EMPLOYMENT TRIBUNALS

Claimant: Mrs E Garwell

Respondents: 1. Hull City Council
2. Hull Culture and Leisure Limited

HELD AT: Hull **ON:** 3 & 4 April 2017

BEFORE: Employment Judge Tom Ryan

Appearances:
Claimant: In person
Respondents: Mr I Miller, Solicitor

JUDGMENT

The claim of unfair dismissal is not well-founded and the proceedings are dismissed.

REASONS

1. By a claim presented to the Tribunal on 16 October 2016 Mrs Emma Garwell, (formerly Miss Emma Wilson), brought a complaint of constructive unfair dismissal against her former employer, Hull Culture and Leisure Limited. The claim was resisted.

2. The claimant's employment had in fact transferred from the City Council to that company on 1 April 2015 when Hull Culture and Leisure took over that part of the undertaking of the City Council in which the claimant had previously been engaged.

3. Some of the allegations that the claimant relies upon in mounting her claim of constructive unfair dismissal arise from the time when she was employed by Hull City Council. It is accepted for the respondents by Mr Miller that because of the provisions of TUPE if there were earlier relevant matters comprising a breach of contract that is operative in this case then, as a matter of law, the liability for those

would transfer across and the claimant is not debarred from relying upon them if they are relevant.

4. In essence, the claimant's case is that there was a series of acts which are listed first in a letter that followed about a month after her resignation on 26 July 2016 and which, in an amended form, comprised her witness statement in these proceedings. She says these acts amount in the round to a breach of the fundamental implied term of trust and confidence thus entitling her to resign, as she did on 15 June 2016, and says that by reason of that she was dismissed.

5. The respondent disputes that there was any breach of contract by them (or the Council). Alternatively it says that any such breaches as occurred some time ago had been waived and the contract affirmed. The respondents do not, were I to find there was a dismissal of the claimant, assert that it was potentially fair. Thus the success or otherwise of the unfair dismissal claim turns simply upon the question of whether she was dismissed or not. If she was dismissed then under section 98 of the Employment Rights Act 1996 the burden passes to the employer to show a potentially fair reason, and if they do not begin to do that I must find the dismissal was unfair.

Evidence

6. In deciding this case I heard evidence from the claimant herself. The respondent called: Jacqui Blesic, formerly an HR officer with the City Council; Adam McArthur, an assistant manager for the City Council in their Streetscene department, and three witnesses from Hull Culture and Leisure, ("HCAL"), Alison Walker, director of leisure services, her report Stewart Kenny, the area manager and Richard Spencer, the claimant's line manager, from about the middle of 2013.

7. I read the statements from all those witnesses. I have seen a large bundle of documents, much of which contains extracts from the claimant's work diary which she appears to have kept conscientiously over a period of several years, and some mobile phone follows a I was tomorrow has been an email round records of the phones of her and Mr Spencer (these are phones provided by the employer). In closing submissions, which were made orally by both parties, I was handed copies of two cases by Mr Miller: **London Borough of Waltham Forest v Omilaju** [2004] EWCA Civ 1493 and **Vairea v Reed Business Information Limited** UKEAT/0177/15.

Findings of Fact

8. I make the following findings of fact in relation to each of the identified issues. The claimant had helpfully in her witness statement set them out under the various headings.

9. The first allegation, on page 1 of her witness statement, headed "Richard Brown And Wildlife On The Park", was that shortly after she was relocated to Pearson Park,in April 2012 when the Victorian Conservatory in that Park, having been closed, re-opened, she noted that there was a sign of blue/green algae in the pond outside which would explain the deaths and illness of wildlife. Apparently she raised this issue with Mr Brown. According to her he did not like her doing so and insisted, and this is the allegation on which she relies, that she was not allowed to

speak to other staff or to leave the building where she worked or assist with injured wildlife on the Park.

10. The claimant's job was to care for the reptiles and fish in the Victorian Conservatory rather than with the wildlife, but she thought it would be inconsistent that part of her job as a wildlife ranger would not be to care for injured wildlife she came across it in the Park and to do so would provide a safe environment for members of the public.

11. According to the claimant when she raised this with Mr Brown, whether she should just walk past injured or dead animals he responded by saying "Yes". She said that she felt to reluctant to carry out her duties concerning the Park wildlife for fear of attracting unwanted attention. She pointed out that she had no choice but to leave the building at times, not least because there were no toilet facilities in the conservatory and she had to walk across the Park. She said she was worried to do this after Mr Brown's visit "as he told me I couldn't leave the building".

12. In cross examination a number of matters are put to Mr Miller which showed quite clearly from the claimant's own diary that whatever she said in July 2016 she clearly was prepared to walk across the Park, and whilst there was no direct evidence from the respondent, Mr Brown not having been called as a witness, as to what was said, the claimant's answer to the fact that she recorded these matters in her diary was that Richard Brown would not have read it. Whilst it might be the case that he would not have done, the fact is that she was keeping a diary as part of her work duties and her employers had access to it if they wished, and indeed they found it in her locker after she resigned.

13. The context of this is that the claimant had previously worked at East Park and perceived that she was not liked by Mr Brown and others because of a dispute that she had had with a former colleague, Kevin Abbott. That dispute was mediated and apparently resolved, and then Mr Abbott then left for unconnected reasons. Notwithstanding that the claimant perceived that other members of staff held some sort of grudge against her, believing that somehow her dispute with Mr Abbott was part of the reason for his leaving.

14. Be that as it may. The respondents' case was that the diary showed that the claimant did all the things that she was allegedly forbidden to do. There is no mention of blue/green algae in the diary at the time and yet according to her evidence the claimant had spoken to a colleague about it.

15. In my judgment on the balance of probability the facts simply are not established. I do not accept as a matter of common sense and decency that Mr Brown would even purport to prevent someone leaving the building in order to use the lavatory in another building. To do so would be outrageous.

16. The claimant is a thorough diary keeper and maintained a very full record of work and associated tasks. I think it is unlikely if there had been a blue/green algae problem that that would not have been recorded. Those matters cause me to conclude that the account that she gives about that is not reliable and I find that it is not made out on its facts.

17. The second allegation concerns what is headed as “Communication with Mairtin Coss and Richard Brown”. This concerned the claimant not having a mobile phone. She alleged all other aviary staff used their own personal mobile phones to sign on/sign off and generally communicate with a supervisor. As the claimant did not have a mobile phone at the time and was unable to do this the claimant was provided with a two-way radio.

18. The claimant's evidence was that the radio which she tried to use to sign on and sign off at the end of the shift was ineffective because the distance between herself at Pearson Park and Mr Brown and East Park was too great. However she found on Pearson Park another member of staff, a park ranger Mr Duffy-Howard, who offered to lend her a spare mobile phone, known as a “Mobex”, when it was not in use.

19. Shortly after this the claimant made a diary entry saying that she had now got a new mobile phone, and indeed she says in her evidence that she obtained a Mobex for reasons of personal safety as well as general communication requirements. The 16 May 2012 entry refers to the new Mobex. The claimant appears to have started on 5 April 2012, and the claimant accepted that she had the loan of the Mobex from Mr Duffy-Howard for a couple of weeks before that. It seemed to me that I should consider the allegation on the basis that the claimant was not provided with a Mobex for a few weeks after she started at Pearson Park.

20. The claimant was not a lone worker in the sense that one would recognise that. This is a point that she raises over and again. There were times undoubtedly when she was alone in the sense that very early in the morning there might not have been in the first 15-30 minutes anybody else on the Park. According to the evidence it is quite a big park, about half a mile long, generally oval in shape, and the claimant's place of work was the conservatory which was at one end of the Park. There will certainly have been times, I am satisfied, when the claimant was alone in the sense that there was nobody working in the building with her and there would be nobody within what one might call “hailing distance”, but that would not be continuous throughout the day. I deal later with an allegation that at the weekends she was not able to summon help until 11.00am, even by Mobex phone.

21. Notwithstanding that, I notice that the claimant does not appear to have ever raised a formal concern with her employer. Local Authorities and organisations that they use to undertake part of their work and responsibilities to the public generally recognise they have a duty of care to people who work alone. The hearing bundle contained a lone worker policy of the Hull City Council. The claimant did not raise this issue with her employer, and neither was there any contemporaneous evidence that the claimant felt that this was a matter in respect of which she was vulnerable. Indeed in her submissions she said that on the Park she had had to deal with drunks, drug users, misbehaviour of various kinds including what she says were assaults upon her, and none of that featured in her witness statements. There is no evidence that the claimant reported concerns about lone working.

22. For that reason I am not satisfied on balance that she did have such concern for her personal safety or her jeopardy as she says. Neither am I satisfied that the failure to provide a Mobex in those first few weeks, even looking at it at the time whilst it might have been unwise, was of itself in those circumstances anything that could be classified as contributing to a breach of the implied term of trust and

confidence. Had it continued for month after month and had complaints from the claimant gone unheeded it might be a very different matter but that was not the evidence.

23. The third issue is that of personal protective equipment. The claimant's case is that in 2011, 2012 and 2013 she was not provided with safety footwear annually as other employees were and she had to buy her own. Buying her own equipment and other matters is a topic that runs through this case. Her case is that when he questioned management the reply was that the funds that run out. It does not seem to be suggested by the claimant that this was a common problem with workers doing the sort of work she did. It seems to be unlikely that it would have been somebody singled out, but even if that were right it is clear that from 2013 when Mr Spencer took over as line manager the claimant accepted that she was provided with footwear on an annual basis. If there was a breach the claimant continued employment after it was remedied. The suggestion that any such breach might have had been waived is supported by the evidence.

24. A major concern for the claimant was the next issue which she describes as "Removal of Birds". This conservatory had originally contained an aviary. However, shortly before the claimant went in it had been closed down for a period of 12 months for renovation. It re-opened, as the claimant recorded, on Good Friday, 6 April 2012. The claimant had not worked there before then. She said that the number of animals she had to care for had been cut by more than half prior to the renovation work. She was left with fish tanks and some lizards, and indeed as history later recalls some iguana, and she therefore said that this caused her daily duties to be diluted greatly.

25. The claimant said that she learned that the lack of the decision of a birds was due to the decision of a local councillor, John Fareham, and his personal dislike for them. He was apparently on the Pearson Park committee and went on in 2015 to be appointed as Director of Hull Culture and Leisure Limited. She said that complaints flooded in from the public regarding the missing birds in the aviaries.

26. In 2013 an opportunity presented itself to reintroduce birds back. The documents (539 and 562) show that on 12 and 13 October the claimant records concrete being removed around the aviary and similar activity on 14 October. On 16 October she records that the birds were introduced.

27. On 24 October (549) it does not appear that the claimant was at work for the day or the whole day because another member of staff, Hayley, has completed the diary. There is a reference on that day to the aviary being swept and clearly there are references in the intervening period to the aviary being maintained and I think on some occasions the birds being fed. Hayley appears to have recorded that Jackie Tyson and Simon visited to discuss the plans to remove the aviary and she has put an "un-smiley face" next to that. It is common ground that at the bottom of that page the claimant has put with her typical asterisk-shaped bullet an entry that she made against that same day concerning pest control. Whether she was in that day or not the claimant accepted that it was unlikely that she would not have looked back over the notes to see what had happened and, if she had done so, she would have seen the note about the aviary. What is clear is that she filled in the record for the following day when she was clearly working there alone, Friday 25 October 2013, and she has recorded in her own hand, "Men here to discuss removal of aviary" and

then she dealt with other matters, so quite clearly whatever was done or proposed, the claimant was aware of the proposal.

28. The records show that the birds remained there until 8 November when the entry (562) recorded in the claimant's own hand as “Birds removed from aviary - taken to east”. It is common ground that is a reference to the East Park, where apparently there are birds kept as well.

29. The claimant’s case was that this was evidence of her wildlife ranger role being gradually and systematically eroded. It is important to consider this allegation in context. The claimant started at Pearson Park on 5 April 2012. She remained there for just over four years. In that period, for about three weeks, birds had been reintroduced and were then removed. Her evidence is that she tried tirelessly to change the mind of Steve Simms, the manager, about removing the birds. She complains that a number of birds died as a result of them being moved from the conservatory. She said the aviaries remained empty for several months thereafter and she was forced to deal with constant complaints from the public.

30. I have little doubt that the public if they had wanted to see birds there might well have complained and, if they complained to her, the claimant would have had to handle that. Dealing with visitors to the conservatory was an inevitable part of her job. The claimant may have believed that there was some systematic erosion of her work. If there was such erosion it occurred extremely slowly because the evidence was that the work was there at the time the claimant resigned and remains there still, although it is being covered by somebody from another Park.

31. The claimant may have believed that, as I say, but the evidence of deliberate erosion or systematic erosion by others is simply absent.

32. There then followed what in my judgment is probably the most serious allegation that was made. It is described as the “Anonymous Prostitution Claim”.

33. The matter arose in this way. On 29 May 2014 Councillor Fareham wrote to the Chief Executive, a letter set out at pages 91 and 92. It was forwarding to the Chief Executive a letter to Councillor Fareham giving his full title and honours or qualification, apparently sent to the Chief Executive as well. It is an anonymous letter apparently from someone who said they were known to the councillor, describing Pearson Park as having an unsavoury reputation for sexual activities during the night time. It suggested that one of the council’s employees was using the conservatory to ply her trade as a prostitute, and then named the claimant. The letter contains extracts from the claimant's Facebook page which do not support the allegation. It also contained of four sexually explicit photographs which are described as “from her various internet advertising”.

34. This anonymous allegation was as foul as it was untrue. It was passed to Ms Blesic, who was the City HR Manager, within a few days, and eventually Ms Blesic required the claimant to attend an investigatory meeting on 17 June. The meeting resulted, according to Ms Blesic’s evidence which I accept, in a finding that there was simply no basis for the allegations. The photographs that were attached to the anonymous letter were clearly not of the claimant and the allegation was rejected out of hand by Ms Blesic and taken no further. Even so, I do not for a moment

underestimate the distress that this letter and its aftermath must have had upon the claimant.

35. The claimant's primary complaint was first of all she was not told what the meeting was about. That apparently led to a situation where either the claimant hung up the phone or Ms Blesic, as she suggested in evidence, hung up the phone on the claimant because the claimant was speaking over her and not allowing her to respond. What was happening in my view was that the claimant was asking to be told what the meeting was to be about and Ms Blesic was saying that she could not tell her.

36. In evidence, and I think probably for the first time, the claimant accepted that the City Council, her employers at the time, would have no idea whether the allegations were true or false. They came in particularly unpleasant terms by way of an anonymous letter which is always a troubling feature. But just because a letter is anonymous does not always mean it is false, although one might think that generally they are.

37. In the course of her evidence the claimant accepted that she realised that if the allegations were true and they were notified in advance of an investigation meeting, it might lead to an employee who had been guilty of some form of misconduct, seeking to exculpate herself improperly.

38. Had it been the case that this was a disciplinary meeting and the claimant was not being told about it that would be a very different matter. But this was an initial investigatory meeting and the claimant recognised the reasonableness in those circumstances of Ms Blesic not actually saying what the meeting was about until it took place. Nonetheless she said, and I have no doubt this is true, not knowing what the allegation was could cause her a degree of worry and stress.

39. The claimant in her witness statement says that Ms Blesic effectively was biased against her and had made an assumption there was truth in the allegation and was described as handling the situation unprofessionally, but the claimant did not pursue that at the end of the day. Her allegation by the end of the case was really to do with the telephone call.

40. I am going to assume, in the claimant’s favour but for the sake of argument, that Ms Blesic did hang the phone up. I am satisfied on balance that if that occurred it was probably because the conversation had become heated. The claimant’s case is that she was never informed of the outcome of this. Clearly the matter went no further. The claimant is not unintelligent. She realised it was not going any further. She accepted that it was appropriate for the employer not to tell anybody else about it to maintain her confidentiality when such an unsavoury allegation was being made, although the claimant did tell, by then I think, her line manager, Mr Spencer, because she thought he ought to know because of her own personal situation.

41. It was obviously a highly unpleasant meeting to have to attend and I can well understand the claimant's concern about it. In my judgment nothing that Ms Blesic did could even begin to amount to an act contributing to a breach of the implied term.

42. Ms Blesic clearly had a proper role to play in investigating it. She believed she had written to the claimant advising her of the outcome but the letter was not

produced to me. Even if a letter were not sent and even on the basis that Ms Blesic hung up the phone, I would not come to a different conclusion.

43. The next allegation is headed “Animal Welfare”. The claimant alleges that on numerous occasions she was not provided with essential equipment or food required for the animals in her care. She said for four years from 2012 she had been forced to spend hundreds of pounds of her own money to buy food, medical supplies and heating/lighting equipment in order to ensure health for the animals. The claimant would request them, she said, from her supervisor via telephone, “but because staffing levels were a problem, Mr Spencer was off work because of ill health, no-one was able to visit me and bring the supplies I needed”. She said for that reason she felt it was like the role was being diminished and the attitude of management was that it did not matter if a couple of lizards or fish died.

44. The claimant's evidence about this rather undermined the way in which she put the allegation. She said to me in the course of evidence on the first day of the hearing that she regularly had to buy medicines for the fish. There is no doubt that the staff had access to vets to provide medicines if it were necessary. When she was asked to explain she said she said, “I had to buy some iodine off the internet, five or six bottles at £7 or £8 a time because George the iguana kept rubbing his face upon the bars and hurting his chin” and it was to treat that.

45. On another occasion she said she spent £120 on perspex because although she had requested it, Councillor Fareham did not like the perspex and she had to put it in place because the perspex prevented George from injuring himself on the bars or the metal.

46. She said that she spent £90 buying rope for the iguanas to climb on. On another occasion she said she bought ultraviolet strip lights which were available from Hull Pets and Gardens for £15 or £16 a time.

47. Mr Spencer’s case was that from time to time the organisation had credit notes from Hull Pets and Gardens because they sometimes bred snakes in the Council or HCAL aviaries and vivaria and sold them to pet suppliers in return for credit notes against goods.

48. The claimant’s evidence was that being a relatively modestly paid employee she spent several hundred pounds of her own money over a period of time.

49. One point that puzzled me was that one of the suppliers to which the claimant did have access and with whom her employer had an account was a specialist supplier for buying equipment and food for reptiles and fish. The claimant said this supplier did stock ultraviolet strip lights. I found it difficult to understand why the claimant simply could not have ordered those from the regular supplier rather than having to buy them herself.

50. What is clear is the claimant never made any claim for reimbursement, neither for that nor for other smaller matters like sellotape, cling film or beef or extra fruit when there was not enough for the week provided with the regular Friday delivery.

51. It seemed to me that that is simply implausible. Whilst I have no doubt that the claimant was deeply committed to the welfare of the animals, and that is highly to be

commended, I am simply not satisfied that the claimant has made out on the facts that this expenditure without agreement for reimbursement occurred.

52. The next allegation concerned an employee at the City Council, Ms Carr. Ms Carr, (with whom Mr McArthur was expected to deal when it was raised with him) may have had some health problems. I record it in that way because I have no real information as to precisely what was wrong. Ms Carr had worked at previous sites. According to Mr McArthur she did have some slightly challenging behaviour but only in terms of being assertive towards her managers. Mr McArthur had spoken to her once in the past about this on an informal basis.

53. When the site to which Ms Carr was allocated was shut down, she needed to be relocated to a different place of work. Because of her behaviour it was decided that since Mr Simpson who managed her previous site also managed Pearson Park it would be beneficial for Ms Carr to be moved there. At this stage according to Mr McArthur, and his was the only evidence which I had on this, there was no difficulty between Ms Carr and her colleagues. What she had difficulty with was changes to her routine. It also appears according to Mr McArthur that part of the difficulty may have been that Ms Carr felt with some justification she was a woman working in a predominantly male environment.

54. However, there was, in those circumstances, no reason as far as the City Council was concerned not to locate Ms Carr at Pearson Park where the claimant worked at the time. That relocation took place in May 2014 and, at that stage, the claimant and Ms Carr were both still employed by Hull City Council.

55. According to the claimant's witness statement it became clear in the months that followed that Ms Carr had serious health issues. She confided in the claimant regularly, and mentioned she had been on sick leave for six months and told her the reason for that and about some treatment. Describing her as being short-tempered with anger management problems the claimant said she never knew what to expect from one day to the next. The claimant said, "Ms Carr would burst into the building and start shouting and swearing at me because she was having a bad day", and according to the claimant she regularly behaved like that in front of members of the public. She said that she was later told by Ms Carr's previous colleagues and the charge hand, Mr Copley, that the management had deliberately placed her on Pearson Park to isolate her from others. I do not accept that evidence without more. The claimant's belief was that management purposely placed Ms Carr with her in the hope that it would make her [the claimant] wish to leave her role.

56. For a year it appears that nothing particularly untoward happened, notwithstanding what is said in the claimant's witness statement.

57. On 1 April 2015 an incident happened. Ms Carr became aggressive and threatening. There was a dispute about a table. She picked the table up and threw it towards the claimant although did not hit her. Ms Carr attempted to block the claimant's path back into the storage unit and swore and shouted obscenities at her. She then snatched a large set of keys out of the claimant's hand and threw them through the main building and narrowly missed a small child.

58. The claimant removed herself from the situation immediately and contacted supervisors, but according to the claimant she could not find who the relevant

supervisor was and she finally was told to ring Cliff Reddin, a Personal Development Officer, who gave her advice and according to the claimant she spent an hour waiting to be told she could go back into the building and resume normal activities.

59. There was then an investigation. The claimant was interviewed. Ms Carr had been removed from the workplace and Mr Railton, another gardener, had been put there temporarily. The claimant said she spent several months feeling worried after hearing rumours from Sarah's colleagues that management were going to put her back in the conservatory. She said she was not formally told what had happened at the investigation and then only learned the following year that in fact Ms Carr had resigned.

60. The account in the witness statement is not borne out by the contents of the claimant's interview. Julie Dowd interviewed her over this. Mr Spencer, the claimant's manager, was there and a note taker, some 10 or 11 days after the incident when it is likely the matters would have been fresher in Mrs Garwell's mind.

61. The claimant described their working relationship as reasonable. She said that she sometimes came into contact with Ms Carr up to 13 times a day depending on Ms Carr's mood. She said that when in a good mood Ms Carr would get on with work distressed would come and find her to talk about it. If Ms Carr was unhappy she would find a member of staff to vent her feelings at.

62. When she was asked after the description of the specific incident whether there was anything else she would like to add, she said there had been a few incidents in the past with Sarah where she has "reacted over the top to something that's not an issue. I have tried to avoid situations since May 2014 when she first came to Pearson Park. When I [I suspect that this is a miss recording of "she"] first came to Pearson Park I was just trying to establish something about the hot house plant and she just kicked off. Sarah was shouting and swearing. This lasted maybe ten minutes and then I walked away from it. There was another incident outside about the lockup, she was shouting and screaming." The claimant said, "On another occasion she shouted at me and told me to get off my fucking phone and deal with an incident with a goose in the park. When I went outside there was no issue with the goose."

63. When the claimant was asked whether this would become more frequent she said, "No, less, because I've got good at reading her when she is likely to kick off, and by not responding in any way".

64. In my judgment that is a significantly different picture from that painted in the witness statement.

65. As to the incident itself, there is generally consistency about what occurred and no point is taken on that. Ms Carr faced disciplinary proceedings and was given a final written warning and then resigned.

66. However, what is interesting is what the claimant says in her interview about how she reported the matter, and she it is recorded that she said this: "I removed myself from the building. I didn't really feel safe. I contacted my supervisor, Cliff Reddin, and he told me to stay where I was until he came". She did not mention there about feeling unsafe because she could not get supervisory help. I find that the

allegation that the respondent have acted in any way improperly over that is simply not made out on its facts.

67. Turning then to whether the claimant was notified about it, Mr Spencer gave evidence in his witness statement that he did inform the claimant that Ms Carr was never going to return to Pearson Park, and he was not challenged on that and I have no reason to not accept it.

68. What is also significant about all the matters that occurred prior to that, in my judgment, is that the claimant indicated to me in final submissions that she decided to continue when her employment could have transferred, as it did, to HCAL, but she might have objected and stayed with the City Council, albeit she may have had to find another role, because of her love for animals. To my mind that is highly significant in terms of whether, any earlier acts said to comprise a breach of the implied term can be said to have been waived.

69. The later allegations concern communications with supervisors and supervisory cover. The claimant's case was that from five consecutive weeks in April/May 2016 shortly before she resigned she was unable to make contact with her supervisor.

70. The mobile phone records show there were numerous recorded attempts of the claimant reporting in either to Mr Spencer or to other managers. I accept that there would be some times when Mr Spencer might not be in work, such as on a weekend or a Bank Holiday, but the suggestion that the claimant makes for a five week period all of her phone calls were ignored and all text messages were not responded to is not made out.

71. In one particular week in early June the claimant was questioning Mr Spencer about that period. It was clear from the claimant's own mobile phone records of that period that she was not reporting into Mr Spencer on each of those days but for three or four of the days that she referred toshe was reporting in to another manager. Mr Spencer was unable to identify the identity of the phone number when it was put to him in questioning. The claimant's suggestion that because of this, Mr Spencer allegedly being elusive, the welfare of animals was at risk was simply not established on the evidence. The claimant did not give any detail of that assertion.

72. Finally, in terms of supervision, the claimant alleged that supervisory cover was that she no knowledge of who was supervising her on any given day, and that Mr Spencer never informed the claimant who she should contact in his absence. The reality is that according to Mr Spencer in his evidence, and I accept it, the Mobex phones were programmed with the relevant supervisors' numbers and although the claimant may not have known the name that attached to each phone number I am satisfied that she had access to supervisors.

73. I reject the claimant's evidence that at the weekend the East Park supervisors did not start their shifts until 11.00am, 3½ hours after her shift had already started on Pearson Park. Mr Spencer accepted that there may be half hour period in the morning before there was as supervisor at Pearson Park but he said essentially they operated seasonally, in the summer dawn to dusk, and there would certainly be supervisors who had started their shifts well before 11.00am. I prefer his evidence to that of the claimant.

74. The next allegation concerned Mr Railton who was the gardener who replaced Ms Carr at Pearson Park in May 2015.

75. On 18 May 2016 after about a year of working together, with some difficulties according to the claimant, there was an altercation in the staffroom. As a result the matter was reported to Mr Spencer over the telephone by Mr Railton. Mr Kenny, Mr Spencer's manager, came to visit the site to establish what the problem was. The claimant was upset and left the building. Later that morning they visited and she explained to them the problems she had been having with Mr Railton in recent months and what had happened. There were issues that needed to be resolved and they were going to arrange a meeting with HCAL and the City Council management, because Mr Railton was a City Council employee, and apparently both Mr Railton and the claimant agreed to have a meeting. The claimant said a number of weeks passed and no meeting was arranged. There was an uncomfortable atmosphere and no communication. This was a period of 3½ weeks before the claimant resigned.

76. It does not seem to me that a delay of that order, though undesirable, could be said of itself to amount to an act tending to undermine or destroy the duty of trust and confidence.

77. For some time the future of the Park and the conservatory had been an issue. There was clearly lottery funding (Heritage lottery funds) being sought by HCAL. There was a public consultation event about the future of the Park which included the suggestion that the Park might not in the future include animals, which took place on 20 May. That was when the claimant was made aware of it. The evidence showed that HCAL were only made aware of this event on 18 May and the claimant accepted that. What was happening was there was some other event taking place in the park and at short notice it was decided to put up a stall where the public could have their say about the future of the Park to coincide with that.

78. The claimant said there was no information from her employer regarding the changes made available to her. I accept that may be right. However it seems likely that the employer did not alert her to this because of the time pressure. The claimant said it convinced her she was about to lose her job. I accept the claimant may have believed that was a possible outcome.

79. The final event in the chronology which is said by the claimant to be the final straw concerns an incident where she had a telephone conversation with Mr Spencer who asked her to attend a meeting on 7 June 2016 at 2.00pm. The meeting was to be at Pearson Park. Mr Spencer afforded her the chance to get union representation.

80. The meeting came about in this way. Somebody had set up a Facebook site about the iguanas. "Save George and Mildred the Hull iguanas" was the title of the profile picture on the Facebook site, apparently entered on 24 May 2016, and it contains pictures, in fact a picture in particular, of the claimant clearly stood at the time wearing a Hull City Council jacket or top with one of the iguanas, apparently Mildred according to the claimant, on her shoulder smiling at the camera. It is a good picture. Somebody had clearly thought it was appropriate to use this to advertise the fact there was a possibility that the iguanas might be removed from the Park and to encourage people, I suspect, to campaign against that.

81. What happened was that the site also went on to say that if you wanted to have your say about it, you should contact Councillor Fareham and put in Councillor Fareham's contact details. That came to the attention of Ms Walker, who was second up the line of command who wrote to Councillor Fareham on 7 June (the email on pages 138-139) saying that it appears that a member of HCAL has set up a private Facebook page that, according to Ms Walker, was what it looked like to her. She had deputed to Mr Spencer the task of investigating this, and this meeting was that investigation.

82. Mr Spencer showed the claimant the Facebook page on his mobile phone. The claimant told Mr Spencer she was not aware of it nor did she know who was responsible for it, and she identified the photograph as one that had been taken by the Hull Daily Mail some two years earlier and she pointed out, in my judgment entirely correctly, that she had no rights or control over the image in the public domain in the sense that she could not, without taking I think she meant legal proceedings, do anything about it. Mr Spencer was adamant, that he did not say she was responsible for creating the Facebook page.

83. According to the claimant he suggested that she should contact the owner of the Facebook page and get him to remove the picture, and alternatively, according to Mr Spencer, that she should post on the Facebook page in the alternative, or send an email to the message. The claimant explained that just because she was in the image it did give her the right to it and people did not need to have permission to use it. That may not be right but I accept it was the claimant's belief at the time.

84. What Mr Spencer said he probably said to the claimant, and I should say at this stage that Mr Spencer's recollections are affected by two things: one is that he is here being asked a year later what occurred in a meeting in may 2016; secondly, I am told that Mr Spencer has temporal lobe epilepsy and nocturnal epilepsy which affects his memory, but, doing the best he could, he said that he may well have said to the claimant, "if it were me I would want to do something about it".

85. He accepted that he, Mr Spencer, had tried to contact the owner of the Facebook page by email on two occasions, once from the work address and once from his personal email address, without success. He said that he did not ask the claimant to contact the person, he was not instructed to do it, and he agreed that it would not be appropriate to ask an employee to do that.

86. Clearly the concept of somebody contacting the owner of the Facebook page was raised at the meeting because the union representative, Mr Brooks, asked for an adjournment and after the adjournment it is clear, both from the evidence of Mr Spencer and indeed the contemporaneous note which appears at page 129 in a diary, that after the adjournment Mr Spencer records re-entered: "It was agreed that it was best that I keep trying to email Jason Spencer to see if I could get a response" (Jason Spencer was the name of the email address on the Facebook page). That both suggests that he had tried to do so before and that he agreed to keep trying, and indeed his evidence was that he did without success.

87. He was satisfied that having spoken to the claimant there was no issue for her to answer, and he reported as much to Mr Kenny and to Mrs Walker. He accepted that he had got a copy of the disciplinary procedure with him and he pulled it out and said to the claimant that he had to follow the disciplinary procedure on misuse of

social media, and in effect he was pointing out that the misuse of social media could be a disciplinary offence in the hands of the employer because what people do on social media is usually meant to be private and should impinge upon their work.

88. However, what is in dispute about this is that Mr Spencer implied that the claimant was responsible for creating the Facebook page that was in issue or saying that "it was a very dangerous game to be playing." Having seen Mr Spencer I am entirely satisfied those are not the sort of things that he would have said. He seemed to me to be a manager who took his duties seriously. He was not assertive in my judgment. He was charged with the task in this way.

89. According to the claimant, and this is how it was put in her witness statement, she says:

> "For me personally this was the final straw. Throughout my career at Hull City Council and HCAL I have been subject to constant victimisation and accusations of prostitution, accusations of bringing the Council into disrepute, being placed in positions that put my welfare and safety at risk, regular bullying my management and systematic removal of work duties, largely down to the interference of Mr John Fareham. It is for these reasons that I feel HCAL have broken contract and I have cause for a case of constructive dismissal."

90. The claimant resigned by a letter dated 10 June 2016, apparently I think sent to Mr Spencer who handed it on to Mr Kenny, giving notice of resignation with immediate effect, saying that her reasons were that:

> "Hull Culture and Leisure are in breach of contract. HCAL have over a period of time systematically and purposely forced me into a position where I feel I can no longer perform my daily work duties without fear of accusation or intimidation."

91. On 15 June 2016 (page 143) Mr Kenny acknowledged the resignation and said it was accepted and asked the claimant to contact himself or Ricky Spencer to arrange a meeting to discuss the issues, and he thanked her for her work and wished her well. The claimant responded, acknowledging receipt of that and saying she would give reasons in the next 14 days. It took her longer than that. She wrote the letter of 25 July 2016 which essentially contained the same information as her witness statement, and there was no meeting thereafter. The claimant went on, as I understand, to work in her husband's business in driver training.

Submissions

92. The parties made submissions.

93. In essence they argued the facts from both sides. They summarised their positions very much as I have already recorded.

Relevant law

94. So far as a complaint of constructive unfair dismissal is concerned it is necessary for the claimant to satisfy the Tribunal that there has been by the respondent a breach of a fundamental term or a serious breach of a term by the

employer which is so seriously damaging of the contract of employment with its implied duties of trust and confidence such that she is entitled to resign forthwith; that she did resign in response to that breach and not for some other reason; and that she does not delay after the breach has occurred to the point where it can be said that she has waived the breach and affirmed the contract.

95. Section 95(1)(c) of the Employment Rights Act 1996 is the statutory basis. Paragraph 14 of the judgment in **Omilaju** sets out the basic propositions of law on the test for constructive unfair dismissal.

> **"1.** The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.
>
> **2.** It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".
>
> **3.** Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).
>
> **4.** The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).
>
> **5.** A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents."

96. That this is a high hurdle for an employee to overcome as has been reinforced recently by the Employment Appeal Tribunal in the case of **Frenkel Topping Ltd v King** [2015] UKEAT 0106/15/2107 and the nature of the term and the difficulty of overcoming that hurdle was emphasised in the case of **Tullett Prebon plc v BGC Brokers** [2010] IRLR 648 (High Court).

97. There is then reference in paragraph 15 to the explanation of the "last straw" principle:

> "The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

> "(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W. M. Car Services (Peterborough) Ltd.* [1981] ICR 666.) This is the "last straw" situation."

98. Then importantly, in paragraph 21 there is an analysis of what the position is if the final straw, as it is then called, is not capable of contributing to a series of earlier acts which cumulatively amount to a breach.

> "If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

99. Significantly in paragraph 19 of that judgment, and going back to the case of Woods, there is a reference there to an employer who, stopping short of a breach of contract, squeezes out an employee by making the employee's life so uncomfortable that he resigns, and therefore in the context the doctrine or the principle of the last straw seems to have emerged, and it occurs to me in considering this case that that might be the sort of allegation that the claimant could have made in this case.

100. But it is not. The claimant's case is put much higher than that. The claimant's case is that she was being subject to constant victimisation, accusations, having her welfare and safety put at risk, regular bullying and systematic removal of work duties.

Conclusions

101. From the findings of fact that I have made, even as it were ignoring the fact some of these matters were old, if the claimant by "victimisation" really means "bullying" or "unfavourable treatment", she was not the subject of such treatment by the employer.

102. The "accusations" refers to the accusation of prostitution and the Facebook page entry about saving the animals. The first was a false accusation made to the Council which the Council dealt with, as I have found, appropriately. It was not an accusation made by the employer. As to the latter I find that was also dealt with in an appropriate way.

103. As to the last straw event, for the reasons I have explained in dealing with the findings of fact, whilst the claimant may believe that the respondent wanted to remove her work duties, there is no evidence that there was systematic removal of it

and no evidence before me that was, as the claimant submitted, largely down to the interference of Councillor John Fareham.

104. There were some curious emails from Councillor Fareham concerning the Facebook campaign which I did explore with Miss Walker in evidence. Councillor Fareham appears to have taken a critical view of the claimant. However, the suggestion that once the claimant's employment transferred to HCAL that had any effect is not borne out, it seems to me, by the responses to the emails. The claimant's managers made it perfectly clear to Councillor Fareham, to whom they had to apologise that his name was in the public domain for reasons which were apparent in Miss Walker's email, that they had investigated the matter and they had found that the claimant was not responsible for the creation of the website. It seemed to me that the claimant could not expect them to do more.

105. Looked at objectively, I can see that there are points in this case, as I have identified, where the claimant could feel that her employer might have done more. They might have provided a Mobex phone earlier. They might have provided better information about who the shift supervisor was, if the claimant is right about that. However, it does not seem to me that, even taking all the matters upon which the claimant could establish a case into account, that she has shown that there was conduct that was likely or designed seriously to undermine or to destroy the duty of trust and confidence.

106. I should add this. In order to, make out a breach of the implied term the claimant has to show that the respondent acted without reasonable and proper cause. I find that, in relation to the allegations about the accusation of prostitution, the closure of the aviary, the issue with Ms Carr, the issue with Mr Railton and the Facebook campaign, the evidence does not support a finding that the respondent acted without reasonable and proper cause. I do not necessarily consider that the claimant can show the contrary in respect of the other allegations but the ones I have listed are the main, as it were, props of her case and these cannot succeed for that reason also.

107. I also find that the matters that the claimant relies upon which occurred prior to May 2016, are matters in respect of which, the claimant has waived any breach that might have occurred. She continued working, in my judgment, for at least a year after the serious incident with Ms Carr which occurred on 1 May 2015, until the events with Mr Railton just over a year later. That lapse of time, no doubt because the claimant wanted to continue to work with the animals because she wanted to care for them, shows the contract was affirmed and prevents here relying upon them as contributing to any later breach. The acts that occurred thereafter do not even on the claimant's account, amount to a fundamental breach of the implied term upon the analysis that I have set out.

108. In those circumstances the claimant cannot establish that there has been a breach of the implied term. Because there has been no breach the claimant cannot be found to have resigned in response to a breach. If she did not resign in response to such a breach she was not dismissed as a matter of law.

109. Accordingly she cannot establish unfair dismissal and these proceedings are themselves dismissed.

110. Finally, I apologise to the parties for the length of time it has taken to send them the judgment and reasons in writing. This was caused by the volume and demands of other judicial work.

Employment Judge: Ryan

Date: 7 July 2017