EMPLOYMENT TRIBUNALS

Claimant: Miss R Thornton

Respondent: Beech Hall School Limited

Heard at: Manchester **On:** 11 December 2018
1 April 2019
21 June 2019 (In Chambers)

Before: Employment Judge Holmes

REPRESENTATION:

Claimant: Ms N Thornton, Sister
Respondent: Mr T Wood, Counsel

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The claimant was unfairly (constructively) dismissed.

2. The claimant is entitled to a remedy. The parties are encouraged to seek to agree remedy. If they are unable to do so by **30 September 2019** they, or either of them, are to notify the Tribunal that a remedy hearing is required. That notification shall specify the estimated length of hearing, dates to avoid, and the issues that the Tribunal will be required to determine on remedy.

REASONS

1. By a claim form presented to the Tribunal on 24 July 2018 the claimant complains of unfair dismissal, arising out of her resignation from her employment with the respondent on 28 March 2018. That is the sole claim she makes. The claim was heard on 11 December 2018, but could not be concluded, and was resumed part heard on 1 April 2019. Thereafter the parties made written submissions, and the Tribunal deliberated in Chambers on 21 June 2019. The Tribunal apologises for the delay in promulgation of this judgment, occasioned by pressure of judicial business.

2. The claimant was (very ably, for a non – lawyer, the Tribunal must observe) represented by her sister, Ms Naomi Thornton, who was also a witness for her. The claimant gave evidence, and also called her mother, Mrs Bridget Thornton. The respondent was represented by Mr Wood, of counsel, and called Vikki Bradley, Hazel Bennett – Squires and James Allen. There was an agreed bundle. References to page numbers are accordingly to pages in the bundle, unless otherwise stated.

3. Having heard the evidence, read the documents referred to the course of the evidence in the bundle, and having considered the submissions of the parties, the Tribunal finds the following relevant facts. Given that allegations and comments were made in the evidence about two third parties (indeed, in relation to the sexual orientation of one of them), neither of whom were witnesses , who had no opportunity to "defend" themselves, and whose identity is not germane to the Tribunal's judgment, the Tribunal considers that, given the publication of its judgments online, they need only be referred to by their initials.

3.1 The claimant was from 25 March 2002 employed by the respondent, which operates a pre – school nursery at Beech Hall Drive, Tytherington, Macclesfield. The respondent is part of the Riverston Group, which runs two schools in the UK, the respondent school and one in Blackheath. It has no Group HR department. The claimant's terms and conditions of employment were issued on 15 February 2008 (pages 34 to 38 of the bundle). She was promoted in or about February 2008 to Room Supervisor and Early Years Practitioner. In 2017 the claimant applied for the Deputy Manager's role, but was unsuccessful.

3.2 Vikki Bradley was the Nursery Manager, and the claimant's direct line manager. Hazel Bennett – Squires was the Deputy Nursery Manager. James Allen was the head teacher of the School, of which the nursery was a part. The nursery accommodated some 56 children, with 9 members of staff within the nursery department. James Allen was not based on the nursery premises, but at the School. Vikki Bradley and Hazel Bennett – Squires were based at the nursery, and had day to day contact with the claimant.

3.3 The claimant's employment was successful, and she enjoyed it. She worked in the baby room, and was room supervisor. She had no disciplinary record, and no significant health issues. In September 2018 a new nursery nurse, CW, started work at the nursery, as maternity cover. The claimant was her supervisor. The claimant found her hard to manage, as did others employed by the respondent. The claimant found her slow and ineffectual, and reluctant to update the children's learning journeys. She also put out broken toys. The claimant found that she did not bond as well as she did with the children, but she professed more up to date skill and knowledge. The two clashed, and Vikki Bradley was aware of these clashes. Each complained informally to colleagues about the other.

3.4 The claimant found this a stressful situation. At the suggestion of Vikki Bradley,she went to her GP, accompanied by a co – worker. It is unclear precisely when she did so (there is no documentation in the bundle) but not in dispute that she did, or that Vikki Bradley had suggested this.

3.5 CW was off work sick in October and November 2017, and again at the beginning of December 2017. She was due back on 7 December 2017, but did not attend. She then was off with "stress at work" in December 2017. James Allen tried

to convene a meeting with her, to discuss her employment, her ongoing performance and her recent periods of absence (page 74). On 12 December 2017 it appears that she put in a form of "grievance", but this is not in the bundle. The meeting was not held until 22 December 2017. A timeline of CW's absences, and the references to her grievance is at page 69 of the bundle.

3.6 On 22 December 2017 James Allen at the meeting with CW discussed a number of issues with her, including what he called her "grievance". He said he would take that up at another meeting. CW made a number of claims about Vikki Bradley, and how she had treated her, alleging that she had "been fuming with her" at one point. James Allen told her that he would review CW's attendance and make a decision on her employment, but dismissal was a possible outcome. He said he would investigate her grievance, in the New Year.

3.7 Before leaving, however, CW handed James Allen her letter of resignation with immediate effect (page 77).

3.8 On 15 January 2018 SH began working as the claimant's assistant (having worked previously on agency basis in late 2017). He had been a successful new employee, and was expected to fit in well, and to continue to develop.

3.9 Whilst initially the claimant thought well of SH, and considered he would be a good colleague, after he was appointed on a permanent basis the relationship between him and the claimant, however, did not progress well.

3.10 Against a background of the claimant finding that SH would not accept her authority, and would not work in the way that she directed him, on 17 January 2018, there was an argument between the claimant and SH, in which the claimant raised her voice. This was in the nursey, and heard by others. It came to the attention of Hazel Bennett – Squires, and other colleagues. She therefore informed Vikki Bradley, who had not been present, of this incident later that day.

3.11 On 18 January 2018, the following day, Vikki Bradley, having been made aware of the incident the previous day, came into the nursery, and spoke first to SH, and then the claimant about the incident the previous day. This was not a formal meeting, Vikki Bradley was trying to find out what had occurred, and to see how best to resolve it. The claimant, however, found this an inappropriate and difficult discussion. Vikki Bradley did , the Tribunal finds, raise her voice, and the claimant did say that she would not put up with being spoken to, and would not let Vikki Bradley finish what she was saying. She left work there and then, at around 10.30, ending the discussion. It was unclear what her intentions were.

3.12 Later that day (quite when is unclear, but it was after 10.30, or even early the following day) the claimant sent a text to her colleague and friend Michelle Bagueley, who was on her way to New York, on holiday. In that text, and during the ensuing exchanges, the claimant said that she had "left the shithole", and that she had to do so because the "dragon", by which she meant Vikki Bradley , was screaming at her, and she had told her that if she did not stop, she would be "out of the door". This text exchange, in which the claimant gave Michelle more information about what had occurred, is at pages 85 to 95 of the bundle. She referred (page 86) to ""fucking

Hazel" telling Vikki Bradley about what had gone on, and to SH, twice, as a "drama queen". SH is gay.

3.13 In this text exchange the claimant went on to make reference to contact that she had had with other colleagues, and how SH had apparently said he wanted to work things out with her, referring to him as a "knob!!!".

3.14 These text exchanges continued (pages 79 to 84 of the bundle) in which the claimant spoke of the lack of support, and sought, and indeed received, advice from Michelle. She discussed with her how she could return to work in the circumstances. Michelle's advice was to have a meeting, and get it all sorted out.

3.15 Later on 18 January 2018 James Allen telephoned the claimant to see what she intended to do. The claimant saw her GP. On 19 January 2018 the claimant began a period of absence. She obtained a fit note, which does not appear to be in the bundle, but which recorded the reason for her absence as "work related stress". This was for the period of one week. Further fit notes were issued.

3.16 The claimant remained off work, and on 9 February 2018 James Allen emailed the claimant the day before her sick note expired (which would have meant a return to work the following Monday) and suggested it would be beneficial to meet (page 97 of the bundle). In the meantime, precisely when is unclear, but his witness statement says it was "on or around 19th January 2018", James Allen had sight of the text exchanges between the claimant and Michelle Bagueley, and others. He made no mention of these texts in this email to the claimant.

3.17 James Allen referred in this email to claimant's absence for work related stress, and how there had been no contact from the school during her absence, as this would have placed further stress upon her. He did wish to support her return to work, and suggested that the "three" of them (i.e the claimant, himself and Vikki Bradley) met before she started back at work on the following Monday. He therefore suggested they meet at 9.00 the following Monday 13 February 2018.

3.18 On 11 February 2018 the claimant wrote back to James Allen stating that she was not ready to return, and had a further fit note, and raising the issues that were preventing her return (pages 98 to 100 of the bundle). The claimant's letter covered the events from CW starting her employment, through to the argument with SH, and the issues with Vikki Bradley on 18 January 2018. She set out her account of the incident on 18 January 2018, and her allegations that Vikki Bradley shouted and screamed at her. She explained how she considered that Vikki would always assume she was the one to blame, and how she felt sick with anxiety at the idea of coming back to work in the circumstances. She expressed a wish to find a way forward, and was agreeable to a meeting, but said she would prefer it if Vikki was not there.

3.19 This letter was not treated as a grievance by James Allen, and he took no formal action upon it. He replied on 13 February 2018, explaining that he had not received her message that she had a further fit note, which he had just received, and to request a convenient time for a meeting (page 101 of the bundle). He agreed to the request to meet without Vikki, but went on to say that they would need to resolve the disputes between the claimant and both SH and Vikki Bradley.

3.20 On 21 February 2018 James Allen met with the claimant and her mother. Vikki Bradley was not initially present. Whilst the meeting initially appeared friendly and positive, the claimant did, James Allen accepted, burst into tears at the start of it. During the meeting, with no prior warning, James Allen raised with the claimant the issue of the text messages that she had sent, and produced copies of them from a filing cabinet. He told her that they could be viewed as gross misconduct. He went on , however, to say that he would not take any action about them, and they would not be referred to on her file.

3.21 In this meeting the claimant's mother did most of the talking for her. She urged her to return to work. James Allen said that her prolonged absence had made returning harder. He asked how a return to work could be achieved, and asked if Vikki Bradley could join the meeting. The claimant and her mother did not object, so Vikki Bradley did join the meeting. The arrival of Vikki Bradley, and what she said was not positive. The incident on 18 January 2018 was discussed, and Vikki Bradley stated that she could not understand why the claimant had walked out, as she had not done so previously, when she had treated the claimant in the same way. Reference was made by Vikki Bradley to the claimant having left the nursery understaffed, and letting colleagues down, a comment with which James Allen agreed. The claimant and her mother sought reassurance as to whether the claimant would be welcomed back to work, but felt that Vikki Bradley's attitude would not change, and she would remain critical of the claimant. There are no notes of this meeting.

3.22 The meeting concluded with no agreed outcome. An occupational health assessment may have been one outcome, but James Allen had made no enquiries about getting one, and had never previously made such a referral, and did not mention getting one. On 23 February 2018 the claimant emailed James Allen (page 103 of the bundle) asking if the text messages that had been discussed during the meeting had been destroyed, no reference would be made to them on her personnel file, their contents had not been shared, and would not have any bearing on any future employment reference. She said she would make her decision about returning to work after she had seen her GP, and in the light of his reply about the text messages. The claimant had by this time decided that she would resign, and was primarily seeking to ensure that no reference that was provided by the respondent would make any reference to these matters.

3.23 By response of the same date, James Allen replied that, whilst it would have been entirely appropriate for him to have considered disciplinary action, given her 17 years service, and the fact that the texts were sent during a period of heightened anxiety, they would be destroyed, and would not be referred to in any employment reference in the future (page 102 of the bundle). They have, in fact, not been destroyed, and were produced to the Tribunal. In this email he referred to the comment made in the meeting that her prolonged absence had not enabled her smooth return to work, and continued to exacerbate the challenge. He made reference also to the fact they had not met in the first week of her absence. He urged her to return to work, put this episode behind her, and confirmed that Vikki Bradley would do all she could to support her.

3.24 On 28 February 2018 the claimant resigned giving one month's notice. Her resignation letter is at pages 104 to 105 of the bundle. She referred to the meeting, and what had been said in it. She expressly referred to the comments made by Vikki Bradley, querying why she had walked out, as this was nothing different to what had happened on a number of other similar occasions. She asked whether this caused James Allen concern, and said that it was clear that the conditions she would face if she came back to work would be the same or worse than before. No steps whatsoever had been proposed in relation to her anxiety or the issues that gave rise to it. This made her position untenable, and she therefore had reluctantly decided to resign. She gave one month's notice, but as she was still unwell she enclosed a sick note, covering the remainder of her employment up to 21 March 2018. She sent an email at 15.38 on 28 February 2018 to James Allen to inform him that she had sent a letter of resignation, and a further sick note (page 106 of the bundle).

3.25 By email of 28 February 2018 at 18.49 James Allen replied (page 106 of the bundle), saying he was genuinely sorry, but appreciated her communication, and with regret, accepted her resignation.

3.26 The relevant sickness absence provisions in the claimant's terms and conditions of employment are at clauses 10.1 to 10.5. The only reference to any grievance procedure is at clause 14, which refers to the Staff Handbook (page 37 of the bundle).

3.27 Clause 16 of the terms document refers (page 38 of the bundle) to the Company's Sickness and Absence and Equal Opportunities Policies, but no such policies have been produced in evidence. The Staff Handbook for 2016/2017 is at pages 39 to 68 of the bundle. At page 60 of the bundle is a section entitled "Absence", which effectively is a practical set of terms relating to notification, and the discretion to grant compassionate or other leave. It is not any form of absence management procedure.

3.28 On page 61 of the bundle under the heading "Discipline", there appears this:

"Please see the Beech Hall Staff Grievance Procedure"

No such procedure has been produced to the Tribunal. Whilst reference was made to such a document on a notice board, no copy has been produced, and the Tribunal accepts that the claimant was unaware of any such document.

4. Those are the relevant facts found by the Tribunal. There was not a lot of factual dispute, and where there was the Tribunal is satisfied that the witnesses were giving their honest recollection of events. In terms of the events on 18 January 2018 , to the extent that it matters, the Tribunal prefers the claimant's account of the discussion with Vikki Bradley. The Tribunal finds that she did raise her voice, possibly because the claimant was interrupting her, but the claimant's almost contemporaneous text messages, sent with no expectation they would be produced in evidence, and her subsequent letter of 11 February 2018, show a consistent account of Vikki Bradley "screaming" at her. That may be an overstatement, but it assists the Tribunal in assessing what, on a balance of probabilities, actually occurred. The Tribunal has been hampered too by the (slightly surprising) absence

of any notes of the crucial meeting on 21 February 2018. The Tribunal broadly prefers the account of the claimant and her mother of this meeting.

The submissions.

5. The parties made submissions (extensive, the claimant's running to 19 pages, and the respondent's to 17) , in writing, which are available on the Tribunal's file and which it is not intended to repeat in this judgement. To summarise, Mr Wood invited the Tribunal to conclude that the claimant had not established that the respondent had acted in fundamental breach of contract, and that whilst there may have been some unfortunate consequences for the claimant who reacted badly to the incidents with CW and SH, and at Vikki Bradley raising the issue of the claimant's conduct with her, the respondent nevertheless acted reasonably in dealing with the issues with which it was confronted. The claimant reacted badly to two staff situations in which she bore some responsibility, which she would not accept. Not only was there no fundamental breach of contract, there was no final straw, as James Allen's email of 23 February 2018 provided the claimant with the reassurance that she sought in relation to the text messages, and any potential disciplinary consequences for her current, or her future, employment. In those circumstances there was no fundamental breach of contract, and hence no constructive unfair dismissal.

6. For the claimant, Miss Thornton submitted that the respondent's behaviour taken as a whole over the period from December to the meeting on 21 February 2018 showed a lack of professionalism, and duty of care for the claimant who was in a vulnerable state, which was considerably aggravated by James Allen's confrontation of her with potentially serious disciplinary action in the meeting which was supposed to assist her to achieve a return to work. In essence, there was continual blame of the claimant, who had been given inadequate support in managing two difficult members of staff. There was no prospect of anything improving upon her return to work, Vikki Bradley showed no signs of changing, and she was still expected to work with SH. The submissions make frequent reference to the respondent's lack of HR support, or procedures, and, at times verge upon allegations of failure of the respondent to discharge its duty of care towards the claimant. Points are made on credibility issues, and the Tribunal is invited to prefer the claimant's account of events to that of the respondent. These submissions respond (being sequential) to specific submissions made in the written submissions of the respondent.

The Law.

7. Section 95(1)(c) of the Employment Rights Act 1996 provides that there is a dismissal when the employee terminates the contract with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

8. The classic statement of the law on constructive dismissal is set out in the judgment of the Court of Appeal in ***Western Excavating (ECC) Limited v Sharp [1978] ICR 221*** which held that for an employer's conduct to give rise to a constructive unfair dismissal it must involve a repudiatory breach of contract. There are three elements to a constructive unfair dismissal, namely:

That there was a fundamental breach of contract on the part of the employer;

The employer's breach caused the employee to resign; and

The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

In order for a Tribunal to deal with these matters it must identify the contractual term or terms, either express or implied, which have allegedly been breached. It must then go on to identify a fundamental breach of that contract on the part of the employer. The implied term of trust and confidence was the term of the contract which had allegedly been breached by the respondent by various acts or omissions over a period of time which, the claimant says, cumulatively amounted to a fundamental breach. The Tribunal, therefore must firstly decide whether the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

9. That term, as recognised in cases such as ***Wood v. W M Car Services (Peterborough) Ltd [1981] IRLR 347*** and ***Mailk v BCCI [1997] IRLR 462*** is that the respondent will not , without reasonable and proper cause, conduct itself in a manner which is calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee.

10. It is clear that in order to establish that there has been a fundamental breach of contract it is not necessary to show one fundamental act or omission. There does not need to be one event, there can be a series of events which cumulatively amount to a breach of that implied term. In such circumstances, where there is not one individual act or omission relied upon, but a series of actions that are alleged to amount to that breach, where they culminate in one particular act that is known as the "last straw", and in order to establish that a claimant has been constructively dismissed there has to be a last straw. Indeed in the leading case which the Tribunal is considering on this issue, ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35,*** a decision of the Court of Appeal and the judgment of Lord Justice Dyson, it is clear from the discussion in that case of the nature of constructive dismissal, that in order for there to be a constructive dismissal where there is a series of acts, the final straw must be there, and although the final straw may be relatively insignificant, it must not be utterly trivial. There must be a final straw, otherwise there can be no constructive dismissal. 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. The judgment goes on to say:

"A claimant cannot subsequently rely on those acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

Moreover, and this is an important part of the judgment:

"An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of

his trust and confidence in his employer. The test of whether the employee's trust and confidence have been undermined is objective."

11. So to the extent that the claimant might have perceived that as being the case, the Tribunal cannot rely solely on that, it must look objectively on the act complained of.

Discussion and decision.

12. The Tribunal has first had to consider whether there has been a fundamental breach of contract entitling the claimant to resign. No express term is relied upon, the claimant is relying upon the implied term of trust and confidence, as discussed above. Additionally, there is, the respondent concedes, an implied term that an employer would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. In her closing submissions Ms Thornton also makes reference to an implied term requiring the employer to take reasonable steps to ensure the health and safety of the employee. This has not been previously advanced, but is the Tribunal agrees, a further term to be implied into an employment contract.

13. The first question, therefore, for the Tribunal is whether the respondent acted in such a manner as to amount to a fundamental breach of the first of these implied terms. The claimant relies upon a course of conduct going back to the period when CW was employed, and culminating in the meeting held with James Allen on 21 February 2018. The Tribunal cannot see any conduct on the part of the respondent in relation to CW that may amount to a breach of the implied term of trust and confidence, the first such conduct that could be relied upon would be that of Vikki Bradley in allegedly shouting at the claimant so that she left work on 18 January 2018. The Tribunal accepts the claimant's account of these events, and finds that Vikki Bradley did, in broad terms, raise her voice with the claimant when confronting her about the incident that occurred the previous day with SH. Further, seeking to resolve such issues with the two protagonists in the nursery, during the working day, was not a wise idea. Whilst appreciating that management may wish to deal with matters informally, and "nip things in the bud", Vikki Bradley would probably accept, in hindsight, that this was not the best way to deal with this incident. That would not, however, have been sufficient, the Tribunal finds, to have entitled the claimant to resign at that stage, but it is relevant background against which the respondent's subsequent conduct needs to be considered. The claimant by her letter of 11 February 2018 (pages 98 to 100 of the bundle) clearly set out issues that she had in particular with Vikki Bradley, going back to the employment of CW. In that letter the claimant spoke of the impossible position that she was in, and the impact of the situation upon her mental health and well-being. James Allen did not treat this letter as raising any form of grievance. It is correct that the claimant did not so entitle it, nor did she use the word "grievance" within it. Any employer reading that letter, however, would take from it that the claimant was raising serious issues about her treatment at the hands of her immediate line manager.

14. The respondent does not appear to have, or have had, a grievance procedure. Reference was made to an alleged document on a notice board, but nothing has been produced, and the Tribunal accepts that the claimant was unaware of any grievance procedure. This absence is surprising, given that it is part of a larger group of companies, with access to an HR function, and has gone to the

trouble of providing a staff handbook, and a contract of employment for its staff. The latter, at paragraph 14 (page 37 of the bundle) makes specific reference to a formal grievance procedure policy being set out in the Staff Handbook. A perusal of that handbook, however, reveals that it is more applicable to relationships with pupils and parents than it is to relationships between employees and employer. That employees could raise grievances is abundantly apparent from the fact that CW, before she left, clearly did. No copy of that document is included in the bundle, and it may well be that CW used terminology that clearly indicated she was raising a grievance. Be that as it may, the Tribunal does not consider that the lack of any reference to the word "grievance" in the claimant's letter of 11 February 2018 absolved James Allen of the responsibility to consider the contents of that document, and to consider what steps should then be taken to investigate and, if possible, resolve the issues that were at that time preventing the claimant from returning to work.

15. He did not do so, and had no real explanation as to why he did not do so, other than the absence of any reference to the word "grievance". That may be unfortunate, and again would not, of itself, have constituted a fundamental breach of the implied term of trust and confidence. Thereafter two things happened, the first was the response by James Allen to the claimant's text messages to colleagues, and the second was his meeting with her on 21 February 2018. He accepts that he did not, prior to that meeting, inform the claimant that he had been provided with these texts. Whilst he suggested that he had only recently received them, his witness statement suggests otherwise. Regardless of when he saw them, the fact remains that the claimant attended a meeting which had been arranged to discuss her potential return to work, only to find that she was, for want of a better word, ambushed with serious allegations, of which she had no prior warning. It is appreciated that James Allen would be in a difficult position. Raising such matters with her in advance of the meeting could have increased her stress, but it would at least have given her an opportunity to say whether she would be in a position to deal with those matters at the meeting, or would prefer not to do so. Alternatively, and this is probably the better course, James Allen could have said nothing in the meeting, and then, after it was over, depending upon the outcome, he could then have raised these matters with her after it was over, perhaps in a separate email, or letter. As he was not going to take any action, he could have so informed the claimant, and encouraged her to return to work.

16. Rather, he did the worst of both worlds. He raised these matters with the claimant for the first time in this meeting, and agrees that he told her that they could be construed as gross misconduct.

17. Mr Wood submits that there is no "egg shell skull" principle in constructive dismissal, and he is correct, up to a point. That said, the Tribunal has to look at the conduct complained of and decide whether it was likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The important word is "the", it is not a requirement that the conduct must be likely to damage <u>any</u> such relationship. That assessment, therefore, must surely be made in the light of all the circumstances, one of which must be the health of the employee. Thus if, as here, an employee is absent from work by reason of work-related stress, there must be a greater likelihood of damage to the relationship than there would be in circumstances where the employee is fully fit, and is attending work.

18. James Allen sought to explain why he felt it necessary to raise these allegations with the claimant at this meeting. He felt that the matter was urgent, and wanted to have it dealt with as soon as possible. It is right, as he says, that he informed the claimant that no disciplinary action would be taken against her. That was, of course, to her benefit, but was, with respect to James Allen, too late, coming as it did after the damage was done. It is hard for the Tribunal to avoid the observation that rushing to confront the claimant with these further serious allegations during a meeting whose purpose was to effect her return to work after a period of stress-related sickness absence, was a hasty and ill thought out action to take.

19. That Vikki Bradley, the very subject matter of the claimant's concerns expressed in her letter of 11 February 2018 should then be invited into this meeting, when the claimant had previously indicated that she did not wish her to be present, rather compounded James Allen's mistake. The Tribunal accepts that the claimant did agree to her joining the meeting at this point, but a moment's reflection on the part of James Allen, particularly given that this occurred after he had raised the text message allegations with the claimant, would have led to reconsideration of this proposal. As is clear from the evidence, the participation of Vikki Bradley in this meeting did not lead to any resolution, but to further concerns on the part of the claimant that she would not be able to return to work with her. James Allen's evidence was that he did this because he did not know what else to do.

20. In short, the meeting of 21 February 2018 was something of a "dog's breakfast", neither fish nor fowl, to mix metaphors. It is surprising that James Allen received no HR support or advice as to how to approach and conduct this meeting, what it in fact was, and how it should, or should not be conducted. A discussion about how the claimant might return to work then encompassed a potentially serious disciplinary issue, and , with the invitation of Vikki Bradley, became some form of attempt at face to face mediation of an unacknowledged grievance. This is not to denigrate what James Allen was trying to achieve, and the Tribunal sympathises with him. He was, however, rather ill – equipped to avoid the pitfalls into which he then fell, and their fatal consequences for the employment relationship.

21. The Tribunal accepts that the respondent, in the person of James Allen mainly, did not engage in this conduct intending that the relationship of trust and confidence be destroyed or seriously damaged, but it was clearly likely that it would be. There was no reasonable or probable cause for this. Taking some more time, seeking HR advice, and giving some more basic reflection on how to handle this situation (no consideration of any occupational health advice appears to have been given) , would have been perfectly easy and practicable. Whilst it may be surprising that the respondent company, which employed some 50 staff in 2017, had no HR support, its parent company had a turnover of approximately £5m that year, and employed some 130 staff across the Group (source – Companies House). That is a matter for the respondent, however, and simply meant that James Allen did not have the benefit of such support, nor, it seems, the initiative to seek it.

22. Mr Wood for the respondent argues that there was, thereafter, no final straw, as the claimant then wrote to James Allen asking him to confirm that the texts would be destroyed, and that there would be no disciplinary record which may affect any reference that the respondent would give the claimant when applying for any future employment. Mr Wood rightly points out that such assurances were given, and

hence the claimant cannot rely upon James Allen's email response on 23 February 2018 as any form of final straw as it was entirely consistent with what the claimant was seeking. For her part, however, the claimant has explained, and the Tribunal accepts, that her purpose in seeking such assurances was to ensure that she was unlikely to be adversely affected when seeking any future alternative employment, which was at that time in her mind. To that extent the claimant is not, in the view of the Tribunal, relying upon that email as constituting a final straw in any event. She was merely ensuring that if she took the decision to resign, which she was clearly contemplating in the light of the meeting of 21 February 2018, she would not be immediately handicapped in any job search by any disciplinary cloud on her record. To that end, she does not, and indeed does not need to, rely upon this document as constituting a final straw. That came, in the view of the Tribunal, in the meeting of 21 February 2018. Mr Wood in his submissions realistically and fairly takes no point upon affirmation, and as the claimant's resignation was only some seven days after the meeting of 21 February 2018, the Tribunal would not have found that the claimant delayed her resignation so as to be held to have affirmed the respondent's fundamental breach of contract.

23. No other reason for the claimant's resignation is advanced, and the Tribunal is accordingly satisfied that she resigned in response to the respondent's fundamental breach of contract culminating in the meeting held on 21 February 2018. Her claim of constructive dismissal accordingly succeeds, and, as, again fairly and practically, the respondent does not seek to advance a potentially fair reason for any constructive dismissal in these circumstances, it must follow that the claimant's dismissal was also unfair. For completeness, the Tribunal bases its decision on the breach of the implied term of trust and confidence. The other two terms relied upon were not, the Tribunal finds, fundamentally breached. The term that an employer would reasonably give redress to an employee's grievance was not, the Tribunal finds, fundamentally breached, not least of all because of the respondent's failure to appreciate that there was a grievance to resolve. Further, as to the implied term to ensure health and safety, any breach that there may have been of this term as far from being fundamental at this stage. Rather, elements of these terms are inevitably involved in the breach of the implied term of trust and confidence. It is that term, therefore, that the Tribunal finds was fundamentally breached.

Remedy.

24. The claimant is accordingly entitled to a remedy. Whilst in the response the respondent has pleaded that there should be reductions to take into account ***Polkey***, and/or contribution, these arguments are also not pursued, and hence when considering remedy the Tribunal will be concerned primarily with assessing the appropriate level of compensation that should be awarded to the claimant.

25. The parties are invited to consider whether they can agree remedy, for which purpose the claimant should provide an up-to-date Schedule of Loss. It should be a relatively simple matter for the parties to calculate and agree the appropriate basic award. In relation to the compensatory award, any such award is capped under the present legislation at 12 months pay. That, it should be remembered, is a financial, not a temporal limit, and on the figures provided by the claimant (appreciating that these are not at present agreed by the respondent) on gross monthly pay of £1,380 the relevant cap on the compensatory award would appear to be in the region of £16,560.

26. The Tribunal also notes that the Schedule of Loss contains a claim for pre – termination loss of earnings, presumably based upon the claimant only receiving sick pay up until the end of her employment. The claimant should be aware that the Tribunal cannot see a basis for such an award. Compensation for unfair dismissal can only be awarded for losses sustained after the dismissal. Unless the claimant (or her sister) can direct the Tribunal to any authority which holds that the Tribunal can make such an award, the Tribunal will not be able to do so.

27. The claimant did not obtain alternative employment immediately after her resignation, and the Tribunal is unaware of the present situation. It is appreciated that the claimant was ill for some time after her resignation, and issues may arise as to mitigation of loss, and causation of any such sickness which may have prevented her obtaining alternative employment. In the event that the parties are unable to agree remedy (and they are reminded that ACAS still has a role to play up until the claim being finally disposed of), they are to notify the Tribunal, and in particular are to seek to narrow the issues and to inform the Tribunal of what issues will require determination on a remedy hearing. The Tribunal will then accordingly list a remedy hearing, but in the meantime encourages the parties to seek to resolve these issues if at all possible.

Employment Judge Holmes

Dated :27 August 2019

RESERVED JUDGMENT SENT
TO THE PARTIES ON

11 September 2019

FOR THE TRIBUNAL OFFICE