EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss A Mason	**v**	**United Cinemas International (UK) Ltd**

Heard at: London Central **On**: 8 – 9 October 2018

Before: Employment Judge Lewis

Representation

For the Claimant: Mr A Mellis, Counsel

For the Respondent: Mr P Howarth, solicitor

RESERVED JUDGMENT

The claim for unfair constructive dismissal is not upheld.

REASONS

Claims and issues

1. The claimant brings a claim for unfair constructive dismissal. She relies on fundamental breach of the implied term of trust and confidence.

2. The issues were agreed and are attached to these Reasons with the following agreed modifications:
   2.1. Item 1c refers to the 6 week period when the claimant was off sick.
   2.2. Item 1d refers to the meeting with Ben Robinson on 3 April 2017.
   2.3. 1e only concerns the text sent in the evening.

Fact findings

3. The tribunal heard from the claimant and, for the respondent, from Bianca Searle, Miriam Bradley and Duncan Kerr. The respondent proposed also to call Rachel Brown and John Gallifant, who dealt with the claimant's grievance and grievance appeal after she had resigned. As the claimant's representative considered it unnecessary to cross-examine them, it was agreed that I would simply read their signed witness statements. There was an agreed trial bundle of roughly 549 pages.

4. The claimant started her employment with the respondent on 20 April 2015 as a Sales Account Executive. Her role was to sell forms of digital advertising ('assets') to various Distributors, for example website banners. This involved managing a diary of available slots over the year.

5. Distributors had overriding contracts with the respondent, but individual sales deals were simply confirmed by the Distributor providing a purchase order number. The claimant was then supposed to email the Sales Co-ordinator details of the purchase order number, the name of the Distributor, and the type, value and date of the booking. The Sales Co-ordinator would then raise a SIR which would generate an invoice.

6. The claimant's line manager was Anna Sinclair, who was Distribution and Advertising Manager. Ms Sinclair's manager was Shireen Alvis of Lee.

<u>The alleged bullying</u>

7. The claimant says that Ms Sinclair started bullying her in June 2016, about one month after a previous colleague left. The claimant says Ms Sinclair had previously bullied this colleague.

8. In July 2016, the claimant broke her ribs and had a period of sickness absence. The claimant told Ms Alvis of Lee that she felt she had been 'interrogated' about her recent period of absences and that Ms Sinclair blew hot and cold.

9. The text messages between the claimant and Ms Sinclair create a different impression. They are friendly and show no signs of bullying or feeling bullied. For example, on 20 July 2016, the claimant texted: 'Hey Anna just at the hospital they are testing me for blood clots as I have flown will keep you updated. I have checked my emails this morning xx.' Ms Sinclair replied 'Hey Hun – thanks for the update – take care and let me know how it goes.' Then on 25 July, the claimant texted: 'Morning Anna just waiting at the Drs now for a prescription been up all night in agony. I'll give you a call just after 9. x'. Ms Sinclair replied: 'Morning Ash – ok at my desk so call me when you can x', The claimant texted later: 'Hi Anna still waiting for my Dr to call me. I have been working all day today. x'. Ms Sinclair replies: 'Hi Ash – sorry been manic today – think we should catch up first thing and sort a plan as I think you need to be off sick for the rest of the week – let's catch up tomorrow morning though …'

10. The claimant says that Ms Sinclair's manner was different on the telephone or face-to-face. I find this hard to judge. What the claimant calls 'interrogation' may just have been insistently pressing her for details. One cause for dispute, for example, was an incident when the claimant called in sick and wanted to work from home. Ms Sinclair had said that if she was sick, she must take the day off as a sick day, which the claimant did not want to do.

11. The claimant did not want to speak to Ms Sinclair about her manner in case it made things awkward. Ms Alvis of Lee therefore had a word with her about her management of the claimant.

12. During a work night out on 29 September 2016, the claimant told Ms Alvis of Lee that things had not really improved with Ms Sinclair. As a result, Ms Alvis of Lee arranged an informal mediation meeting on 12 October 2016. I was not given any detail of what was said in the meeting or its outcome. After the meeting, Ms Alvis of Lee told Ms Sinclair to work on greeting people when she came in, even if she did not feel in the mood because of her own personal issues, to work on her email tone and to stick to a structure for holding 1to1s with her team.

13. On 31 October 2016, the claimant attended a fact finding meeting with Peter Waugh. This was part of an investigation into someone else's grievance. The notes of the meeting show the discussion was generally about Ms Sinclair and the team – how communication worked within the team, whether the claimant was aware how others felt (particularly Carita), what kind of line manager Ms Sinclair was.

14. The claimant told Mr Waugh that Ms Sinclair was up and down and that she was not having the best time being managed by her. She felt she was walking on egg-shells and it was a relief if Ms Sinclair did not come in as she was going home anxious most nights. She said the pod she sat on with Ms Sinclair was 'toxic'.

15. The claimant also complained to Mr Waugh that Ms Sinclair did not show compassion when people in her team had been off sick, eg when she had been off with broken ribs. Mr Waugh looked at the text messages, some of which I have quoted above, and spoke to Ms Sinclair and Ms Alvis of Lee. Based on this, he concluded that there was no evidence to support this claim.

16. However Mr Waugh did conclude that the team dynamic was not good, the lowest common denominator being Ms Sinclair's interaction with different team members. He arranged for Ms Sinclair and the claimant to be moved off the same pod on 9 November 2016. He told the claimant that she should speak up and tell Ms Sinclair how she was feeling when things happened.

17. The claimant had also complained to Mr Waugh and, on 26 October 2017, to Ms Edwards in HR about a Google link sheet which had gone to the whole team asking for details to be completed about sickness. The claimant said her sickness details should be private. Ms Edwards said that the respondent did not share such personal information and this was a mistake.

The practice was immediately stopped. The claimant was asked if she wanted to raise a formal grievance about it and she said no. She agreed in the tribunal that this was a mistake and not an example of bullying.

18. In the same email (1 November 2016) where she said she did not want to take a formal grievance, she added on another note that she had had a 'catch up' with Mr Waugh the previous day and would like to know what the next step was and when she would be updated. Ms Edwards does not appear to have got back to the claimant. The claimant was not given a copy of the notes of the meeting or any letter regarding further actions.

19. As well as the examples given to Mr Waugh, the claimant also gave the tribunal the following examples.

20. She said her holiday request for her honeymoon in June 2017 was refused, because Ms Sinclair said she now needed to take that time off. During the grievance investigation which took place after the claimant had resigned, Ms Sinclair said they had had an informal conversation when the claimant had not yet confirmed her exact dates. She said there was never any conversation about whether the claimant could or could not go, and that her own holiday had been booked for 3 – 8 July. I cannot make any finding that Ms Sinclair cancelled or refused the holiday. The claimant is too vague in her details of how that happened, and she made no written complaint at the time, which I would have expected if her manager had been so unreasonable as to cancel dates already booked for a honeymoon. It is possible there was some kind of conversation about possible dates where Ms Sinclair was a bit difficult, but I cannot be sure that anything conclusive happened.

21. The claimant gave as another example of bullying that she was only given a 2 in a mid-year performance review. It was explained to the claimant at the time, that her score was lower than it might otherwise be because she was taking part in office gossip culture. At the year end, Ms Sinclair put her score back up to 3. The scores would all have been agreed with managers above Ms Sinclair's level, in this instance, Ms Alvis of Lee and Mr Edge.

22. The claimant also complained that Ms Sinclair rarely held 1to1s with her, either cancelling them because she was out the office or doing them over the phone.

23. The claimant gave as a further example of bullying that her targets had been increased from £2.9 million when she started to £3.2 million. The claimant felt she only had limited scope to grow revenue if she had assets to sell and she was booked all year across all the assets. The requirement to increase revenue came from managers more senior than Ms Sinclair.

24. The claimant did not at the time raise a formal grievance about bullying beyond speaking to Mr Waugh during the fact-finding for a colleague and complaining to Ms Alvis of Lee from time to time. The claimant knew what a formal grievance was. Her mother was an HR professional. She was also

offered the opportunity to take a grievance regarding the circulation of the medical sheet and declined.

25. The claimant gave few other specific details of bullying, although I pressed for these several times. In general, she said the atmosphere was 'toxic' and that Ms Sinclair would be nice to her one day, and ignore her or be unpleasant the next. She said Ms Sinclair had told her to apologise because she was rude to a colleague in a meeting, but when she spoke to that colleague, they did not know what she was referring to. Ms Searle recalled an occasion when the claimant came to apologise to her and she said 'Don't apologise to me, have a chat with Bronwyn'.

26. The claimant's colleague, Mr White, said that Ms Sinclair would shout at and ignore him as well as the claimant.

27. There is certainly evidence that the claimant and Ms Sinclair had a poor relationship and that working with Ms Sinclair made the claimant anxious and sometimes panicky. The relationship did not improve over time. If anything, following the mediation meeting in October 2016, they started to avoid each other.

28. The claimant says that she reported to Ms Alvis of Lee in January 2017 that there was no change in Ms Sinclair's behaviour and that she repeatedly chased up on an outcome from the meeting with Mr Waugh. There are no written records of her having done so after 1 November 2016. Ms Alvis of Lee said in the post-resignation grievance investigation that she had no notes or recollection of such a discussion, but that she had asked the claimant from time to time following the mediation meeting how things were and the claimant had said 'fine'. The claimant on the other hands says Ms Alvis of Lee had said, 'Anna is working on herself'. This evidence was all rather vague. My impression is that there was the odd informal exchange following October 2016 of the 'how's it going?' variety, but that the claimant was not flagging up major issues after that. As I have said, Ms Sinclair was moved to a different pod in November and her contact with the claimant was therefore reduced. The claimant had made no further written request regarding the outcome of her meeting with Mr Waugh following her 1 November 2016 email and the pod move.

29. When I asked the claimant's representative to itemise for me the alleged acts of harassment, he was reluctant to do so other than giving me a list of page numbers to read. He said this was not a case of specific actions on specific dates. It would not meet the threshold of harassment for a discrimination case. However, he said it was a fractious relationship between a senior person and a junior person which cumulatively added up to a repudiatory breach when taken together with later events.

<u>The invoices</u>

30. In February and early March 2017, numerous invoices were rejected by the finance departments of the Distributors and the respondent's debt was

increasing. The Finance Director raised his concerns with the HR Director and a financial investigation was started.

31. As a consequence of this, on 6 March 2017, Bianca Searle, the Event Sales Manager, emailed the claimant as follows:

> 'Hi Ash,
> I urgently need you to send me the following information for Shrieen to share with our auditors. Please note this is not anything you need to be alarmed about we just need to show them our internal processes. All of my team are also providing examples. I know Distributors have requested different PO numbers and changed their activity so I am hoping you have a couple of examples to share.'

The email went on to state what examples were required.

32. On 13 March 2017, the claimant emailed Nicola Gleave in HR. She said she had not received any feedback on her meeting with Mr Waugh on 31 October 2017. She said she had been chasing for feedback since November. I was not shown any chaser emails in the trial bundle prior to this one.

33. On 20 March 2017, the claimant was signed off sick for one week. Her fit note stated 'anxiety'. On 27 March 2017, she was signed off for a further three weeks with 'anxiety symptoms'. The claimant remained off sick for the rest of her employment.

34. On 3 April 2017, the HR Director asked Ben Richardson to conduct an investigation into an allegation that the claimant had submitted a large number of inaccurate invoices for personal gain. Mr Richardson was assisted by Miriam Bradley and Nikki Geldard in HR on the matter. Mr Richardson had been employed by the respondent since 1997 and since July 2017, had been employed as Film Booking Director UK&I and Nordics. He appreciated the seriousness of the matter for both claimant and respondent, and he therefore conducted a very detailed investigation.

35. On 4 April 2017, Mr Richardson telephoned the claimant. When the claimant's mother answered, he asked the claimant to call him back, which she did the next day. Mr Richardson explained the nature of the allegation and that he wanted her to attend a fact-finding meeting on 7 April 2017. The claimant said she was off sick. Mr Richardson said he needed to speak to her because it was an extremely serious matter, but he would keep the meeting as short as possible and come to a location near her home. They agreed on a suitable hotel and the claimant agreed to attend. She accepted in the tribunal that she had not disagreed with going to the meeting and that no pressure had been applied to her. She said she wanted to be as helpful as she could.

36. Mr Richardson emailed the claimant on her home email on 6 April 2017 to confirm the meeting at a nearby hotel and to set out what he wanted to discuss. He said that he required her to attend a fact-finding meeting on 7 April at 2 pm. Ms Bradley would be present as notetaker. Mr Richardson said he would be seeking further information from the claimant regarding the allegation that she had incorrectly allocated large numbers of invoices and credit notes by way of misrepresenting invoice narrative, values and dates,

and that she had done so for reasons of personal gain. Such actions may have caused misrepresentation of the company's financials, with the company's reputation put at stake and distributor relationships damaged. Mr Richardson stated that as this was an issue of utmost and urgent importance, unfortunately it could not wait until the claimant returned to work. He felt it reasonable and necessary to ask her to attend a meeting so he could understand her point of view as soon as possible. He would keep the meeting as short as possible bearing in mind the claimant's current absence and condition.

37. The claimant says that she did not receive this email until a few days after the meeting and that Mr Richardson gave her no details on the telephone. This cannot be correct, since at the end of the fact-finding meeting, she handed in a typed statement which she had already prepared. The statement said she had never been told she was doing invoices incorrectly and that she would never have knowingly falsified the figures. Moreover, during the hearing, Mr Richardson found on his mobile phone the email which he had sent to the claimant at her home email address.

38. The claimant attended the meeting. It lasted about two and a half hours. Mr Richardson went through a list of queries. He told her that £358,000 had to be written off in 2017. The claimant said it was not her job to raise invoices. She said she had started doing invoices in September 2016, but she had had no training. She said invoices had previously been done by the Sales Coordinator, Bronwyn Parsons. Ms Sinclair said that when she left and was replaced by someone new, Charlotte Ikilai, Ms Alvis of Lee had asked the claimant to do her own invoices. This was because Ms Ikilai was still learning.

39. The claimant asked why her errors had not been picked up previously as Accounts did month-end reconciliation, which was also checked by Ms Sinclair, Ms Alvis of Lee and Ms Ikilai. The claimant also said that she was not good at admin.

40. The claimant said that she would not benefit in terms of commission from any overcharging, because when the error was found, it would be credited and rebilled in the following month. As commission was calculated on a quarterly basis, it would have been corrected by the time she was paid.

41. The claimant also mentioned the bullying by Ms Sinclair. Mr Richardson asked her whether she thought her points around Ms Sinclair's behaviour were relevant to the invoice issues. She said no, but she wanted someone to listen.

42. At the end of the meeting, Mr Richardson said he needed to investigate further and would get back to her as soon as he could.

43. On 18 April 2017, the claimant's GP provided her with a further fit note until 30 April 2017, stating, 'Anxiety state, panic attacks'. Early on 19 April 2017, the claimant emailed Ms Bradley to say she had been signed off for two more weeks and that 'the investigation has set me back to the very start of my

illness with depression, anxiety and panic attacks. Please could you let Shireen and Anna know as I am currently not in the frame of mind to discuss my condition.' Up to this point, Ms Alvis of Lee had been keeping in touch with the claimant regarding how she was.

44. Ms Bradley replied that day to say she was sorry the claimant was not feeling better and she had let Ms Alvis of Lee know about the medical certificate.

45. Meanwhile, Mr Richardson had followed up the fact-finding meeting with the claimant with further investigation of the invoice issues as well as her complaints about Ms Sinclair, even though the claimant had said her points in her note about bullying were not related to the allegations about the invoicing. On 18 – 19 April 2017, Mr Richardson spoke to John Pilkington in the Finance Team, Ms Sinclair, Ms Alvis of Lee and Ms Ikilai. He looked up the notes of the Mr Waugh fact-finding. He examined the claimant's schedule, the distributor schedule, invoices and email chains with distributors.

46. Mr Pilkington told Mr Richardson that he thought the claimant was competent at raising invoices but that there had been a clear increase in the number of wrong purchase order numbers used on invoices in October/November 2016. He said one Distributor contact had told him he had no idea where the Purchase Order numbers had come from. Mr Richardson found this worrying because the numbers are supplied by Distributors to the claimant.

47. Ms Sinclair told Mr Richardson that it was possible to make mistakes but she found it hard to understand why that had occurred on such a scale. She showed Mr Richardson instances of assets which had been given to Distributors for free and confirmed as such in employer correspondence, but had been listed by the claimant on the sales schedule as having been sold. Ms Sinclair said she felt confident that the claimant knew how to raise invoices correctly. She said she had never asked the claimant to raise her own invoices except on occasions eg to cover the holidays of the Sales Coordinators. When she realised the claimant had started doing her own invoices on a regular basis, she raised the matter with Ms Searle, who was Ms Ikilai's line manager, and she asked the claimant to stop as Ms Ikilai should be doing the work.

48. Mr Richardson realised that Ms Sinclair and the claimant did not have a particularly good relationship. Ms Sinclair told him she had stepped back with her line management after the October 2016 mediation meeting. Ms Alvis of Lee confirmed to Mr Richardson her perception that they did not have a good relationship and that Ms Sinclair had avoided confrontation after October 2016. She felt the claimant's attitude towards Ms Sinclair had also changed and she had become part of a clique and was 'bitchy'. Regarding the invoices, Ms Alvis of Lee felt the claimant's invoice mistakes had happened too frequently to be an accident. She said there were invoices for activities many months apart which had sequential purchase orders, which could not happen, because purchase order numbers were raised as they were given

out and Distributors would not have gone months without activity. She was also concerned about pre-billing, ie putting a date on an invoice when it was raised rather than when the activity would take place. She said the claimant had invoiced correctly on other occasions, so knew what was correct.

49. In the light of these fact-finding interviews, Mr Richardson looked again at email correspondence between the claimant and Distributors and the invoices which related to the conversations. He came up with a list of very unusual invoicing activities for which he could not find a rational explanation.

50. Having completed his fact-finding interviews, Mr Richardson sent the claimant a text at 21.36 on 19 April 2017, which said:

> 'Hi Ashleigh, I have been following-up on the investigation this week and wonder whether you'd be available for a call at some point tomorrow afternoon. I'd like to ask you a few more questions to help with the investigation. Please let me know whether that would be convenient with you. I would again be joined by an HR representative taking notes, Nikki Geldard on this occasion. Thanks, Ben.'

51. The claimant replied:

> 'Hi Ben I appreciate you're following up on the investigation but as you're well aware, I've been signed off work for past 3/4 weeks yet I'm still be hounded for more information. Last night I was contacted at 8pm and tonight by yourself at 9.30 pm, I really don't appreciate this and something I will be taking up with HR. There comes a point when this must stop, I was willing to meet before and answered the questions you had, why am I being harassed given my current work situation (signed off) … I would rather talk tomorrow morning.'

52. Mr Richardson telephoned the claimant the next morning and apologised. The claimant also informed Ms Bradley about the time of the message. Ms Bradley emailed the claimant back in the afternoon:

> 'Hi Ashleigh
> I have now spoken to Ben and I think he was trying to honour his commitment to get back to you as soon as he could, but in hindsight it perhaps would have been better to wait until this morning.
> I understand that he had since apologised and that you have spoken today to arrange to respond to some further questions he had in writing rather than over the phone to try and minimise the anxiety that you are experiencing. I know this is a stressful situation but it is really important that Ben does a thorough investigation so we do appreciate you working with us to enable us to get a true picture of facts.
> Many thanks.'

53. When he had spoken with the claimant earlier, the claimant had told Mr Richardson that she did not want to meet him again in person to discuss his further questions. It was therefore agreed that he would send her his written questions the next day. He therefore sent her this email at 18.54, attaching a list of 22 questions:

> 'Hi Ashleigh
> Thanks for your response earlier and for agreeing to answer my further questions by email. I would rather have discussed my questions with you but at the same time fully appreciate that due to your condition, this method feels more manageable for you and so am happy to adjust to whichever way works best for you.
> Attached is a document recapping on the conditions of our first meeting, which this process is an extension of, and detailing the questions I have for you.
> In the interests of resolving this matter as efficiently as possible for you, I feel a reasonable time frame for you to complete the questions set is 24 hours and so would ask you to please aim to send these back to me by 6pm tomorrow (Friday 21st).
> If you have any questions or there's anything I can help you with, please feel free to give me a call or email back and I'll do all I can to help.
> Many thanks,
> Ben.'

54. The claimant responded the next day, answering only three questions. She reminded Mr Richardson that she was currently off sick with anxiety, depression and panic attacks which were work-related due to her manager having bullied her. She said it was impossible to answer the questions because she had no access to her work emails where a lot of her work was held.

55. Mr Richardson replied on 22 April saying that he did sympathise with her being currently unfit to work, but it was in the best interests of both herself and the business to try to resolve the issues as efficiently as possible. He said it was really important to get her perspective to inform his decision on the next steps. Otherwise he might have to make a decision without her input. He asked her to try to answer as best she could and reply to him by 3pm Monday (24 April). He said he did not feel the claimant necessarily needed details of invoices etc to be able to respond as many of the questions were around patterns of behaviour. Having said that, if there were specific pieces of information on emails etc which she would like access to, he would try to obtain them for her.

56. At 10.05 am on 24 April, the claimant asked a further extension to 9 am the next day. This was agreed. In fact she provided her written answers at 13.06 on 24 April. She answered 20 of the 22 questions. She made it clear where the reason she could not answer was because she did not have access to her email account. That was in only two instances. Otherwise she could remember the transactions as they were fairly recent or the questions concerned patterns of behaviour.

57. Mr Richardson had discussed the claimant's request for access to her emails with Ms Geldard. He felt access was unnecessary because the questions set out the necessary detail and were general in kind. The respondent's concern was that, if given access, the claimant might tamper with email evidence.

58. On 25 April 2017, Mr Richardson held a fact finding meeting with Ms Searle to discuss the claimant's responses. She said that on numerous occasions, she, Ms Sinclair and Ms Alvis of Lee had told the whole team including the claimant during team meetings that they should not be raising their own invoices. This made Mr Richardson doubt the claimant's statement that she had never been told not to raise her own invoices.

59. After reviewing all the evidence, Mr Richardson felt there was a disciplinary case to answer. He had responses from several of the claimant's colleagues which he felt contradicted what she had said on a number of matters. He had also checked the claimant's invoicing against her emails and found a large number of discrepancies which the claimant had not satisfactorily explained. He found the extent of these abnormalities unacceptable.

60. On 26 April 2017, Mr Richardson emailed the claimant to say he had concluded the informal fact finding process and had made the decision to pass the case on to a disciplinary hearing, as he felt that there was still a case to answer. Duncan Kerr (Interim Ireland Country Manager) would be holding the meeting and he would be contacting her shortly with a date. On a separate note, Mr Richardson said he had looked into the previous fact finding meeting with Mr Waugh. He said it was fully investigated at the time and recommendations were made as a result. He attached the notes summary document and recommendations detailed at the end, which he said he believed had all been actioned.

61. Mr Kerr took a hand-over from Mr Richardson on the phone on 26 April 2017. Mr Richardson then forwarded all the fact finding meeting notes and documentary evidence.

62. On 27 April 2017, Mr Kerr wrote to the claimant requiring her to attend a disciplinary hearing on 2 May at 1.30 pm. He suggested the meeting take place at a hotel close to her home. Ms Bradley would be present as note-taker.

63. He set out the allegation, ie that the claimant had misrepresented her sales figures and performance by raising large numbers of SIRs/Invoices with false information; providing false forecasting numbers; and displaying false activity on her advertising schedule. The total impact of this activity identified so far was over £400,000 and the consequences potentially meant the claimant being paid commission not due to her, damage to the company's relationship with Distributors, and inaccurate financial forecasting.

64. Mr Kerr identified three areas which stood out: (1) POs being used that had not been provided by the distributor, which were either historical or fictional; (2) incorrect deferrals where revenue had been raised in the incorrect period and then duplicated; (3) invoice amounts raised incorrectly or where an activity was free of charge. He said the consistent pattern strongly suggested a deliberate approach rather than errors.

65. Mr Kerr enclosed copies of the documents gathered during the investigation –over 100 pages of invoices and email trails. He said if there were any further documents which she wished to be considered, she should provide copies. If she didn't have copies, she should provide details so that they could be obtained.

66. The claimant was advised that if she was found guilty of gross misconduct, she could be dismissed. She had the right to be accompanied by a work colleague or trade union representative. If she had any specific needs which may need to be accommodated at the hearing, she should notify Mr Kerr. If she was unable to attend, she should contact Mr Kerr on receipt of the letter.

67. The claimant emailed back the next day. She said her doctor had the previous day signed her off for a further three weeks and she would be assessed again on 10 May. She said she was too unwell to attend a disciplinary hearing while she was signed off work. She said her legal representative had advised her that if the hearing went ahead in her absence and she was dismissed, she would be taking action for unfair dismissal.

68. Mr Kerr replied a few hours later to say the 2 May meeting was postponed and he would get back to her.

69. Mr Kerr then discussed the matter with Ms Bradley who showed him the DWP's Health and Work Handbook which states that the effects of an unresolved dispute on an employee's mental health may be greater if proceedings are postponed; an employee may be unfit for work but fit to engage with the management process.

70. Mr Kerr therefore decided it was in the best interests of both the claimant and the company to conclude the matter as soon as possible. In respect of the company, he was worried about the implications of the claimant's actions if the allegations were true.

71. Mr Kerr therefore wrote to the claimant on 2 May 2017, inviting her to a reconvened hearing on Monday 8 May 2017. He said he felt there were two competing priorities from the company's perspective. On the one hand, to ensure matters were dealt with speedily, particularly in a serious case where wider concerns and considerations were involved. On the other hand, they also wished to come to a fair conclusion and give the claimant an opportunity to fully engage and set out her explanation of events. He said that the fact the claimant was signed off from her duties with ill-health did not necessarily mean she was too unfit to attend a disciplinary hearing. Indeed, citing the DWP Handbook guideline, the disciplinary hanging over her head might be exacerbating her ill-health. Taking that all into account, he had therefore rescheduled the proposed disciplinary hearing for Monday 8 May at 12 pm at the hotel near to the claimant. Mr Kerr said he would very much like the claimant to attend and they would make any suggested adjustments in terms of location, timing, number of breaks etc. However, if she felt completely unable to participate directly, it was likely that the hearing would proceed in

her absence. Mr Kerr said he could as an alternative send the claimant a list of written questions for her to respond to in writing.

72. On 3 May 2017, the claimant's solicitor, Mr Ruwala, wrote to the respondents. Mr Ruwala referred to the bullying by the claimant's manager which he said started from early 2016 and continued until the claimant went off sick in February 2017. He referred to the following incidents: telling the claimant that she would have to cancel her honeymoon because the manager now wanted to take that time off; increasing the claimant's targets by £90,000 so that her commission was reduced substantially; accusing the claimant of being rude to others in meetings when that was blatantly not the case. He said the claimant had raised the bullying to her manager's manager in August 2016, that a fact-finding had been held in October 2016 and there was never any formal outcome of this grievance. The only outcome was that the claimant and her manager should stay away from each other. No support was given.

73. The letter went on that the claimant was pressurised to attend a fact finding while off sick and was never sent any letter confirming what the allegations were before the meeting. She was then pressurised to answer a list of 22 questions. She had now been called to a disciplinary hearing and had been sent various invoices. Mr Ruwala said the claimant was unable to attend because she was off sick with stress and did not have access to her PC which would be essential to rebut these allegations.

74. The letter stated that in view of the way she had been treated, the claimant felt unable to work for Odeon. She did not accept there was any merit in the allegations against her. However, there may be a possibility of rectifying the relationship if the respondent confirmed by 12 noon on Friday 5 May (1) that it would postpone the disciplinary until the claimant's grievances had been thoroughly investigated including any appeal and the claimant had received an outcome; (2) that it would provide notes of the meeting which the claimant had with her manager's manager in October 2016; (3) that it would fully investigate the way the claimant had been treated by her manager and the way she had been treated since she had been signed off sick.

75. Mr Kerr replied on 4 May 2017. He said the ACAS Code allowed for temporarily suspending the disciplinary process or for hearing the disciplinary and grievance matters at the same time. In this case, he could see no reason why they could not be dealt with concurrently. Doing otherwise would drag out the process unnecessarily and risk exacerbating the claimant's ill-health. He also said he believed the matter had been dealt with previously and an informal resolution reached. He reattached the meeting notes from October 2016. Regarding access to her emails, if there were specific emails which the claimant wanted the respondents to search for, they could do so.

76. Mr Kerr concluded that the 8 May 2017 meeting would now take the form of a dual-purpose grievance and disciplinary hearing. The first part would look at the disciplinary allegations. There would be an appropriate rest break and it would then reconvene and explore the claimant's grievance complaints. He

said that if the claimant were to resign now, it would be premature in the extreme and he urged the claimant in the strongest possible terms to attend.

77. On Friday 5 May 2017, the claimant resigned. She emailed the respondents as follows:

> 'As of today (5/5/2017) I hereby resign from my position as Distribution Account Executive with immediate effect. I have not taken this decision lightly but feel ODEON has left me with no alternative but to resign. I have been open and honest in your 'fact finding sessions' and had nothing to hide. ODEON has never dealt with my grievance regarding bullying from my line manager nor handled correctly the accusations against me.'

78. Mr Kerr emailed in response to acknowledge the claimant's resignation. He said that given the serious implications, they would be working towards making formal findings on the disciplinary issues. They already had some input from the claimant, but would like to offer her one final opportunity to comment, ideally in person, but otherwise in writing. If the claimant required access to her IT account in advance, they would make the necessary arrangements. He asked that the claimant let him know by 9 May which option she would prefer.

79. Mr Kerr said they would also be prepared to explore the claimant's grievance in relation to bullying. He asked that she let him know what grievance she was referring to that she had previously raised and in what form, and what she meant by saying that it had never been dealt with.

80. The claimant did not take up the offer to input into the disciplinary process.

81. On 18 May 2017, Mr Kerr emailed the claimant with the outcome of the disciplinary allegations. He set out his findings in a great deal of detail. He concluded that the claimant had raised invoices incorrectly across various distributors, leading to vastly inflated forecasted revenue. This had risked, and most likely actually caused, significant harm to hard-won relationships which the company had developed over many years. Mr Kerr said the claimant's explanations, set against numerous pieces of evidence, were either demonstrably untrue or wholly inadequate. Mr Kerr believed that the claimant's actions were intentional and designed both to mask underperformance and to increase commission. He said the evidence showed the claimant's evidence around certain areas was untrue and that there were also clear examples of the claimant having undertaken the various processes correctly in the past, so this was not a matter of lack of training. The scale and degree of the actions meant that the explanation that they were 'one-off' mistakes was simply not credible. Therefore, had she not resigned, summary dismissal would have been appropriate. Even if the mistakes were unintentional, they would be indicative of a really serious failure of what would be objectively expected of someone at the claimant's level. That would have warranted summary dismissal for gross negligence.

82. The claimant's grievance was dealt with by Rachel Brown. The claimant did not feel able to attend a grievance meeting so they communicated in

writing. Ms Brown met Ms Sinclair, Ms Alvis of Lee and Mr Waugh. She wrote to the claimant on 1 June 2017 rejecting the majority of the grievance. However, although she did not find that there had been any bullying or harassment, she did feel certain things could have been done better and made recommendations. In particular, she felt that the document detailing sickness absences should not have been shared with the wider team, although that was not done by Ms Sinclair – it was Ms Alvis of Lee who had given the claimant access to the google document; the outcome of the claimant's meeting with Mr Waugh should have been confirmed to the claimant and not only to HR and Ms Alvis of Lee; and the outcome of the mediation meeting between Ms Sinclair and the claimant should also have been shared with all involved. Further, Ms Sinclair should have documented the 1to1s between herself and the claimant, especially after the mediation meeting.

83. John Gallifant dealt with the claimant's grievance appeal. He met the claimant and spoke to a number of other employees. He upheld the original grievance outcome.

Law

84. Paragraph 46 of the ACAS Code on Disciplinary and Grievance Procedures says that 'where an employee raises a grievance during a disciplinary process, the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.'

85. The claimant contends she was constructively dismissed under s95(1)(c) of the Employment Rights Act 1996. Under s95(1)(c) an employee is dismissed where she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.

86. An employee will be entitled to terminate her contract without notice to her employer only if the employer is in repudiatory breach of contract: see Western Excavating (ECC) v Sharp [1978] ICR 221.The claimant contends that her employer was in breach of the implied term of trust and confidence. Breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract (Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT).

87. In Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, [1997] IRLR 462. the House of Lords held the implied term of trust and confidence to be as follows:

> 'The employer shall not without reasonable and proper cause conduct itself in a manner calculated *and* likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

The italicised word 'and' is thought to be a transcription error and should read 'or'. (Baldwin v Brighton & Hove City Council [2007] IRLR 232).

88. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. The bar is set much higher. The fundamental question is whether the employer's conduct, even if unreasonable, is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

89. There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, ie from the perspective of a reasonable person in the claimant's position. (Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420, CA.)

90. The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (Nottinghamshire County Council v Meikle [2004] IRLR 703, CA; Wright v North Ayrshire Council UKEATS/0017/13.)

91. The duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually can be justified as being within the four corners of the contract.(United Bank Ltd v Akhtar [1989] IRLR 507, EAT).

92. A claimant may resign because of a 'final straw'. The key case of London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493 establishes these principles in regard to the final straw:

(1) the final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial.
(2) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.
(3) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the 'final straw' consists of conduct

which viewed objectively as reasonable and justifiable satisfies the final straw test.

(4) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence."

93. The claimant must not 'affirm' the breach. A claimant may affirm a continuation of the contract in various ways. She may demonstrate by what she says or does an intention that the contract continue. Delay in resigning is not in itself affirmation, but it may be evidence of affirmation. Mere delay, unaccompanied by any other action affirming the contract, cannot amount to affirmation. However, prolonged delay may indicate implied affirmation. This must be seen in context. For some employees, giving up a job has more serious immediate financial or other consequences than others. That might affect how long it takes the employee to decide to resign. (Chindove v William Morrisons Supermarket PLC UKEAT/0043/14.)

94. The 'final straw' might refer to two different situations: either the employer's conduct has not previously amounted to a breach of trust and confidence or it may be that the employer's conduct has already crossed that threshold, but the employee has soldiered on until the last act which triggered her resignation. The significance of the 'last straw' is then that it revives the employee's right to resign. (Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.)

95. An employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts, even if he or she has previously affirmed, provided the final act forms part of the series (in the way explained in Omilaju). The final action does not land in an empty scale. (Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.)

Conclusions

96. I now apply the law to the facts to decide the issues. If I do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

Issue 1: Was there breach of the implied term of trust and confidence?

97. At the outset of the hearing, the claimant confirmed that the contract term which was alleged to have been breached was the implied term of trust and confidence. I have considered the alleged incidents individually and cumulatively. I appreciate that the claimant became upset and stressed at various points during her employment. However, I do not find that there was on an objective test a breach of the implied term of trust and confidence.

Item a: Bullying by Ms Sinclair

98. The claimant and Ms Sinclair had a poor working relationship. Ms Sinclair was not a good manager. Her moods were up and down with others in the team as well as with the claimant. Sometimes she was very nice, for example as shown by the July 2016 texts when the claimant was off sick. At other times, she was short-tempered or uncommunicative. Her unpredictability made it particularly stressful to work with her. As time went on, she communicated less. She did not hold 1to1 meetings except the occasional telephone conversation.

99. I can appreciate that it is an unpleasant experience to work for such a manager. I accept that the claimant did get to a point where she felt she was walking on egg-shells and found it a relief if Ms Sinclair did not come in. However, I would not go as far as describing Ms Sinclair's behaviour as bullying. Managers come in all shapes and sizes and some are much easier to work for than others. Ms Sinclair was not an easy personality. I do not think that the conduct described to me comes anywhere near a breach of trust and confidence. Indeed the claimant's representative agreed that the individual acts of harassment taken together did not constitute a repudiatory breach on their own, but added up together with later events.

100. Some of the things which the claimant complains of were tough but legitimate management. For example, increasing the claimant's targets and thus affecting her commission. This was the result of decisions at higher levels to bring in more revenue. Marking the claimant down on a mid-year appraisal because of her tendency to participate in the office gossip culture is another example. The score was approved by Ms Alvis of Lee and Mr Edge, and the claimant's mark was brought back up to 3 at the year-end in any event. A further example is insisting that if the claimant was not well enough to come in, she must take the day off sick, not work from home. Ms Sinclair might have chosen to be more flexible, but it is a legitimate management position. As for the holiday issue, I am unable to make any clear finding as to what happened.

101. The claimant referred to an occasion when she says she was told to apologise to someone following a meeting but the person concerned did not know what she was referring to. Ms Searle recalled an occasion when the claimant came to apologise to her and she said 'Don't apologise to me, have a chat with Bronwyn'. I cannot reach any conclusion on this. It may well be that Ms Sinclair was justified in suggesting an apology.

102. With regard to the circulation of the document with everyone's sickness details, this was very bad, but it was a mistake. The moment the claimant complained about it, the respondent apologised and the practice was stopped. The claimant was offered the opportunity to bring a formal grievance about the matter, but she declined. The claimant accepted in the tribunal that it was a mistake and not an act of bullying. It also appears from the post resignation grievance that Ms Alvis of Lee was responsible for the mistake.

103. For all these reasons, I do not find that Ms Sinclair bullied the claimant or that her conduct was in itself a breach of trust and confidence. As I have said, I will go on to consider the cumulative picture.

Item b: Becoming aware of such bullying and doing nothing

104. When the claimant raised the issue of the email circulating sickness dates, she was offered the opportunity of taking a formal grievance. She said she did not want to do that. She simply wanted the practice stopped. The practice was stopped.

105. The claimant spoke informally to Ms Alvis of Lee, Ms Sinclair's manager, on several occasions. She did not want to speak directly to Ms Sinclair in case it made things awkward. Ms Alvis of Lee spoke informally to Ms Sinclair about her management style.

106. When the claimant told Ms Alvis of Lee on 29 September 2016 that things had not really improved, Ms Alvis of Lee arranged a mediation meeting on 12 October 2016. After the meeting, Ms Alvis of Lee told Ms Sinclair to work on greeting people when she came in, even if she did not feel in the mood because of her own personal issues, to work on her email tone and to stick to a structure for holding 1to1s with her team. Ms Alvis of Lee did not put anything in writing to confirm any outcome following the meeting, which clearly had been low-key and informal.

107. On 31 October 2016, the claimant attended a fact finding meeting with Peter Waugh. This was part of an investigation into someone else's grievance. The claimant expressed her views regarding how Ms Sinclair behaved towards the team and herself. She said she was going home anxious most nights. She said the pod she sat on with Ms Sinclair was 'toxic'.

108. As a result, Mr Waugh arranged for Ms Sinclair and the claimant to be moved off the same pod on 9 November 2016. He told the claimant that she should speak up and tell Ms Sinclair how she was feeling when things happened. He did not write to her afterwards regarding their discussion.

109. It is likely that the reason Mr Waugh did not write to the claimant after their fact-finding meeting was because it was in fact someone else's grievance. The discussion and the claimant's observations were prompted by Mr Waugh's questions about how Ms Sinclair was as a line manager and how she related to this other person (Carita) in particular. In so far as the claimant referred to her own treatment, not every point stood up to examination. For example, the claimant asserted that Ms Sinclair did not show compassion to her when she was off with sore ribs, but Mr Waugh looked at the very positive email exchanges between Ms Sinclair and the claimant at that time.

110. In her 1 November 2016 email the claimant asked what would be the next step following her meeting with Mr Waugh. She never received a written reply, though she and Ms Sinclair were moved off the same pod on 9 November 2016. Ms Alvis of Lee informally asked the claimant from time-to-

time after that how things were going. The claimant raised no major issues. until 13 March 2017, after she had been sent an email on 6 March 2017 asking for information to share with the auditors. Despite what she said on 13 March, she had not chased for feedback after 1 November 2016 and after the pod move on 9 November 2016.

111. In summary, the respondent did take actions to support the claimant. Ms Alvis of Lee had repeated discussions with Ms Sinclair about her management style. She held an informal mediation on 12 October 2016. Mr Waugh arranged for the claimant and Ms Sinclair to be moved off the same pod. This seemed to resolve the worst of the problems. The claimant understood about formal grievances, but chose never to raise one. She wanted to keep things informal. I therefore find that the respondent did take actions to support the claimant and was not in fundamental breach of the implied term of trust and confidence in its handling of the matter.

112. When the claimant later raised a formal grievance about the alleged bullying, the respondent arranged to listen to the grievance on the same date as the disciplinary hearing. The disciplinary investigation was already in place before the grievance was raised. The claimant resigned before the grievance could be heard and any necessary follow-up action taken.

Item d: Pressurising the claimant to attend a 2.5 hour meeting while on sick leave without informing her of the allegations against her

113. The claimant was signed off sick with 'anxiety' on 20 March 2017. At the time Mr Richardson telephoned her to invite her to an investigation meeting, she had been signed off for a further three weeks with 'anxiety symptoms'. He asked her to come to a fact-finding meeting on 7 April 2017. He said it was an extremely serious matter and it could not wait until she returned to work. He said he wanted to know her views. He offered to hold the meeting at a hotel near to her home to make things easier and said he would make the meeting as short as possible. The claimant agreed to attend. She accepted in the tribunal that she had not disagreed with going to the meeting and that no pressure had been applied to her. She said she wanted to be as helpful as she could. In the event, the meeting did last 2.5 hours.

114. The claimant was informed of the allegations against her both on the telephone and in more detail in an email prior to the meeting. At the end of the fact-finding meeting, she handed in a typed statement which she had pre-prepared.

115. It is therefore not correct to say either that the claimant was pressurised to attend the meeting or that she was not informed of the allegations against her. To the extent that she was strongly encouraged to attend, I do not find this was a fundamental breach of trust and confidence. As the respondent explained to the claimant, it found the matter urgent because of the potential damage to relationships with its Distributors as well as inaccurate financial forecasting. They needed to understand what had happened as soon as possible. The claimant had agreed to meet and an adjustment was made to

meet at a location near her home. I shall discuss the issue of pursuing a disciplinary investigation with an employee who is signed off sick further below.

Issue e: Sending the claimant a text making further enquiries while she was on sick leave at 21.36 on 19 April 2017
Issue f: The claimant complained to Ms Bradley about the text message and nothing was done

116. At the outset of the hearing, the claimant clarified that issue 1e referred only to the late text sent at 21.36 on 19 April 2017.

117. At the end of the fact-finding meeting on 7 April 2017, Mr Richardson told the claimant he needed to investigate further and would get back to her as soon as he could. Having completed the last of his other fact-finding meetings on 19 April 2017, Mr Richardson texted the claimant to ask whether she would be available for a call at some point the next afternoon as he would like to ask a few more questions. He asked whether that would be convenient.

118. Meanwhile, on 18 April 2017, the claimant's GP had provided her with a further fit note until 30 April 2017, stating, 'Anxiety state, panic attacks'. The claimant emailed Ms Bradley to say she had been signed off for two more weeks and that the investigation has set her back to the very start her illness with depression, anxiety and panic attacks.

119. The claimant emailed Mr Richardson to complain about the time he had contacted her and to remind him she had been signed off work. She also complained to Ms Bradley. They both apologised immediately to the claimant. Mr Richardson sent no more emails at such a late hour.

120. I do not find a fundamental breach of trust and confidence in the sending of this text message or its timing. I will make general comments about the pursuit of the investigation while the claimant was off sick below. The timing was thoughtless, but when brought to Mr Richardson's attention, he immediately apologised and did not do it again. The tone of his text and his ongoing communications was always pleasant and sympathetic. Ms Bradley also responded instantly to the claimant's complaint and spoke to Mr Richardson.

Item g: Sending further emails about the investigation while the claimant was on sick leave including a request to answer 22 questions without any PC access

121. There are two issues here – pursuing the investigation further while the claimant was on sick leave and requiring her to answer questions without PC access.

122. The format of 22 written questions was an adjustment made for the claimant because she did not want to meet again face-to-face, which would have been Mr Richardson's preference.

123. Initially Mr Richardson asked for a response within 24 hours of 20 April 2017. This was eventually extended to 9 am on 25 April 2017.

124. The claimant reminded Mr Richardson that she was off sick with anxiety, depression and panic attacks, and said that it was impossible to answer the questions because she had no access to her work emails. Mr Richardson replied sympathetically but firmly. He said it was in the best interests of both her and the business that matters were resolved as efficiently as possible. He would prefer not to have to make a decision without her input. He said he did not feel she needed details of invoices to answer questions as the questions were more about patterns of behaviour. However if there were specific pieces of information on emails etc which she would like access to, he would try to obtain them for her. His view, having discussed the matter with HR, was that the claimant did not need to see her own email account and that the risk of granting her access was that she might tamper with her emails before the investigation was completed.

125. The claimant provided a response to the questions on 24 April 2017. She answered 20 of the 22 questions. She made it clear where the reason she could not answer was because she did not have access to her emails. That was only in respect of two items.

126. I do not find Mr Richardson's request that the claimant answer the 22 questions while on sick leave and without access to her work computer a fundamental breach of trust and confidence. As I have said, the matter needed addressing urgently. Mr Richardson made adjustments in recognition of the claimant's sickness by allowing her to answer questions in writing rather than in person, and by extending her time for reply. As stated, I will make some more general observations on this below.

127. Regarding access to her work PC, in the event the claimant was able to answer 20 out of the 22 questions without access. She was told she could specifically request any documents she needed. I will make further observations on this issue below.

Issue h: Refusing the request to postpone the disciplinary hearing on 8 May 2017

128. The initial proposed date for the disciplinary hearing, 2 May 2017, was postponed at the claimant's request, when she said she had been signed off for a further 3 weeks and would be too unwell to attend. However, it was rescheduled for Monday 8 May 2017. Mr Kerr told the claimant that he was balancing on the one hand giving her an opportunity to fully engage, and on the other hand, wider concerns which meant the matter needed to be dealt with speedily. Anyway, a DWP handbook suggested that having a disciplinary hearing hanging over the claimant could exacerbate her ill-health. The fact that she was not well enough to attend work did not mean she was not well enough to attend the hearing. Mr Kerr said they would make any suggested adjustments in terms of location, timing, number of breaks. The proposed location for the hearing was again at a hotel near the claimant's home. If the

claimant still felt unable to attend, they could instead supply her with a set of written questions to answer.

129. The claimant's solicitor then suggested that there may be a possibility of rectifying the relationship if the respondent agreed to postpone the disciplinary until the claimant's grievances had been thoroughly investigated including any appeal and the claimant had received an outcome; (2) provided notes of the meeting which the claimant had with her manager's manager in October 2016; (3) confirmed it would fully investigate the way the claimant had been treated by her manager and the way she had been treated since she had been signed off sick.

130. Mr Kerr said the grievance and disciplinary could be dealt with concurrently on 8 May 2017. He said that to do otherwise would drag out the process unnecessarily and risk exacerbating the claimant's ill-health. He reattached the meeting notes with Mr Waugh from October 2016, which the claimant had by now been given. Regarding access to her emails, he said that if there were specific emails which the claimant wanted the respondents to search for, they could do so. She had already been sent with the disciplinary notification over 100 pages of invoices and email chains.

131. The claimant did not ask for any specific emails. On 5 May 2017, she resigned. She said the respondent had never dealt with her grievance regarding bullying from her line manager and had not handled correctly the accusations against her.

132. The claimant points out that following her resignation, she was offered a further opportunity to attend a disciplinary hearing and for the first time was offered supervised access to her PC.

133. I do not find the refusal to postpone the disciplinary hearing of 8 May 2017 was a fundamental breach of trust and confidence.

134. Regarding the claimant's health at this point, there is a real difficulty for employers as to whether they can legitimately proceed with investigation and disciplinary proceedings while an employee is off sick with stress. It is a question of degree and the surrounding circumstances. Very often it is the start of the disciplinary process which causes the stress and as long as the disciplinary matter remains, the individual's mental health does not improve and may well deteriorate. It is also true that every employee will become highly anxious about disciplinary proceedings. Feeling a high level of anxiety does not mean an individual is unable to participate in the process. Equally, being signed off as unfit to work, does not mean the individual is unfit to attend meetings and answer questions.

135. In this particular case, the respondent had the problem that the claimant's actions had put at risk their relationship with the Distributors and had also distorted their financial accounting. These matters needed to be sorted out as a matter of urgency and the respondent needed to understand what had happened.

136. The claimant did not categorically refuse to participate in the earlier investigation steps. She referred to her ill-health but she also showed that she was able to answer questions if given time and they were put in writing. The respondent offered a number of adjustments at both investigation and disciplinary stages, ie holding meetings at a location agreed with the claimant near to her home; an offer of adjustments to timing and needed breaks; and an offer to deal with questions and answers in writing if necessary. The respondent might have done well to ask Occupational Health for an opinion as to whether the claimant was well enough to participate. On the other hand, the claimant could have produced a note from her own GP saying she was not fit to attend a meeting or answer written questions.

137. Balancing all these factors, I do not find the respondent's insistence on proceeding with the disciplinary on 8 May 2017 to be a fundamental breach of trust and confidence. The claimant understood the importance of the matter, she was receiving sensitively expressed communications, and a number of adjustments had been offered.

138. The fact that what would have been a delayed disciplinary hearing was offered following the claimant's resignation does not change the above. Once the claimant resigned, the circumstances were different, but the disciplinary was still concluded within two weeks.

139. The next matter mentioned is the decision to go ahead without having given the claimant access to her PC. I am doubtful this was as prominent a factor at the time as it was made to appear during the tribunal hearing. The emphasis in the final correspondence and resignation letter is more on other matters.

140. In principle, there are circumstances in which refusing to allow an employee access to documents which would enable her to defend herself against serious allegations would be a fundamental breach of trust and confidence. I do not find this was the case here. Although the claimant was refused direct access until after she had resigned, she was repeatedly invited to describe any documents which she would like to be found. The claimant was able to answer 20 of Mr Richardson's 22 questions without any further documents because she was given sufficient detail of the circumstances and remembered recent transactions. She could also answer questions about courses of action. On being invited to the disciplinary hearing, she was sent over 100 pages of invoices and emails which Mr Richardson had looked at and was relying on. In Mr Richardson's view, the issues were clear on those documents and other documents would not shed light on them.

141. Moreover, had the claimant attended the disciplinary hearing or even agreed to answer written questions in her own time with her solicitor's help, she would have been able to identify any document which it emerged could throw light on the queries.

142. I therefore find the respondent was not in fundamental breach of the implied term of trust and confidence by approaching the matter of access to documents the way that it did. I do not change my mind simply because following the claimant's resignation, the respondent offered supervised access. One view of that is that, had it obviously become necessary during the disciplinary hearing, the respondent would have offered such access as and when necessary.

143. The final point about postponement concerns the refusal to postpone the disciplinary in order to hear the claimant's grievance first. When an employee raises a grievance subsequent to the initiation of disciplinary proceedings, it may or may not be appropriate to hear the grievance first. The key thing is to listen to and consider the grievance issues before the final decision is made on the disciplinary matter, especially if the two are potentially related.

144. In this instance, the respondent's suggestion of hearing the disciplinary and grievance together would achieve the claimant's desire that everything be looked at. In fact, the claimant had told Mr Richardson that her bullying allegations against Ms Sinclair did not relate to the matters under disciplinary investigation.

145. This is not a case where an employee has put in a formal grievance and an employer has failed to investigate. From the outset, the claimant had only wanted informal action. After the meeting with Mr Waugh as part of another employee's grievance, the claimant and Ms Sinclair had been split up from sitting on the same pod. The claimant did not chase up any formal responses from Mr Waugh after that split. Ms Alvis of Lee occasionally checked in with the claimant. It was only after receiving the invoice relating to auditors that the claimant revived the matter in writing and shortly afterwards went off sick.

146. Even then, the claimant was only asking for a response from Mr Waugh. Mr Waugh had only had a meeting with her regarding someone else's grievance. The claimant did not raise a formal grievance of her own about the bullying until after the disciplinary investigation had started.

147. In any event, the respondent was prepared to hear the grievance alongside the disciplinary. The claimant was asking for her grievances followed by any appeal to be dealt with first. That was unnecessary and unrealistic given the pressing matters to be resolved regarding overcharging Distributors. There was no reason to think handling the matter that way would be unsatisfactory. The claimant resigned before it could be tested out.

148. I therefore find no fundamental breach of trust and confidence in the decision not to hold the grievance first and not to postpone the disciplinary for this reason.

Item c: Failing to support the claimant while she was on sick leave

149. The claimant was on sick leave from 20 March 2017 until her resignation on 5 May 2017. Ms Alvis of Lee had kept in touch with her until on 19 April

2017, the claimant told Ms Bradley that she could not face discussing her condition with Ms Alvis of Lee or Ms Sinclair. Ms Bradley had also kept in touch. The respondent did not refer the claimant to Occupational Health but she was under the care of her own GP. The respondent also made adjustments through the investigation and disciplinary process as detailed above.

150. I do not find any lack of support by the respondent during the claimant's sickness and to the extent that there was any, I do not find it a fundamental breach of trust and confidence.

Issues 1 and 2: Totality of breaches

151. I have also considered the overall picture. I have considered the concurrence of all the various concerns behaviours by the respondent. Nevertheless, given the circumstances which I have explained, I do not find that the respondent was in fundamental breach of trust and confidence. That threshold is not met. The claimant was not dismissed. She resigned before attending the disciplinary hearing or indeed the offered concurrent grievance. The claim for unfair constructive dismissal is therefore not upheld.

Issue 3: did the claimant resign in response to the alleged breaches

152. In any event, I do not find that the claimant resigned because of any of the alleged breaches. I find that she resigned because she believed she was going to be dismissed at the disciplinary hearing. The respondent had repeatedly stressed how serious the allegations were against her. She knew dismissal for gross misconduct was a real possibility. She had not previously resigned over the alleged harassment or over the respondent's alleged failure to take action. She had only re-opened the matter after receiving the letter regarding documents for the auditors. Then at the very point when the respondent said it would formally look at her grievance, albeit concurrently with the disciplinary hearing, she resigned.

153. For this reason also, the claim fails. The other issues do not apply.

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Employment Judge Lewis

Dated: 26 October 2018

Judgment and Reasons sent to the parties on:

29 October 2018

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For the Tribunal Office