firm, where every role mattered and every role was distinct, perhaps more so than in a large organisation. To deprive an individual of their role in these circumstances is in my judgment a repudiatory breach of contract, either because it falls outside the scope of the flexibility provision within the contract, or because to exercise a flexibility provision to bring about such a fundamental change is a breach of the implied term. It follows from this conclusion that the Respondent was also requiring the Claimant to undertake an entirely new role by moving her to the conveyancing department.

44. Turning to the next item in the list of issues, the evidence did not establish that the Claimant had experience in the roles of PA to the conveyancing department although I accept that she had undertaken some tasks that were conveyancing related such as banking related tasks and some document administration. Whether or not the training being offered was going to be adequate does not seem to me to be a material consideration in this case – the Claimant did not complain about being moved because she was not going to be adequately trained. She complained because she did not want to be moved at all.

45. As to whether the new recruit would completely replace the Claimant in her role I do not find that that was the case – there was no evidence that the Claimant was going to lose her office management responsibilities although I acknowledge that some of those responsibilities were reallocated towards the end of September. However, they were not reallocated to the new recruit. This was not a case of the Claimant being "replaced" in the literal sense. I consider

that the Respondent did intend that she retain the bulk of her administration duties but be allocated to a different department. It was the allocation to the different department that was the problem.

46. I consider that that the Respondent did fail to deal appropriately with the Claimant's letter of 21 September. The Respondent maintained that it had dealt with the Claimant's main complaints in meetings, it has not shown that that was the case. There was no evidence of meetings with the Claimant after 21 September and Mr Hawkridge was quite clear in his evidence that he considered the letter to be a "whinge" and not a grievance. Even in a small organisation an employer is under a duty to address grievances and it is a breach of the implied terms of the contract not to do so (as *Goold* confirms). Mr Hawkridge's attitude to the Claimant's legitimate complaints and obvious hurt and upset came across as dismissive and disrespectful of a long serving employee. Not every failure to deal with a grievance will amount to a repudiatory breach of contract, but on these facts, against the background of the unilateral imposition of a change in role that was the subject matter of the grievance, ignoring the letter added insult to injury and in my judgment was further repudiatory breach.

47. Having established that there were repudiatory breaches by the Respondent the next question is whether these breaches caused the Claimant to resign. It is quite clear from the Claimant's resignation letter that she resigned because the litigation PA role had been taken away from her. I have found that the removal of that role did, on the facts of this case, amount to a repudiatory breach of contract. The Claimant clearly resigned in response to it. She did not in my judgment delay too long before doing so. The authorities clearly permit an employee who is about to take the major step of giving up their job, some time to reflect before taking that step. Clearly on the facts the Claimant changed her mind – to start with she thought that she would be able to tolerate the new arrangements. However, when she saw the new recruit physically in the workplace she realised that she had misjudged and that she would not be able to put up with it. She resigned promptly after coming to that realisation.

48. Did the Respondent act reasonably in bringing about the state of affairs that caused the Claimant to resign (her constructive dismissal)? In my judgment it has not shown that it did. There was an attempt in Mr Hawkridge's evidence to put across the business case for the decision. I found that his reasoning was chaotic and inconsistent and that no clear valid reason was established. I give a proper margin here to an employer's entitlement to run its own business in its own way, but even with that in mind, the Respondent in this case has not shown what it was trying to achieve. Plainly Mr Alder also had misgivings about Mr Hawkridge's judgment but felt powerless to change his mind. I do not accept the Claimant's submission that the Respondent was trying to engineer her resignation – I prefer to see the course of events as attributable to disorganisation and poor business practice rather than a conspiracy to manoeuvre the Claimant out of her job. But irrespective of that, a valid business reason for the change (and thus a potentially fair reason to dismiss under s 98 ERA) was not established on the facts. It was not satisfactorily explained why the new recruit could not have been trained up in the

conveyancing department, rather than moving the Claimant.

49. Finally, the process adopted by the Respondent was wholly unreasonable and fell far short of the standards required to meet the test set out in s 98(4) ERA. To spring the change on the Claimant without prior consultation was an egregious breach of good employment practice and is difficult to separate it from the repudiatory conduct involved in imposing the change. It was thoughtless and high handed and certainly exacerbated the impact of the change on the Claimant. This entire dispute might have been avoided if the Claimant had been properly involved in the discussions from the outset. Accordingly this is not a case in which a failure to consult has made little or no difference to the course of events and (subject to submissions) I would not be inclined to make any reduction in the award under the principle in *Polkey v AE Dayton Services*.

50. It follows from this analysis that the Claimant succeeds in her claim of constructive unfair dismissal. It will now be necessary to hold a remedy hearing unless the parties are able to resolve the matter of remedy between them. To assist in that process, I remind the parties of the maximum unfair dismissal award, which is limited to the lower of one year's salary or the statutory maximum (it is the former that will be applicable in this case). I will also be minded to consider an uplift to the award of between 15 % and 20% (subject to submissions) in respect of the Respondent's failure, in breach of the ACAS Code, to respond to the Claimant's letter of 12 September 2019, which was self-evidently a grievance. It will be necessary to calculate the basic award and to consider the Claimants' efforts to mitigate her losses, which appear to have been extensive.

51. If the parties are unable to reach agreement on remedy either party may apply for a remedy hearing, which will be listed before me.

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Employment Judge Morton
Date: **9 July 2021**

Judgment sent to the parties and entered in the Register on: **14 July 2021**

for the Tribunal Office

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