

RM



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms L Farmer  
**Respondent:** Tesco Stores Limited  
**Heard at:** East London Hearing Centre  
**On:** 9 & 10 May 2018  
**Before:** Employment Judge M Hallen (sitting alone)

## Representation

**Claimant:** Mr O Omope (Legal Executive)  
**Respondent:** Mr G Anderson (Counsel)

# RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claim for constructive unfair dismissal is unfounded and is dismissed.

# REASONS

## Background and Issues

1 In her Claim Form received by the Tribunal on 8 February 2017 the Claimant claimed unfair constructive dismissal contrary to Section 98 of the Employment Rights Act 1996 ("ERA"). The matter came before Employment Judge Ferguson on 27 April 2017 at which the parties were represented by the same representatives as attended at the substantive hearing. In the Case Management Summary sent to the parties on 28 April 2017 Judge Ferguson outlined the issues in respect of the claim as follows:-

### Constructive Dismissal

1.1. Was the Claimant constructively dismissed?

1.2. Was an act or omission or series of acts or omissions by the Respondent a cause of the Claimant's resignation? The acts relied upon by the Claimant were as follows:-

1.2.1. The Respondent unreasonably delaying the investigation of the Claimant's grievance raised on 4 March 2011, concerning allegations of bullying/harassment against Mr Paul Wilson (Store Manager) and Mr Chris Hales (Non Food Trader) of the Respondent Goodmayes Store.

1.2.2. On or around 26 August 2014, Ms Karyn Psyl-Thompson failing to interview Ms Louise Woodley-Hay, Mr Alistair Williamson, Ms Michelle Jackson who were accused by the Claimant of continually bullying/harassing her in the Respondent's Gallows corner store.

1.2.3. Michelle Jackson, on 24 April 2014, inviting the Claimant to a disciplinary hearing (and later issuing the Claimant with a final written warning) in respect of an incident which occurred on 20 March 2014, whereby out of date baby food was discovered for sale in the store during a shift on which the Claimant was manager on duty.

1.2.4. Being asked by the Respondent to transfer to the Respondent's Gallows Corner Store during the course of the misconduct investigation (concerning the incident of 20 March 2014).

1.2.5. The Respondent unreasonably delaying the investigation of the Claimant's grievance concerning Ms Jackson's final written warning, raised on 8 May 2014.

1.2.6. The Respondent refusing to allow the Claimant to return to the Respondent's Goodmayes Store.

1.2.7. During all grievance meetings from June 2015 to the date of the Claimant's resignation, Karyn Psyl-Thompson, Nicola Sheail, Louise Woodley-Hay, Debra Linney, and John Popley ignoring the Claimant's requests to be transfer to a store other than the Respondent's Gallows Corner Store.

1.2.8. On 16 May 2016, the Respondent refusing to engage in the external Acas mediation process to rebuild their relationship with the Claimant.

1.2.9. On 31 October 2016, Anne Cattle (who was hearing the Claimant's third grievance) having no knowledge of the Claimant's previous grievances or copies of the Claimant's previous documents.

2 If so, did the acts or omissions by the Respondent amount to a fundamental breach of contract? The Claimant relied upon a breach of the implied term of trust and confidence, the incident on 31 October 2016 being the "last straw". The Respondent argued that there was no breach of contract.

3 If the Claimant was constructively dismissed, was that dismissal unfair?

4 Did the Claimant unreasonably fail to comply with the Acas Code of Practice on disciplinary and grievance procedures and if so is it just and equitable to reduce any award made to the Claimant?

5 At the substantive hearing, there was an agreed bundle of documents made up of two ring binders. The Claimant prepared a witness statement and gave evidence and was subject to cross-examination. She called Mr Francis Edwards who also prepared a written witness statement and was subject to cross-examination. Witness statements from Jason Whiting, Janet Grant and Brett Emms were also presented to the Tribunal. These statements were read by the Tribunal but these witnesses were not subject to cross-examination. The Respondent called five witnesses namely Michelle Jackson, Sharon Kyte, Louise Woodley-Hay, John Popely, and Anne Cattle. All of these witnesses prepared written witness statements and were subject to cross-examination.

## **Facts**

6 The Claimant commenced employment on 11 August 2003 and at the date of her employment she was employed as the Home and Health Manager based at the Goodmayes Extra Store. By a letter dated 22 July 2013 which was at page 153 of the bundle of documents she was appointed to a position of Home and Health Manager at the Respondent's Romford Gallows Corner Extra Store and was provided with the terms and conditions of employment which was at page 524 of the bundle of documents which confirmed her position at the Romford Gallows Store. This contract contained a mobility clause as follows:

"You may be required to go to other locations for training or to work from an alternative location whether on a temporary or a permanent basis within reasonable travelling distance subject to the needs of the business."

7 There was dispute as to this matter during the conduct of this case but the Tribunal found as a matter of fact and based upon the documents referred to in the bundle, that the Claimant by consent moved to the Romford Gallows Corner Extra Store of the Respondent as of July 2013 and this was the Claimant's contractual location of work as of the date of resignation which was 31 October 2016.

8 From March 2011 the Claimant raised three grievances. The first two grievances had three stages to them. The Claimant resigned shortly after the first meeting to deal with the third grievance at the end of October 2016.

9 The first grievance was dealt with in three stages between 4 March 2011 to 22 July 2013. At this point, the Claimant was working at the Respondent's Goodmayes Store. The Claimant's grievance form which was at page 63 of the bundle of documents raised allegations of bullying and harassment arising out of her working relationship with Chris Hales and Paul Wilson (Non Food Trade and Store Managers respectively). During the course of the hearing, the Claimant asserted that there were substantial delay in her raising the grievance on 4 March 2011 and the Respondent dealing with it on 21 September 2012. The Tribunal found that as a matter of fact, there was no such delay. What appears likely to the Tribunal was that the Claimant did not progress this grievance for a considerable period of time and as shown at page 66 of the bundle of documents she handed in the grievance form on Friday 21 September 2012 whereupon it was actioned by the Respondent. Stage one of the grievance was dealt with at the hearing on 26 November 2012 by Vikki Schollen. She spoke to 13 witnesses named by the Claimant as part of her investigations and concluded that there was no evidence to support the Claimant's grievance of bullying and harassment. Ms Schollen made a series of

recommendations to assist the Claimant as shown at page 102 of the bundle and the Claimant said that she felt that her complaints had “been acknowledged at last” (page 102). The Claimant also acknowledged that she was happy that the grievance had been dealt with. Nevertheless, the Claimant escalated the matter to stage two of the Respondent’s grievance procedure which was dealt with by Nicki Mendes, Group Personnel Manager of the Respondent and were dealt with at a hearing on 17 December 2012. The notes of the meetings were at pages 109 – 133 of the bundle of documents. Not being satisfied with Ms Mendes stage two conclusions, the Claimant escalated the matter to stage three of the Respondent’s grievance procedure and this was dealt with at a hearing on 9 May 2013 by Alison Williams, Format Personnel Manager of the Respondent. The notes of stage three were at pages 135 – 147 of the bundle of documents. The outcome letter prepared by Ms Williams was at pages 151 – 152 of the bundle of documents. For the third consecutive occasion, the Respondent’s officers including Alison Williams came to the conclusion that there was no evidence to support the allegations the Claimant had made of bullying and harassment against her colleagues. She was given a choice of remaining either at the Respondent’s Gallows Corner Extra Store or returning to the Respondent’s Goodmayes Store. The Claimant decided to stay at the Romford Gallows Corner Store and successfully applied for a permanent role as Home and Health Manager at this store as evidenced in writing at page 153 of the bundle of documents. The Tribunal found that as a matter of fact, the Respondent legitimately and reasonably concluded the Claimant’s first grievances in respect of her treatment as set out in her grievance at page 63 by way of its three stage grievance process. None of the three managers found evidence of bullying or harassment of the Claimant and the final stage was completed by Ms Williams on 9 May 2013.

10 The Claimant thereafter continued to work successfully in her new role as Home and Health Manager at Romford Gallows Corner Extra Store from July 2013 until 20 March 2014 when a customer complained that he had been sold out of date baby food. The baby food department was the Claimant’s responsibility as Home and Health Manager and the Claimant was invited to three investigatory meetings in respect of her potential misconduct by not following routine and process resulting in an out of date baby food product being sold to a customer. The investigating officer was Louise Wilby, Non Food Trading Manager and the Claimant was invited to three investigatory meetings with Ms Wilby on 28 March 2014, 7 April 2014 and 25 April 2014. The notes of these investigatory meetings were contained at pages 155 – 171 of the bundle of documents. During the investigation, the Claimant confirmed that she understood the importance of ensuring that out of date baby food was not sold and she acknowledged that it was her role to ensure that appropriate checks were undertaken excepting that, by signing the rotation planner, she was confirming that the baby food was safe to sell. In fact, the Respondent ascertained that the Claimant had not checked backroom stock and Ms Wilby herself checked the shop floor and found that baby food that was 17 days out of date was still being sold. The matter proceeded to a disciplinary hearing with Michelle Jackson who was employed by the Respondent as Customer Experience Manager at the relevant time. Ms Jackson undertook a disciplinary meeting with the Claimant in early May 2014 and concluded that the Claimant should be issued with a final written warning in respect of her misconduct. The Claimant appealed against the final written warning and this was overturned by James McNab, on 29 May 2014. There was limited documentation in respect of Ms Jackson’s disciplinary hearing. However, there were appeal notes available at pages 200 – 206 in respect of the appeal hearing conducted by Mr McNab. The reason for the final written warning being rescinded was not entirely clear but it appeared to the Tribunal to be process based. The notes show that the grounds of appeal related to the

Respondent failing to follow the correct disciplinary procedures as shown at page 200 and that the Claimant had not been shown the actual out of date baby food that was sold which was at page 204 of the bundle. The Tribunal found that as a matter of fact, the Respondent was entirely justified in taking disciplinary action against the Claimant in respect of her responsibility for allowing out of date products to be sold for which the Claimant acknowledged responsibility. The Tribunal did not find that there was any evidence to support the contention that the Claimant was being bullied and harassed as part of a continuing act of bullying and harassment by the Respondent in respect of such disciplinary action. It appeared based upon the Tribunal's review of the documents that related to the disciplinary action the Respondent was entirely justified in taking disciplinary action against the Claimant in respect of her conduct.

11 The Claimant raised a second and entirely new grievance on 8 May 2014 which was at pages 174 – 175 of the bundle of documents. In this grievance the Claimant complained about alleged bullying and harassment by Louise Wilby and Alistair Williams. She said these two, her lead manager and store manager, had bullied and harassed her. She complained that she had been graded as a “red” performer in line with the Respondent's traffic light performance grading scheme. She confirmed that she felt she had been singled out and made to feel stupid uncomfortable and degraded by her peers as a consequence of her manager's treatment of her. The Claimant sought to persuade the Tribunal that the second grievance was somehow related to the first grievance that was concluded by Ms Williams on 9 May 2013. However, the Tribunal was not persuaded by this assertion. It appeared to the Tribunal as shown at pages 174 – 175 that this was an entirely new grievance related to new managers at the Romford Gallows Corner Store and had nothing to do with her first grievance. Again, this second grievance was dealt with by the Respondent under a three stage process. The first stage was between 8 May 2014 and 30 August 2014 and this first stage was dealt with by Karyn Psyl-Thompson. The Claimant attended a meeting with Ms Psyl-Thompson on 14 May 2014 and the notes of this meeting were at pages 183 – 193 of the bundle of documents. Ms Psyl-Thompson adjourned the meeting because the Claimant was not prepared and was appealing her performance rating and her final written warning. Once reconvened, Ms Psyl-Thompson met with the Claimant on 3 July 2014 (212 – 218), on 16 July 2014 (219 – 226) and 18 July 2014 (230 – 240). At the 3 July 2014 meeting, the Claimant added complaints about her performance grading. At the meeting on 18 July 2014, the Claimant added to her grievance complaint about being bullied by Ms Jackson in respect of disciplinary action.

12 Ms Psyl-Thompson investigated the grievance in large part between 25 July and 22 August 2014. She interviewed some 18 people in that period (295 – 393) including Ms. Wilby, Mr. Williamson and Ms Jackson. In cross examination the Claimant accepted that this was so and that her second allegation that Ms. Psyl-Thompson did not interview these witnesses was not correct. Ms. Psyl-Thompson's outcome and report was at pages 421 – 423 of the bundle of documents. Her conclusions were as follows:-

12.1. There was no evidence to support the allegation that Ms Jackson had predetermined the disciplinary process against the Claimant and had used it to bully her.

12.2. Whilst Ms Wilby had not bullied the Claimant, there were issues in the relationship and that there had been insufficient support for the Claimant. Ms Psyl-Thompson made four recommendations in that regard and these were set out at page 423 of the bundle of documents.

12.3. Two witnesses had said that they saw Mr Williams having an impact on the Claimant and that she had got upset. Mr Williams said that he was frustrated when managers did not come prepared to meetings. Ms Psyl-Thompson confirmed action in respect of Mr Williams's behaviour.

13 Following receipt of the outcome from Ms Psyl-Thompson, the Claimant escalated the matter to stage two of the Respondent's grievance procedure in respect of the second grievance and this appeared in her email at pages 428 – 429 of the bundle of documents. The second stage of the grievance appeal process was dealt with by Nichola Sheail with investigations meetings being conducted in November 2014 (459 – 472 of the bundle), January 2015 and March 2015 (476 – 485 of the bundle). An outcome letter and report was sent to the Claimant on 13 April 2015 and was at pages 486 – 488 of the bundle. Ms Sheail, the Respondent's Group Personnel Manager concluded that the stage one grievance process had been sufficiently thorough noting that the Claimant did not ask for any further evidence to be considered (page 487). She upheld the Claimant's grievance with regard to insufficient support to her in her role (something which Ms Psyl-Thompson had already acknowledge) and concluded that Ms Psyl-Thompson's recommendations were the right ones to follow. She did not uphold the Claimant's grievance about bullying but again made more recommendations which included retraining for Michelle Jackson on grievance and disciplinary processes, training Ms Louise Wilby on supporting the Claimant's performance and updating the performance development plan for Alistair Williams and Michelle Jackson around personal impact and managing frustrations. In addition, she made additional recommendations about mediation, salary and sick pay.

14 The Claimant was not satisfied with the second stage grievance conclusion reached by Ms Sheail and wrote a letter of complaint to the Respondent's Chief Executive Officer, Mr Dave Lewis on 14 April 2015 which was at pages 489 – 492 of the bundle of documents. In this letter she complained of harassment and victimisation against a number of individuals employed by the Respondent. This was treated by Mr Lewis as stage three of the grievance procedure. Ms Sharon Kyte another personnel manager employed by the Respondent was appointed to deal with this third stage grievance. Stage three of the grievance was dealt with between 14 April and 26 June 2015. Ms Kyte met with the Claimant on 11 June 2015 (497E of the bundle). Ms Kyte's outcome letter appeared at page 498 – 500 of the bundle of documents and again it was concluded that a thorough investigation had taken place in respect of the Claimant's second grievance. However, Ms Kyte upheld the Claimant's allegation that the grievance had taken too long to complete and that some of the recommendations had not been implemented (498). A mediation process had not taken place because the Claimant had not returned to the Romford Gallows Corner store. The recommendations at stage two had not been implemented. For this, Ms Kyte apologised and confirmed that the Respondent would support the Claimant in finding alternative roles for her so that she did not have to return to the Romford Gallows Corner store and that she could stay working at the Respondent's Roneo store for 12 weeks while a suitable position could be found for her. The parties had agreed that if after that time a position could not be found for her, the Claimant would return to the Romford Gallows Store (page 500). The Claimant acknowledged the position by way of an email which was at pages 501- 502 of the bundle of documents dated 21 July 2015 confirming that she would consider alternative roles during the 12 weeks period and preferred management roles in home, health or clothing. However, if at the end of that period she could not find alternative roles, she would consider a return to her existing role at Gallows Corner.

15 As it transpired, the Claimant continued working at the Respondent's Romford Roneo Store from July 2015 until the date of her resignation on 31 October 2016 nearly a year later. Louise Woodley-Hay met with the Claimant on 18 November 2015 (504A – N of the bundle), 9 May 2016 (506 – 511 of the bundle) and 16 May 513 – 519 of the bundle) to discuss the fact that, despite not having secured a role away from Romford Gallows Store, the Claimant was still working at the Roneo Store. At the end of the 18 November meeting, the Claimant acknowledged that her role was at Romford Gallows and that her grievance had been resolved with a support period at Romford Roneo. At page 504G she was asked "so do you understand that your role is at Gallows Corner as a Tesco Manager" to which she confirmed the answer was 'yes' and was asked if her grievance had been resolved with a support period at Romford Roneo to which she answered 'yes'. Ms. Woodley-Hay went on to organise external mediation with an external ACAS officer. She explained this to the Claimant at a meeting on 16 May 2016 (page 513-519) and arranged for the ACAS officer to contact her. The structure of the mediation was that the ACAS officer would hold a meeting with her first and the subsequently hold a meeting with the managers against whom the Claimant raised a grievance (Ms. Wilby, Mr. Williamson and Ms. Jackson). A meeting would then be arranged between the Claimant and the three managers. Ms. Woodley-Hay became aware after a telephone call from the ACAS mediator who met with the Claimant that the Claimant did not wish to progress the mediation further.

16 John Popely met with the Claimant on 1 September 2016 (526 – 532). He told her that she would return to Romford Gallows within four weeks. At this point the Claimant attempted to suggest that the Romford Gallows Store was not her home store but rather that she had been contracted to work at the Goodmayes Store. However, as stated earlier in the judgment, the Claimant had voluntarily transferred to the Romford Gallows Store and this was her principal place of work. Mr Popely confirmed that position in writing to the Claimant which letter was at page 526 of the bundle of documents and was dated 1 September 2016.

17 The Claimant returned to the Romford Gallows Store for a short period of time on 30 September 2016 but she only worked two shifts before going on sick leave and then subsequently resigning from her employment on 31 October 2016. Her letter of resignation was at page 555 of the bundle of documents and was dated 31 October 2016 stating "Further to the meeting held 31 October 2016 with Anne Cantle at Tesco Roneo corner, it is with regret that I feel that the role has become untenable. Therefore with sadness I would like to tender my resignation from the company." Prior to resigning from her employment, the Claimant raised a new third grievance on 14 September 2016 which was at page 533 of the bundle of documents and was dated that date. In the grievance, the Claimant confirmed that following her meeting with Mr John Popely when she was given four weeks notice to return to Romford Gallows Store, she was not happy with such instruction claiming that since the commencement of her grievances in 2011, few if any meeting conclusions had been complied with or actioned. It was put to the Claimant in cross-examination and accepted by the Tribunal that the third grievance was a new and separate grievance and was really an attempt to prevent a return to the Claimant's place of work at Romford Gallows Store. The Claimant confirmed that she was prepared to return to the Romford Gallows Store if she could not be transferred to an alternative position. Between the resolution of the grievance by Ms Kyte on 26 June 2015 the Respondent had made at least three efforts to find alternative work for the Claimant which she did not action. Furthermore, since that date and her temporary role at the Romford Roneo Store, the Claimant made little if any effort to find another position herself. The

Tribunal accepted that this third and new grievance was really an effort by the Claimant to prevent a return to the Romford Gallows Store and an effort by her to resurrect the earlier grievances which had already been concluded. Indeed, it had been over a year since Ms Kyte had concluded the Claimants second grievance appeal at stage three of the Respondents procedure on 26 June 2015 and the Claimant's raising the third grievance on 14 September 2016.

18 With respect to a third grievance which was at page 533 of the bundle of documents, this was assigned to a completely new People Manager employed by the Respondent, Ms Anne Cantle to investigate at stage one. Ms Cantle had a meeting with the Claimant on 31 October 2016 the notes of which were at pages 541 – 545 of the bundle of documents. At this meeting, the Claimant said that Ms Cantle should have had more information about her previous grievances (page 544 of the bundle). The Claimant refused despite Ms Cantle's efforts to provide more information and proceeded to leave the room and not return. At the Tribunal hearing, Ms Cantle was criticised for her lack of knowledge of the Claimant's entire grievance and disciplinary history. It was asserted by the Claimant that this lack of knowledge on Ms Cantle's behalf amounted to a "last straw". The Tribunal did not accept this contention. It seemed to the Tribunal that Ms Cantle was part of the stage one of grievance process relating to the Claimant's third grievance and was acting entirely reasonably in ascertaining the background to the grievance raised by the Claimant on 14 September 2016. She was an independent officer with no prior knowledge of the Claimant's grievance or disciplinary history and was acting entirely correctly. The Tribunal accepted that Ms Cantle conduct could not amount to "the final straw".

### **The Law**

19 The contractual term said by the Claimant to have been breached in this case was the implied term of mutual trust and confidence ("the implied term"), whereby an employer shall not

"without reasonable and proper cause, conduct itself in a manner calculated or likely to seriously destroy or damage the relationship of confidence and trust between employer and employee."

Lord Steyn at page 45 in Mahmud & Malik v Bank of Credit and Commerce International SA [1998] AC 20.

20 Reviewing the implied term in Frenkel Topping v King [2015] UKEAT-0106-15, Langstaff P held that

"12.....This is a demanding test. It has been held ... that simply acting in an unreasonably manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik as being "apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."



- 13 Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is a repudiatory ...
- 14 The test of what is repudiatory is being expressed in different words at different times. They are, however, to the same effect. In Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 it was “conduct with which an employee could not be expected to put up”. In the more modern formulation, adopted in Tullett Prebon Plc v BGC Brokers & Others [2011] IRLR 420, is that the employer must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the extent of the terms.”

21 While an employer cannot remedy a repudiatory breach of contract so as to preclude its acceptance, it is able to take steps to prevent an event from undermining trust and confidence in the first place: Assamoi v Spirit Pub Co [2012] UKEAT/0050/11.

22 Finally, a breach of mutual trust and confidence may arise from a series of acts taken together in combination with “a last straw”. On 1 May 2018, judgment was handed down in Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA CIV 978 Underhill LJ with whom Singh LJ agrees. The judgment puts to an end the tension in the cases but effectively reaffirms the orthodoxy of Omilaju. Underhill LJ summarise the test for the Tribunal as follows:-

“55. I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In a normal case where an employee claims to have been constructively dismissed it is sufficient for a Tribunal to ask itself the following questions:

- (1) What was the most recent act (or omission) on the part of the employer which the employee says is caused, or triggered, his/her resignation?
- (2) Has he/she affirmed the contract since that act?
- (3) Was the act (or omission) by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the Malik term?
- (5) Did the employee resign in response or partly in response to that breach?

23 Underhill LJ endorsed the approach in Omilaju (Waltham Forest) LBC v Omilaju [2004] EWCA CIV 1493. At paragraph 40 he cites with approval the following judgment of Dyson LJ:-

“21. 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 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.”

### **Employment Tribunal Conclusions**

24 In this case, the Claimant cited that the final straw was Ms Cantle on 31 October 2016 having no knowledge of the Claimant’s previous grievance or copies of the previous grievance documents to hand and having to ask the Claimant to provide further information in respect of her entire grievance history. As a consequence of Ms Cantle making such request, the Claimant confirmed that she viewed this as the “final straw” citing that Ms Cantle should have known about the Claimant’s previous grievance and disciplinary history and should not put her through the stress of having to recite such history again. The Tribunal accepted that Ms Cantle was an independent investigation officer having no previous knowledge or awareness of the Claimant’s case. In the Tribunal’s view, she did exactly what was expected of manager’s investigating the Claimant’s grievance of 14 September 2016 namely she met with the Claimant on 31 October 2016 to ascertain in full detail what she wished to raise as part of her grievance as well as outlining further investigation that would be conducted by the Respondent at that stage. Ms Cantle read the Claimant’s grievance form at page 533 of the bundle and convened a meeting to ask her in detail what the substance of her complaints were. Ms Cantle’s distance from the Claimant’s history of grievances was intentional and was not unusual as she was a new and independent investigation officer and was viewing the grievance afresh with clear eyes. In the Tribunal’s view it could in no way have undermined trust and confidence in the Respondent as the manager appointed to investigate the third grievance was acting entirely normally and in accordance with recognised grievance procedures. Therefore, the Tribunal’s view was that the “final straw” relied upon by the Claimant was an entirely innocuous action on the part of the Respondent and did not amount to a “final straw” as asserted by the Claimant. As a consequence it was not necessary for the Tribunal taking in to account the guidance given in *Kaur* to look at the earlier series of acts which the Claimant cited amounted to a breach of the implied term of trust and confidence and went all the way back to 2011. However, for the sake of completeness, the Tribunal deals with the nine allegations that the Claimant cited as being a breach of the implied term of trust and confidence going back to her first grievance dated 4 March 2011.

25 With regard to the first allegation of delay in the investigation of grievance number one, the Tribunal accepted the Respondent’s evidence that although the grievance was dated 4 March 2011 it was not raised by the Claimant until 21 September 2012 and when it was raised by her it was dealt with promptly by way of an investigation meeting on 26 November 2012 and then subsequently by reasonable recommendations that were made by the Respondent. In any event, the matters that the Claimant sought to rely upon went back to 2012, were historic and were irrelevant to her resignation.

26 Secondly, the Claimant alleged that Ms Psyl-Thompson failed to interview Ms Wilby, Mr Williamson and Ms Jackson. The Claimant accepted in cross-examination at the Tribunal hearing that she was wrong in this assertion and that the three witnesses were interviewed by Ms Psyl-Thompson as part of her investigation at the time. In any event, the Tribunal found that these matters were historic and were irrelevant to the Claimant's resignation.

27 Thirdly, the Claimant alleged that Ms Jackson inviting her to a disciplinary hearing on 2 April 2014 and later issuing her with a final written warning was a breach of the implied term of trust and confidence. The Tribunal accepted as did the Claimant in cross examination that it was appropriate for the Respondent to invite the Claimant to a disciplinary hearing in respect of her conduct in relation to baby food that was discovered for sale and which was out of date. The final written warning which was issued by Ms Jackson was in any event overturned on appeal by Mr James McNab on 29 May 2014. The Tribunal found that this matter was so historic as to be irrelevant to the Claimant's resignation.

28 Fourthly, the Claimant asserted that being asked by the Respondent to transfer to the Respondent's Gallows Corner Store during the misconduct investigation was a breach of the implied term of trust and confidence. The Tribunal concluded that this move was made in January 2013 long before the investigation in March 2014 relating to the Claimant's misconduct. The reason for the transfer to the Gallows Corner Store was because the Claimant had raised a grievance against managers at the Goodmayes Store. At the end of grievance number one, the Claimant was given the option to stay at the Gallows Corner or return to Goodmayes (151) and she chose the former. She was then permanently appointed to Gallows corner in July 2013 which she accepted and she was issued with a new contract of employment.

29 Fifthly, the Claimant cited a breach of the implied term of trust and confidence as a result of the unreasonable delay in investigating a grievance concerning Ms Jackson's final written warning raised on 8 May 2014. The Tribunal noted that the Claimant did not raise a grievance about Ms Jackson on 8 May 2014. The suggestion that the disciplinary investigation was an act of bullying and harassment arose on 25 July 2014 (245 – 254) and was raised in the context of a broader grievance (grievance number two). The Tribunal accepted that there were legitimate reasons that grievance number two took so long to conclude involving Ms Kyte interviewing numerous witnesses and delays arising partly to the Claimant and/her representative non availability. In any event, Ms Kyte did conclude that stages one and two took slightly too long and upheld these grievance on that point (page 498 – 500 of the bundle of documents). The Tribunal also accepted that these were historic matters and were irrelevant to the Claimant's resignation.

30 Sixthly, the Claimant asserted that the Respondent's refusal to allow her to return to the Goodmayes Store was a breach of the implied term of trust and confidence. The Tribunal accepted that at the conclusion of the second grievance there was no vacancy at the Goodmayes store which store the Claimant had left to move to Gallows Corner in 2013. The Claimant was encouraged and helped to find an alternative role during the 12 week review period and for a much longer period of time thereafter. There was little evidence that the Claimant whilst employed at the Respondent's Roneo store made any real effort to find another role herself. In any event, the Tribunal noted that Gallows Corner was the Claimant's base store and that she had no contractual right to return to the

Goodmayes Store in any event. The Tribunal noted that there was a mobility clause in the Claimant's contract of employment (page 93) and she had secured alternative and permanent employment at Gallows Corner in July 2013 (153).

31 The Claimant seventh contention was that the Respondent was in breach of the implied term of trust and confidence in ignoring her request to be transferred to a store other than Gallows Corner. The Tribunal did not accept the Claimant's contention and noted that the Claimant was given help in searching for alternative roles during the 12 week review period and subsequently. The Claimant also did not make any effort during the period between June 2015 to 31 October 2016 to find an alternative role herself with the Respondent's organisation. The Claimant was interviewed for a role and was made aware of a number of vacancies which she did not pursue.

32 Finally, the Claimant asserted that on 16 May 2016 the Respondent's failure to engage with external ACAS mediation was a breach of the implied term of trust and confidence. The Tribunal accepted the Respondent's contention that the ACAS mediation role was one that involved the Claimant being interviewed first and then thereafter the Respondent's witnesses being interviewed subsequently. The Claimant confirmed that at her interview with the ACAS officer she did not wish to be involved in mediation and thereafter the ACAS officer confirmed this to the Respondent thereby ending the mediation process. The Tribunal accepted the Respondent's evidence that it was the Respondent that set up the mediation with Ms Woodley-Hay confirming that the Claimant would be required to meet with Mr Williamson and Ms Wilby as part of that conciliation after the Claimant had been interviewed. It was the Claimant that wished not to be involved in meeting with Mr Williamson and Ms Wilby. Furthermore, the Claimant was permitted to stay for an extended period of time beyond the 12 week review process at the Roneo store until September 2016 in order to secure a consensual return to the Gallows Corner store. At this time due to the disruption in the Respondent's business, Mr Popely wrote to the Claimant requiring and giving her four weeks to secure a consensual return to the Gallows Store that being her base store. The Tribunal found that this was a reasonable thing for the Respondent to do especially after attempting to secure an agreed move to another store for the Claimant between June 2015 and October 2016. The Claimant was simply unhappy at moving back to the Gallows Corner store despite it being perfectly legitimate for the Respondent to want her to return. The Tribunal found that she only raised the third grievance in October 2016 in response to the impending move despite grievance number two having concluded in June 2015 a year earlier.

33 For the above reasons, the Tribunal dismisses the Claimant's claim for constructive unfair dismissal.

Employment Judge Hallen

21 May 2018