EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100503/2021 (V)

Heard by CVP on 2 & 3 August 2021

Employment Judge N M Hosie
Members D McDougall
J McCaig

Mrs D Mennie	**Claimant** **In Person**
CHC Scotia Limited	**Respondent** **Represented by** **Ms G Harrington,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the claim is dismissed.

REASONS

Introduction

E.T. Z4 (WR)

1. Diane Mennie claimed that she was constructively and unfairly dismissed from the respondent's employment and that she was directly discriminated against on the ground of pregnancy/maternity. The claim was denied in its entirety by the respondent.

The evidence

2. The Hearing was conducted by video conference using the Cloud Video Platform ("CVP"). We heard evidence first from the claimant. We then heard evidence on behalf of the respondent from:-

- Scott Walker, UK Maintenance Manager at the relevant time, who heard the claimant's appeal against her dismissal.
- Adrian Morton, Maintenance Manager, who heard the claimant's Grievance.
- Lesley Sim, Senior HR Manager.

A joint bundle of documentary productions was also submitted (P).

3. We wish to record, at this stage, that we were of the unanimous view that each of the respondent's witnesses gave their evidence in a measured, consistent and convincing manner and presented as credible and reliable. In many respects, their evidence was corroborative.

The facts

4. Having heard the evidence and considered the documentary productions, we were able to make the following findings in fact, relevant to the issues with which we were concerned. The claimant was employed by the respondent as an Aircraft Engineer from 3 April 2017 to 10 December 2020. Her contract of employment was one of the documentary productions (P.65-77).

5. She was familiar with the respondent's Grievance Policy (P.36-41) and it's "Code of Business Conduct Integrity & Ethics" (P.46-64). She was also familiar with the respondent's "SQID" system for reporting issues and concerns at work. The "SQID" reports which the claimant submitted were produced (P.78).

6. The claimant returned back to work, on shift, from a period of maternity leave on 5 October 2020.

7. On 6 October 2020, the claimant had a verbal disagreement at work with her colleague, Hugh Sutherland, about how to carry out a task on an aircraft. This was partially witnessed by the claimant's colleague Chris Innes. The claimant spoke with her Shift Supervisor, Peter Randall, immediately afterwards. He sent her home as she was upset.

8. Mr Randall sent the following SMS message to his line manager, Andrew Morton that afternoon: "*Diane has had to go home. Hugh is the person that has caused the upset.*" However, Mr Morton did not see the message until later than evening.

9. At 17:15 that day the claimant sent an e-mail to Mr Randall, as requested by him, with her account of what had happened (P.117/118).

7 October 2020

10. The claimant reported for work the next day. She went straight to Mr Morton's office at around 3pm. Mr Morton believed that she was inferring that she had been bullied by Mr Sutherland. However, when he gave evidence he accepted that she may only have said that he was "bullish".

11. We were faced with a conflict in the evidence which we heard about what was said at that meeting. By this time, Mr Morton had received a copy of the claimant's e-mail to Mr Randall and when she gave him her account she claimed that he was *"quite shocked"* and said, "*why didn't you just punch him*". She claimed that he was *"dismissive* "of her complaint . She also claimed that he asked her if she'd, " *overreacted because I was over sensitive having just had a baby"* and that this shocked her.

12. However, this was denied by Mr Morton. He said that the claimant was visibily upset and tearful and that she said to him, "*I'm not sure if I should be back. I had a baby four months ago"* and that in response he may have said to her, "*do you think that's making you overreact*", or words to that effect, and said he could offer her help if she required it. He also said that the claimant had told him that she didn't know if she would be coming back to work.

13. As we recorded above, Mr Morton presented as credible and reliable. His account was also consistent with a Note of his investigation which he prepared at the time (P.91/92). In our unanimous view, Mr Morton's account was to be preferred. His comments were misquoted by the claimant and taken out of context.

14. At around 3.30pm that day, Mr Sutherland came into Mr Morton's office, accompanied by a trade union representative to advise that he wished to make a formal complaint about the claimant and her behaviour the previous day.

15. In his Note, which he made at the time, Mr Morton recorded what was discussed. We were satisfied that this was reasonably accurate (P.91):-

"*At approx. 15.30 on the 7 October Hugh accompanied by a union representative (David Wright) came to my office to lodge a formal complaint about Diane and her behaviour on the previous evening. I asked Hugh to explain what his reason for the complaint was. Hugh then ran through the incident. Hugh's description of the situation was almost exactly the same as Diane's with no significant differences. I asked Hugh if he was prepared to discuss the incident again with Diane and hopefully resolve the problem. Hugh intimated he was and if a written statement withdrawing the suggestion of bullying was given he may drop the complaint. Significantly Hugh also had a pre-determined opinion of Diane and was keen to emphasise her past rumoured history. I arrived to my desk on the 8 Oct to a formal e-mail asking for this incident to go formal so assume no mutual resolution was reached.*"

16. In an e-mail that day , Mr Sutherland intimated that he wished "*to make a formal complaint regarding Ms Diane Mennie's behaviour*" (P84).

17. Mr Morton had suggested to both the claimant and Mr Sutherland that they should talk and endeavour to resolve the matter between themselves. They both seemed amenable to this. However, there was an impasse as Mr Sutherland wanted the bullying accusation withdrawn and the claimant wasn't prepared to remove the allegation of *"bullish behaviour".*

18. After Mr Morton had spoken with the claimant and Mr Sutherland, Chris Innes came into his office accompanied by a trade union representative. His account was in similar terms to the accounts which the claimant and Mr Sutherland had given to him. Mr Innes made no reference to anything that Mr Sutherland said which could be construed as bullying and he, "*was also clear that there was no foul language outside of normal 'shop floor' acceptability.*"

Claimant's grievance

19. On or about 12 October 2020, Mr Morton received a grievance letter, by e-mail, from the claimant in which she intimated that she wished to "*lodge a formal complaint about an engineer Hugh Sutherland, after an incident on Tuesday 6th October 2020*" (P.88/89).

Investigation

20. In response, Mr Morton obtained a written statement from Chris Innes (P.93/94). The following are excerpts:-

"*I was a bit confused by this as this seemed more or less just a simple disagreement over preferred methods to get the same job completed……...*

From my point of view the whole incident was over a very minor point which could have been over once Hugh had come down from the aircraft before I had heard anything. I was surprised Diane followed Hugh down to carry on the discussion and I was confused as to why it continued for as long as it did.

I personally don't believe there was any 'attitude' behind the way Hugh was speaking, just a desire to get on with the work.

And finally neither one at any point used any offensive/abusive language nor raised their voices at each other."

21. Mr Morton also obtained a written statement from Peter Randall (P.95/96). The following are excerpts:-

"*Listened to what Diane had to say, which appeared to have involved Hugh & a discussion with him on after flight responsibilities & timings & Hugh's take on these seemed to different* (sic) *on when and after flight & pre-flights should take place although at this point I hadn't spoken with Hugh. There was no mention of harsh words or any direct insults having taken place, only an attitude from Hugh which had, according to Diane caused the upset.*

Deemed it best that Diane went home as did not look to be in the best state to perform aircraft maintenance…….Hugh had a different take on what had taken place and pointed to the possibility that Diane may have been the instigator not of the conversation but the upset. Hugh pointed out that he had accepted Diane's stance on waiting to finish the after flight before starting the pre-flight & had gone down from the top of the aircraft to continue work elsewhere but on the same aircraft & that Diane had then come down also.

After having spoken to them both I found that the gist of the conversation between the two seemed to more or less tally. So no real difference in either account of what had been said to each other.

Later found out that Chris had witnessed most of what had been said between Diane & Hugh. I had a private conversation with Chris & his account backed up what Hugh had said about the possibility of Diane being the instigator by going down from the aircraft after Hugh had already done so & continuing the conversation.

It should be noted that neither Diane nor Hugh have worked together previously, Hugh having been in Shetland until fairly recently & Diane having just returned from the maternity leave."

Claimant's grievance hearing on 2 November 2020

22. Notes of the claimant's grievance meeting were produced (P.98-99). We were satisfied that they were reasonably accurate.

23. On 12 November, Mr Morton wrote to the claimant to advise her of the outcome of her grievance (P.100/101). The following are excerpts:-

"*It is my belief that what started as a discussion on how the task should be carried out appears to have quickly escalated to a strong difference of opinion.*

I did note that during your hearing you stated that whilst Mr Sutherland made the suggestion on how to carry out the task it was you who followed him to continue to confirm your position. You also confirmed that on a number of occasions you questioned his response rather than just carry out the task you were completing. This continued interaction appears to have resulted in you believing you were being manipulated and bullied.

After listening carefully to everything you said, I have reached the following conclusions:

Whilst there was clearly an altercation on the shop floor between you and Mr Sutherland and a strong difference of opinion, I can find no evidence to support that this event construed an act of bullying against you.

As a result of my findings I have proposed to take no further action on the allegation of bullying.

I do however believe the situation could have been handled differently by you in how you responded to the suggestions and comments made by Mr Sutherland. I would always encourage team members to express opinions and ideas freely and fairly and listen to what others have to say before expressing a viewpoint.

I would also suggest that we all need to be aware of our body language, our tone of voice, our demeanour and expression in all of our interactions at work. Colleagues tend to hear what is really being said through non-verbal communication in addition to listening to words.

In order to address the issue between yourself and Mr Sutherland, I recommend that you attend and actively participate in some coaching sessions. These sessions will better assist in addressing how you might have dealt with or any similar situation differently. The session may also help to resolve any potential ongoing issues. I will be arranging for Paul Dickens, our Clinical Psychologist, to make himself available to carry out these sessions and will be in contact to agree suitable dates and times. The sessions will be confidential between you and Paul Dickens."

24. Mr Dickens was someone who the respondent had used previously for coaching sessions and counselling.

25. Finally, Mr Morton advised the claimant of her right of appeal.

26. Mr Morton met the claimant and read out the letter to her. He sensed that the outcome was probably not what she wanted and that she wanted a finding against Mr Sutherland. He e-mailed a copy to her and also gave her a signed copy.

Hugh Sutherland's grievance

27. Mr Morton also conducted a grievance hearing with Mr Sutherland on 2 November and wrote to him with the outcome on 11 November. His letter was in almost identical terms to the outcome letter which he sent to the claimant (P.86/87).

Claimant's resignation

28. On 12 November 2020, the claimant sent an e-mail to Scott Walker and others to intimate her resignation. It was in the following terms (P.103):-

"*Dear all, I'd like to submit my resignation from today Thursday 12 November.*

I wish CHC and all staff the very best.

Regards

Diane."

29. Related correspondence was also produced (P.103/102). The claimant intimated that she was prepared to work her notice.

Appeal

30. Although she had resigned and was working her notice, by letter dated 15 November the claimant intimated that she wished to appeal against the outcome of her grievance (P.104).

Appeal hearing

31. The appeal was conducted by Scott Walker, the respondent's UK Maintenance Manager, another credible and reliable witness. Notes of the appeal hearing were produced (P.107/108). We were satisfied that they were reasonably accurate.

32. In her appeal letter the claimant had complained about the recommendation that she attend a Consultant Psychologist which she said was "*wholly unfounded, insulting, discriminative and very disrespectful to me as a person and as an employee.*" However, it was explained to her at the appeal hearing that: "*Paul Dickens was well known to the Company and its employees and had worked with CHC for a number of years in different capacities providing training, coaching and psychological assessment all of which he was qualified to do. It is quite common for coaches to have a clinical psychological*

background." We were satisfied that, as recorded in the Minutes, once that was explained to her, she accepted that she had, "*misinterpreted the content related to Paul and see that now.*" The claimant disputed that that was so. However, not only were we satisfied that the Minutes were reasonably accurate, we also had corroborative evidence from Scott Walker and Lesley Sim that this was accepted by the claimant. Although there had been a proposal that the claimant, and indeed also Mr Sutherland, be referred to Paul Dickens, a "Clinical Psychologist", it was not proposed that he be used in that capacity. He was only to be engaged in a coaching capacity. We were satisfied that that was explained to the claimant's satisfaction at the grievance appeal hearing.

33. The Minutes also recorded the following comments by the claimant (P.108):-

"*I felt I was being pressured to go against Company process – I did feel intimidated – my emotions may have been high coming back to work – I was then upset with the response letter which stated I could have handled the situation better but it comes back to a misunderstanding of what's going on. I read the report again and wondered if I had over-reacted due to just having a baby? At the time I was upset at the letter but I have lots of clarification that possibly didn't come across in the letter and being good to be able to discuss. Was starting to believe I had post-natal depression or was it something to do with me? Looking back over my 3 years with CHC apart from training on 189a/c I feel I have had nothing given to me in the form of courses – I have done some modules for B2 licence and asked for help to get on a course – I have seen other people go on a B2 course – feel I have given 110% - don't want to leave but felt I had no choice – don't know if it's an option to retract my resignation now.*"

Grievance appeal outcome

34. On 26 November, Mr Walker wrote to the claimant to advise her of the outcome of her appeal. His letter was in the following terms (P.109):-

"*Following the meeting that was held with you on 25 November 2020 to discuss your appeal against the outcome of your formal grievance, I am now writing to you to confirm the outcome.*
After listening carefully to everything you said, I have concluded that the findings of the original grievance hearing should be upheld. My reason for this conclusion is as follows:

There was no further evidence presented by you however we did clarify your understanding of what was provided to you during your appeal, in conjunction with the actions I took away to address potential back practice in the department which I believe now resolves concerns you had.

You have confirmed your acceptance to participate in coaching with Mr Paul Dickens and he will be in contact with you directly.

I hope that this now resolves the matter. Should you wish to appeal further, you may do so by setting out your grounds of appeal to me in writing within 5 days of receipt of this letter."

Claimant's request to retract her resignation

35. Mr Walker also sent an e-mail to the claimant on 30 November in response to her request to retract her resignation. It was in the following terms (P.110):-

"*I am writing to you in response to your recent request to rescind your written notification of termination of employment sent to the Company on 12 November 2020.*

Due to the uncertainty within both the Aviation and Oil & Gas industry and the continual need to manage our costs at this time I cannot accept your request.

The company would like to offer to maintain support with the previously discussed coaching sessions regardless of your employment status with CHC Helicopters Scotia.

I wish you every success in the future.

Take care."

Respondent's submissions

36. As the claimant was unrepresented and had no experience of Employment Tribunal proceedings, helpfully, the respondent's solicitor agreed to make her submissions first. She did so orally at the hearing and subsequently submitted her written submissions to the Tribunal. These are referred to for their terms.

37. She first made submissions with regard to the findings in fact. She submitted that the *"health and safety matters raised by the claimant were not relevant to the issues in the case".*

38. So far as the "relevant law" was concerned, she referred to the following cases:-

Western Excavating (ECC) Ltd v. Sharp [1978] Q.B.761;
Kaur v. Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978;
Cockram v. Air Products Plc [2014] ICR 1065;
Malik v. Bank of Credit & Commerce International SA [1998] AC20;
London Borough of Waltham Forest v. Omilaju [2004] EWCA Civ 1494;
Lyons v. DWP Job Centre Plus UKEAT/0348/13.

39. In ***Kaur***, the Court of Appeal listed five questions that should be asked by the Tribunal to determine whether an employee has been constructively dismissed. In her submissions, the respondent's solicitor addressed each of these questions.

"What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, their resignation?"

40. As far as this question was concerned, the respondent's solicitor referred to the answer which the claimant gave in response to the Employment Judge asking why she resigned: "*Because I just received a letter from my supervisor saying I was not in a fit mental state and had potential ongoing issues for a psychologist's referral added to the fact that he said I was over-sensitive after having a baby.*"

41. However, it was submitted that the outcome letter did not state this. The respondent's solicitor submitted that, "*the claimant resigned as a result of her misinterpretation of the outcome letter*".

"Have they affirmed the contract since that act?"

42. In answer to this question, the respondent's solicitor referred to the fact that the claimant submitted her e-mail resignation on 12 November 2020 and agreed to work her four weeks contractual notice until 10 December 2020; she declined an offer to take holidays during her notice period and chose to work instead, "*during which time she worked alongside Mr Morton, even though she claimed that the trust and confidence between them both had been compromised. She stated during cross-examination that this was so she could be paid out for her holidays.*"

43. Further, prior to the effective date of termination on 10 December 2020, the claimant requested that her resignation be retracted.

44. The respondent's solicitor submitted that the "principle" in ***Cockram*** that it may be possible to affirm a contract even after notice has been given should be applied to the present case. She submitted that "*by her actions*", the claimant "*affirmed her employment contract*".

"If not, was that act (or omission) by itself a repudiatory breach of contract?"

45. The respondent's solicitor submitted that if the Tribunal did not accept her submission that the claimant had affirmed the contract, this was the next question to be considered.

46. In this regard the respondent's solicitor referred to ***Malik***. She submitted that, "*Looked at objectively, as confirmed in* ***Malik***, *the respondent had not conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and employee.*"

47. Further, she submitted that even if there was a breach by the respondent that was not a repudiatory breach entitling the claimant to resign.

48. She referred to the procedures which Mr Morton followed on receipt of the grievances from the claimant and Mr Sutherland, the investigations he carried out and the individual grievance meetings which he conducted when the claimant was accompanied by a representative.

49. "*Mr Morton's comment to the claimant in the meeting on 7 October 2020 has been misquoted and taken out of context by the claimant.*" Mr Morton gave evidence that he said wording along the lines of "*Do you think that's making you over-react*" after the claimant, in tears, had said to him "*I don't know if I should be back only having just had a child 4 months ago*". Mr Morton was clearly trying to help the claimant and offered her help if she required it. The claimant confirmed that she did not raise this as an issue with HR, there is reference to it contained within any of the documentation exhibited. The claimant also confirmed that when Mr Morton said this to her, *"she did not think of it as an issue."*

50. Further, the suggestion of coaching sessions was contained not only in the grievance outcome letter which was sent to the claimant, but also in the grievance outcome letter which was sent to Mr Sutherland and there was *"clear evidence"* from Mr Morton and Ms Sim, "*that the intention of this wording was to relate to any ongoing issues between the claimant and Mr Sutherland.*"

51. Further, the respondent's Clinical Psychologist, "*was also well known to the respondent for providing a variety of services*". Ms Sim and Mr Walker also gave clear evidence that the claimant accepted during the appeal meeting on 25 November 2020 (P.107-108) that she "*misinterpreted the content of this letter and requested her job back*".

52. The respondent's solicitor submitted that this misinterpretation would not be enough to demonstrate that the respondent was in material breach of contract.

53. In support of her submission in this regard, she referred to ***London Borough of Waltham Forest*** and in particular Lord Justice Dyson at paragraph 22, that, "*an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective.*"

"**If not, was it nevertheless a part (applying the approach explained in *Omilaju) 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***"

54. The respondent's solicitor submitted that the claimant had not alleged that there was a continuing course of events for which the suggestion of coaching was a last straw. In any event, it was submitted there was no such continuing course of conduct which taken cumulatively entitled the claimant to resign.

"**Did the employee resign in response (or partly in response) to that breach?**

55. The respondent's solicitor submitted that the claimant:

"*Resigned as a result of a misinterpretation of her grievance outcome letter. The claimant did not resign in response to any breach by the respondent.*

The respondent submits that the claimant has failed to discharge the burden upon her to demonstrate that the respondent has, in any way, committed a repudiatory breach and consequently, there has been no dismissal. The claimant's claim for unfair constructive dismissal should therefore be dismissed."

Direct discrimination

56. The respondent's solicitor referred to the claimant's updated pleadings (P.27) and her assertion that, "*she has been directly discriminated against because the grievance procedure was not carried out correctly and the findings were biased due to the investigative thinking she had over-reacted due to being over sensitive having just had a baby. The claimant also alleges that she believes the investigator (Adrian Morton) stated in his written report that the 'potential ongoing issues' related to him thinking she was suffering from a mental impairment having had a baby i.e. post-natal depression.*"

57. The respondent's solicitor referred to the terms of s.18 of the Equality Act 2010 and the "protected period" as set out in s.18(6) of the 2010 Act which starts when a women's pregnancy begins and ends.

58. In support of her submissions in this regard she referred to ***Lyons*** and went on in her submissions to say this:-

"*We have heard evidence that the claimant was on maternity leave from either March or April 2020 and returned to the workplace on 5 October 2020 the events which the claimant alleges constitute direct discrimination took place after her return to work on 5 October 2020. The claimant's claim for direct discrimination relating to pregnancy under s.18 of the Equality Act 2010 must therefore fail and should be dismissed on the basis that the protected period had already ended.*"

Sex discrimination

59. Although this was not pled by the claimant a complaint of this nature was addressed by the respondent's solicitor in her submissions. She submitted, that, in any event, such a complaint would fail in terms of s.13(1) of the 2010 Act as, "*the claimant has failed to lead evidence to the Tribunal who her real or hypothetical comparator would be in her claim.*

Furthermore, the claimant alleges that she was the victim of direct discrimination because the grievance procedure was not carried out correctly

and the findings were biased due to the investigator thinking she over-reacted due to being over-sensitive having just had a baby.

It is submitted that the claimant has failed to specifically state in which way the grievance procedure was not carried out correctly and how this was related to her sex. We've heard clear evidence from Mr Morton regarding the grievance investigation and procedure that was carried out and the respondent invites the Tribunal to conclude that this was a reasonable process. Mr Morton also confirmed that both the claimant and Mr Sutherland were treated in a similar way during the process. The claimant states that she believed the reference to 'potential ongoing issues' relating to Mr Morton thinking she was suffering from a mental impairment having had a baby i.e. post-natal depression). However, Mr Morton has expressly denied this in his evidence. Mr Morton also gave evidence on the two outcome letters to the claimant and Mr Sutherland which clearly state exactly the same outcome and offering of coaching to resolve any 'potential ongoing issues' and the claimant also confirmed this to be the case during cross.

The claimant has clearly not been treated in any way less favourably than a man in similar circumstances.

It is submitted that the claimant has not therefore established a prima facie case and that the claimant's claim for direct discrimination should be dismissed in its entirety."

Claimant's submissions

60. The claimant submitted that the grievance which she raised, "*was to highlight a maintenance and safety issue*".

61. She submitted that Mr Morton failed to investigate her complaint properly and, "*focused on my mental health".*

62. She submitted that it was unfair of Mr Morton to suggest "*coaching sessions*" by Paul Dickens, a Clinical Psychologist, in his outcome letter and to say that this, "*may also help to resolve any potential ongoing issues*" (P.101); this suggested that there were other issues which he felt required to be dealt with by the *"Company Psychologist".* She denied that she had said, at the meeting on 27 November, that she "*misinterpreted*" what was being proposed by way of a referral to Mr Dickens (P.107).

63. She also referred to Mr Morton's comment when he spoke to her on 7 October that she had perhaps over-reacted due to being over-sensitive because she had just had a baby.

64. She said that she was unaware at the time that Mr Sutherland's grievance had been treated the same way and that he had received an outcome letter in identical terms to the one which she received (P.86/87).

65. She said that she "*loved her job*" and that she was a "*good engineer*". She thought that she was assisting the respondent by advising them of the concerns she had.

66. When asked why she had tried to retract her resignation, she explained that she had been "*assured that CHC would get it sorted*".

67. So far as her ability to work with Mr Sutherland during her notice period was concerned, she explained that she had "*no option*" and that, "*an apology goes a long way*". However, when she received the outcome of her appeal from Scott Walker she realised that, "*nothing was going to change*".

Discussion and decision

Constructive unfair dismissal

68. Having resigned, it was for the claimant to establish that she had been constructively dismissed. This meant that under the terms of s.95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act") she had to show that she terminated her contract of employment (with or without notice) in circumstances such that she was entitled to do so without notice by reason of her employer's conduct. It is well established that means that the employee is required to show that the employer is guilty of conduct which is a fundamental 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. The employee, in those circumstances, is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him or her to leave at once.

69. The correct approach to determining whether or not there has been a constructive dismissal was discussed in ***Western Excavating***, the well-known Court of Appeal case, to which we were referred. According to Lord Denning, in order for an employee to be able to establish constructive dismissal four conditions must be met:-

> "*(1) there must be a breach of contract by an employer. This may be either an actual breach or an anticipatory breach;*
> *(2) that breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous interpretation of the contract by an employer will not be capable of constituting a repudiation in law;*
> *(3) he must leave in response to the breach and not for some other unconnected reason; and*
> *(4) he must not delay too long in terminating the contract in response to the employer's breach otherwise he will be deemed to have waived the breach and agreed to vary the contract.*"

70. Accordingly, whether an employee is "entitled" to terminate his or her contract of employment "*without notice by reason of the employer's conduct*" and claim constructive dismissal, must be determined in accordance with the law of contract. It is not enough to establish that the employer acted unreasonably. The reasonableness, or otherwise, of the employer's conduct is relevant but the extent of any unreasonableness has to be weighed and addressed and the Tribunal must bear in mind that the test is whether the employer is guilty of a breach which goes to the root of the contract, or shows that the employer no longer intends to be bound by one or more of its terms.

71. So far as the present case was concerned, we were also mindful that there is implied into all contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. Browne-Wilkinson J

in ***Woods v. W M Car Services (Peterborough) Limited*** [1982] IRLR 666 described how a breach of this implied term might arise: "*to constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contracts: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.*"

72. Further, in ***Malik***, Lord Steyn stated that in assessing whether or not there has been a breach of the implied obligation of mutual trust and confidence it is the impact of the employer's behaviour on the employee that is significant - not the intentions of the employer. Moreover, the impact on the employee must be assessed objectively.

73. When we considered the authorities, we recognised that a wide range of behaviour by employers can give rise to a fundamental breach of the implied term of mutual trust and confidence. However, the breach has to be "*repudiatory*" in order for a claimant to rely upon it. Therefore, serious misconduct is required from the employer. This was emphasised by the EAT in ***Frenkel Topping v. King*** EAT/01606/15.

Present case

74. As we recorded above, we preferred the respondent's evidence and made certain material findings in fact in their favour where there was a conflict in evidence. We did not find in fact that when Mr Morton met the claimant on 7 October he made the comments she alleged in relation to her "mental state" when she returned from maternity leave. He carried out a comprehensive investigation of the claimant's grievance and his outcome, based on the information which he had obtained, was a perfectly reasonable one. Moreover, it was significant, that Mr Sutherland was treated in exactly the same way and like the claimant it was suggested to him that he would benefit from counselling sessions with Paul Dickens. It was an over-reaction and

unjustified, on the part of the claimant, to think that the reference to Mr Dickens reflected adversely on the state of her mental health. In any event, we found in fact that at the grievance appeal hearing she accepted she had "misinterpreted" what was being proposed (P.107).

75. We were also satisfied that the appeal which Mr Walker carried out was comprehensive and fair.

76. We found favour, therefore, with the submissions by the respondent's solicitor that there was no breach of contract on the part of the respondent, let alone a fundamental breach.

77. We also found support for our unanimous decision when we considered the five questions suggested by the Court of Appeal in ***Kaur***.

78. Further, it was surprising in the light of the claimant's allegations about the respondent's conduct and how this had impacted upon her, that she would seek to retract her resignation. That did not suggest to us that the respondent had acted in such a way that the claimant could, *"not be expected to put up with it" (**Woods***).

Affirmation

79. It was also surprising that not only was the claimant prepared to work her notice but she did so knowing she was likely to come into contact and possibly work with Mr Sutherland again.

80. On the basis of ***Cockram***, had we been required to do so, we would also have decided that the claimant had affirmed any breach of contract on the part of the respondent. The submissions by the respondent's solicitor in this regard were well-founded.

81. Further, we wish to record, for the avoidance of any doubt that the "health and safety issues" which were alleged by the claimant were not issues in the case. However, it was clear that the claimant's allegations had been considered by the respondent. They decided they were without foundation. They had no safety concerns.

82. We arrived at the unanimous view, therefore, and we are bound to say without a great deal of difficulty, that there was no breach of contract on the part of the respondent, let alone a fundamental breach, which entitled the claimant to resign.

83. Accordingly, the claimant was not constructively dismissed. The claimant failed to discharge the onus on her in this regard.

84. We were also satisfied, with reference to s.98(4) of the Employment Rights Act 1996, that the claimant's dismissal was fair.

Pregnancy/maternity discrimination

85. It also follows from our findings in fact and conclusions in relation to the unfair dismissal complaint, that the claimant was not directly discriminated against on the ground of her protected characteristic of pregnancy/maternity. Mr Morton did not make the comments which the claimant alleged. He was misquoted. Nor could it possibly be construed from Mr Morton that he considered that the claimant was suffering from a mental impairment.

86. There was no evidence to suggest that the claimant's pregnancy/maternity was in any way a factor in the manner in which the respondent treated the claimant and addressed her grievance. She was not treated unfavourably because she had been pregnant and on maternity leave.

87. Further, and in any event, we also found favour with the submission by the respondent's solicitor that the complaint of direct discrimination relating to maternity/pregnancy under s.18 of the 2010 Act, was not well founded as "*the protected period had already ended*"; her allegations related to events which occurred after her return to work on 5 October 2020.

Sex discrimination

88. Although this was not pled, for the sake of completeness, we record that we also found favour with the submissions by the respondent's solicitor in this regard. There was no evidence to suggest that the claimant had been treated less favourably than a man would have been in similar circumstances. Mr Sutherland was treated exactly the same way. The claimant failed to establish a *prima facie* case which would have had the effect of transferring the burden of proof to the respondent.

89. For all these reasons, therefore, the Tribunal is of the unanimous view that the claim should be dismissed.

Employment Judge	**Judge N M Hosie**
Dated	**14 October 2021**
Date sent to parties	**14 October 2021**