Case Number: 3319354/2019

EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Ms S Theodore **Paperchase Limited**

v

Heard at: Watford **On**: 9-11 March 2020

Before: Employment Judge R Lewis (sitting alone)

Appearances

For the Claimant: In person
For the Respondent: Ms R Omar - Counsel

JUDGMENT

The claimant was not constructively dismissed by the respondent and her claim of unfair dismissal is dismissed.

REASONS

1. The claimant asked for these reasons after oral judgment had been given. The delay in sending them out, for which I apologise, is attributable to the public health emergency.

Procedural background

2. This was the hearing of a claim presented on 15 June 2019. Day A was 18 April and Day B was 16 May.

3. The claim was served on 18 July, on which date notice of the present hearing was given (for one day) and a case management timetable was set. The respondent presented its response on 13 August.

4. In response to correspondence, the Tribunal in October varied the case management timetable and extended the hearing length to two days (7 November).

5. In response to correspondence about disclosure, a telephone preliminary hearing was arranged and conducted on 19 December by Employment Judge Smail (order sent 11 January 2020).

6. Judge Smail set out as items 2a to 2i a list of breaches said by the claimant to constitute the basis of the claim for constructive dismissal. I have taken that list to be definitive. He also made orders in relation to disclosure and the bundle. There continued to be correspondence from the claimant complaining of non-compliance and of defects in the bundle.

Case management at this hearing

7. The tribunal had four bundles, containing together about 1000 pages of material. The third bundle consisted of witness statements; the remaining material consisted of documents.

8. The arrangement and presentation of the material was not in accordance with good practice or Presidential guidance. I was told that the claimant had disclosed one audio recording, but had failed to disclose a transcript of it until this hearing had begun. The respondent and Ms Omar listened to it overnight. I was not told of any material inaccuracy in the transcript and listened to the audio at the start of the third day of hearing.

9. The bundles included many documents provided to the claimant in accordance with subject access requests. Some of them had been redacted. The claimant had pursued a complaint to the Information Commissioner, who had found the respondent's data protection procedures to be deficient in one respect.

10. The Tribunal has no powers over data protection and no powers over subject access. Furthermore, the approach of the Tribunal to documents is very different from that of subject access. Subject access is indiscriminate; the Tribunal is selective. Subject access has its own rules and procedures; the Tribunal follows the disclosure procedures of the Tribunal Rules, incorporating the CPR. They attach weight to relevance. As I understand it, subject access attaches little weight to proportionality, and great weight to completeness; the Tribunal's approach is the reverse. In the event, no issue before me turned on any issue of disclosure,

11. At the start of the hearing, a number of procedural matters arose. The claimant was accompanied throughout the hearing by Mr Shazam Chaudry. He took the seat next to the claimant, took notes on occasion, and assisted the claimant. He also gave evidence. He is a former employee of the respondent. I was told that his claim of unfair dismissal against the respondent was to be heard in May 2020. (I assume that it was postponed as a result of the public health emergency). I accepted the assurances of both parties that there was no factual overlap between the two cases which would have required this hearing to be adjourned to be heard jointly with Mr Chaudry's case. I was alert to the risk of this hearing being diverted, in

evidence or cross-examination, into matters which were part of Mr Chaudry's case, not the claimant's.

12. The claimant gave me a letter from her GP of 5 March, to which was attached a consultant's letter of 5 February 2020. In light of those I asked the claimant if she was fit to do justice to her case, and she stated that she was. I asked her to inform the Tribunal of any adjustments which might be required during the hearing, but she did not do so. The hearing took a number of breaks.

13. It was agreed that the claimant's case would be heard first. It seemed to me right, given the pressures of time and the volume of paperwork, that this hearing should be limited to liability in the first instance, with remedy being determined either on the third afternoon or on a separate date. In the event, I was able to give oral judgment on the third afternoon, and would not then have had time to deal with remedy. The claimant then asked for written reasons.

14. The claimant raised issues as to disclosure, which I agreed to address when a specific point arose. No such point did arise. No point arose at which I was asked to consider the redaction of a document.

15. Ms Omar identified a modest reading list of key documents, to which the claimant added a small number. Evidence began on the first afternoon. The claimant was cross-examined for a total of about four hours.

16. The respondent called two witnesses. The first was Mr Jason Hart, who had heard the claimant's grievances. He was a manager with over 25 years experience in the respondent. He adopted his statement and was questioned by the claimant for about two and a half hours. The second was Ms Claire Guerrerio, who headed the respondent's HR function. She had had scarcely any involvement in the events in this case, and her evidence was largely reconstruction of events through interpretation of the file. She also gave evidence about aspects of the respondent's management and HR systems. Her evidence lasted about one and a half hours.

17. Closing submissions lasted some 40 minutes each; in order to enable the claimant to prepare her closing submission, the lunch break was taken early, after Ms Omar's submissions.

18. During the cross-examination of all three witnesses, and submissions on both sides, it was necessary to exercise the tribunal's power under Rule 35, to bring that part of the case to an end, after giving due warning that that would be done.

19. I record having told the parties that of my own initiative I have marked Mr Chaudry's case file as one from which I have recused as the possible hearing Judge. While that may not be strictly necessary as a matter of law, it seemed to me desirable in the interests of justice that his case be heard by a different Judge. I record further that I have not recused from case management of Mr Chaudry's case.

Case summary

20. This was at heart a straightforward claim. The claimant had several years unblemished service. Mr Chaudry was her manager for most if not all of that time. A store colleague, Ms Michalkow, submitted a written grievance against Mr Chaudry, as a result of which he was suspended (and later dismissed). During Mr Chaudry's suspension, Ms Michalkow became acting store manager. The claimant submitted written grievances against Ms Michalkow and another colleague. Both grievances were about how the claimant had been spoken to, and what had been said to her, in telephone conversations. In principle, a grievance investigator needed only ask the claimant, and the colleagues, what had been said, make a finding about what had been said, and then decide if there were anything wrong with it.

21. Evidence given during the investigation led the investigator (Mr Hart) to the view that there should be a separate disciplinary investigation into the claimant's conduct.

22. The claimant's grievances were part rejected, part upheld, and some part of them were not specifically upheld or rejected, but led to conclusions that there had been poor communication skills. The claimant was told that a disciplinary investigation was to take place. The claimant appealed against the grievance outcome, and her appeal was rejected. She then resigned. The disciplinary investigation did not take place.

Legal Framework

23. This was a claim of constructive unfair dismissal. It was brought under the provisions of Section 95(1)(c) Employment Rights Act 1996 which provides,

> "An employee is dismissed by his employer if …. the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

24. In this case, the respondent denied committing such conduct and asserted that the claimant's employment had ended by voluntary resignation.

25. The question for the Tribunal is whether there has been a breach of an express term of the contract of employment which is of such an order of seriousness as to be "repudiatory" i.e. entitling the claimant to treat the contract as brought to an end; or whether there has been a breach of the duty of trust and confidence. There may be breaches of procedure, or even of an express term of the contract, which are insufficiently serious to be of repudiatory nature, i.e. indicating a wish no longer to be contractually bound in the contractual relationship. In this case for example the claimant was wrongly told that her time to appeal the grievance outcome was five days; the correct formulation was five working days, as the claimant instantly pointed out. The provision of inaccurate information to the claimant was not of itself a breach of contract, or a repudiatory breach. (It would have been

different if the claimant had been denied her right of appeal due to a mistaken calculation of the time limit for appealing, but that did not arise).

26. There may be breach of the duty of trust and confidence if the employer without proper cause conducts itself in a way which, viewed objectively, is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee, and the employee, with reasonable promptness, resigns in response.

27. I have added the emphases to stress important points. Conduct which may be of a repudiatory nature does not meet the test of constructive dismissal if the employer has engaged in the conduct for reasonable or proper cause. The assessment of whether there has been such conduct, or such cause, is the objective assessment of the Tribunal. It is not a matter of the subjective or emotional assessment of the claimant at the time: that was a point of particular importance in this case, where the claimant repeatedly based her questions and submissions on how she had felt or interpreted events when they happened.

28. Resignation must take place promptly, and in response to the breach, an issue which given a grievance process which ran start to finish for six months did not seem to be of assistance in this case.

29. In considering whether the claimant has been constructively dismissed, I disregard the claimant's emotion; her sense of grievance about many aspects of her employment; and her criticisms of points of detail which may have been important to the claimant but which irrespective of strength of feeling were not part of the claim of constructive dismissal.

30. It is not unusual for claimants to resign following an unsuccessful grievance. A particular difficultly which follows when the constructive dismissal claim is based on resignation in response to a grievance outcome is this. A claim based on rejection of a grievance will be exceptionally difficult to win in the Tribunal if the claim implies a contractual entitlement to have a grievance upheld. The management of a grievance, selection of witnesses, expression of conclusion, and the conclusion itself, may each individually or cumulatively be an exercise of management discretion. As such, it follows that there may be more than one conclusion to be reached, but there is no single right answer. If a respondent concludes a grievance on the basis of a reasonable and proper exercise of discretion, it is very difficult indeed to see how that can be repudiatory conduct without proper or reasonable cause. That difficulty seemed to me to underpin the claimant's case.

General approach

31. In this case as in many others, the Tribunal heard reference to a wide range of issues, some of them in depth. Where in these reasons I do not deal with an issue, or do not deal with it to the depth of which I heard, that is not oversight or omission, but a reflection of the extent to which that point was truly of assistance.

32. While the previous paragraph is true in many cases, it was of particular importance in this case, where the claimant repeatedly emphasised points and matters which were of great importance to her, but which were not material. She repeatedly prefaced questions about factual matters by asking about her feelings on the matter. She took as proven matters which were in dispute. She loosely used serious language, accusing those around her of lying and conspiring against her (I accept that she did not use the word "conspiracy" but spoke of "collusion").

33. In reaching my conclusions, I must take care to bear in mind two matters. First the claimant was a litigant in person, and as in every case where a litigant is in person, the Tribunal must make all reasonable allowance for ignorance and inexperience of the law, and of the procedures and techniques of the Tribunal. I must also bear in the mind the artificiality of litigation, and the artificiality and unfamiliarity of the Tribunal process. Secondly, the claimant confirmed at the start of the hearing that she was fit to do herself justice, and answered in the negative when I asked whether at the time of the events in question her judgment was clouded by the ill health of which she showed me documentary evidence.

34. In light of the above, it seems to me right to preface findings of fact in this case with a number of general observations. The Tribunal seeks to approach any work place dispute with realism. We attempt to have a realistic understanding of how people speak and behave at work. There are many ways in which that understanding can be shown.

35. Tribunals should not expect anyone at work to achieve perfection and we should show an understanding of everyday human error. The standard is that of a fair and reasonable employer in the circumstances before it. We should understand that where employers are called upon to exercise judgment and a discretion, they often have a range of choices, any one of which can be right. The tribunal should be wary of the wisdom of hindsight: where a manager makes a decision, she or he does so when they do so, on the information before them. We should bear in mind that colleagues at work gossip, and spread rumours, and we should be alive to the fact that neither of those constitutes evidence. We should note too that even widespread gossip, or an apparently plausible rumour, might in fact be untrue. We should bear in mind too that documents written in the work place, particularly text or email, are often written and read hurriedly, with neither writer nor reader intending them to be the subject of discussion in a Tribunal room months or years later. The claimant said to the Tribunal that she had approached the bundle by "dissecting" the documents "forensically". Neither of those words represents the standard which the tribunal expects of a respondent: the standard is that of a reasonable employer in all the material circumstances. While there are some cases which require an approach akin to forensic dissection by the tribunal, this was very far from being one of them.

36. The Tribunal might have regard to proportionality. Small events in the work place which become the subject of a Tribunal claim snowball in their importance. The Tribunal does well to remember that at the time of the

event it may to some of those involved have appeared inconsequential or even trivial. Acknowledging artificiality, and being aware of the risks of a counsel of perfection, have practical aspects. In the work place, not every interaction is the subject of a written record. While some sectors (e.g. health or HR) are more likely to make written records than others, no Tribunal expects every routine conversation or interaction between colleagues to be the subject of detailed note taking. If a conversation has been recorded covertly, the tribunal should note the risk of imbalance which follows if only party knows that recording is taking place.

37. Parties often bring to their cases a binary approach. By this I mean the approach to a dispute in which each party claims to be totally in the right, and asserts that the other is completely wrong. That approach is rarely helpful, because it rarely reflects the reality of the work place. It is wholly to the credit of Mr Hart that the grievance outcome (429) recognised this, by giving at least three separate categories of response to the claimant's complaints: some were upheld, some were rejected, and some were identified as issues of poor communication.

Findings of fact

38. I here set out the material findings of fact. A workable agreed chronology would have been of assistance. This fact find is not intended as a step by step consideration of the contents of the bundle, or of each and every email or other interaction. That would have been disproportionate: my approach is deliberately selective.

39. The claimant, who was born in 1973, joined the employment of the respondent in February 2012. At all relevant times she was a supervisor at the Brent Cross store, working two full days a week, usually Tuesday and Friday. One colleague was Ms Justyna Michalkow, who joined the respondent in about late 2017. Mr Chaudry was store manager of the Brent Cross and Enfield stores, and the claimant's line manager for all, or almost all, of her employment. He divided his time between the two stores.

40. On 16 July 2018 Ms Michalkow submitted a detailed written grievance against Mr Chaudry to the HR department (309). While it should be read in full, I summarise it as a complaint of (in my words) systematic abuse of authority on Mr Chaudry's part, impacting a number of employees, not including the claimant. Later in these events, the claimant seemed not to understand that a grievance process often requires the aggrieved person to state a desired outcome of the grievance process. That Ms Michalkov understood this is shown by the last words of her grievance, which read:

> "I am not willing to work with Shazam anymore. I would like to be transferred to another store as soon as possible or I will be happy to stay in Brent Cross if Shazam would be removed from our store".

41. The material part of the grievance was,

> "Another problem appearing in our store is he being unfair to us…Nonetheless, there is one exception in our store: Samantha, supervisor."

Having identified the claimant as the exception to Mr Chaudry's unfair management, the grievance then alleged a history of non-attendance at work on the part of the claimant, including, "I also think she gets paid for the day she is not working…" (313).

42. Mr Chaudry was suspended on 18 July. He never returned to work, and was dismissed early in October. I was told that his dismissal was for reasons other than the allegation that he was responsible for the claimant being paid for more days than her entitlement. The claimant's evidence was that she did not know that Mr Chaudry had been suspended, but understood that he was absent on annual leave. Mr Chaudry's evidence was that he told the claimant after his dismissal that he had been dismissed.

43. Ms Michalkow's grievance, on its face, in part alleged (in my phrase) collusive wrong doing between the claimant and Mr Chaudry, from which the claimant derived financial benefit. When it was investigated, other colleagues alleged that there was a close relationship between them. The claimant denied in evidence that she had any relationship with Mr Chaudry outside the workplace. I make no finding on this point. I have commented above on the need to distinguish gossip from evidence. I find however that that background was a source of difficulty for the respondent. It was reasonably entitled to investigate; and to form the view that while the claimant should be interviewed about Mr Chaudry, it could not be confident that she would not speak to him about the investigation, and therefore that it should take reasonable steps to safeguard the confidentiality of the process which was being followed.

44. Ms Michalkow was appointed acting manager during Mr Chaudry's suspension. She had a telephone conversation with the claimant on Monday 23 or Tuesday 24 July 2018 (the precise date is not material). The purpose was to ask the claimant to speak to Ms Danielle Parisi, area manager, who was investigating issues relating to Mr Chaudry. In the course of the conversation Ms Michalkow told the claimant that her (the claimant's) name had been mentioned in an investigation into another person or subject.

45. On 27 July, when the claimant was at the store, Ms Parisi telephoned and asked to arrange to meet the claimant about the investigation. The claimant did not agree to meet without some form of written agenda or clarification. Ms Parisi did not want to formalise matters in writing. In the course of their conversation, Ms Parisi made a reference to HR, which the claimant described as 'a threat to report her' to HR.

46. Ms Parisi said, during Mr Hart's investigation, that she had not threatened to report the claimant, but that she would seek HR guidance. Although I did not hear her evidence, I prefer Ms Parisi's account, and reject the claimant's evidence on this point, for the following reasons. The claimant's instant reaction to Ms Michalkow's first call was a combination of suspicion and hostility. Although I asked her to explain that response in evidence, I remain unable to find a cause for it, let alone any justification. The claimant had over 6 years unblemished service, and she had no reason to react to an

investigation by her employer other than with loyal, unconditional support. She did not give that support. I find that her suspicion and hostility also underpinned her conversation with Ms Parisi.

47. I note the claimant's loose use of language in other contexts. The phrase alleged by the claimant implied that Ms Parisi would report her, the claimant, to HR. But Ms Parisi knew that HR had no authority whatsoever over the claimant. The phrase used in the claimant's grievance "report me to HR" is expressed as if it were analagous to "report you to the police". It is very different from Ms Parisi having said words to the effect that she would report to HR with a view to seeking guidance. As an area manager Ms Parisi knew that she had no reason or basis to report the claimant to HR but had every reason to report the conversation to HR for further guidance.

48. The following Monday 30 July Ms Parisi wrote to the claimant (101). This was the email which she later (274) said she had drafted and which had then been 'tweaked' by Ms Breen of HR. Its purpose was plainly to create a record of their previous conversation, in case of future dispute. She wrote,

> " .. [I]n an investigation that I am currently carrying out … I … explained … I would need to ask you some questions regarding allegations that had been raised where your name has been mentioned. I confirmed that I would need to ask you to confirm if you had been witness to specific events and incidents…I reassured you that the allegations made were not against you."

The email concluded that the claimant declined to meet. I accept the respondent's evidence that every other employee at Brent Cross who was approached agreed to meet Ms Parisi.

49. On the morning of 31 July the claimant emailed Ms Guerrerio with her first grievance, which she headed "Area manager complaint," complaining against Ms Parisi of what had been said in the telephone call. The claimant wrote that as a result she felt pressurised and uncomfortable (105).

50. The claimant attended work on 31 July and 3 August. Ms Michalkov was her acting line manager in Mr Chaudry's absence. Their working relationship was cool. At 10:27 pm on Monday 6 August the claimant sent a second email to Ms Guerrerio (140) which was a complaint against Ms Michalkow. Again, she used the word "complaint" not the word "grievance". The first half of the second complaint related to the Brent Cross store laptop. The second half related to the allegation, "I have noticed a distinct change in her behaviour towards me ever since I refused to take part in the meeting she was arranging for [Ms Parisi] on 25 July."

51. The store laptop was an essential working tool. It should have contained, or did contain, financial information and other records, including employment records, essential to the functioning of the store. I accept the respondent's evidence, which was that it had been taken out of use as part of the investigation into Mr Chaudry; but while some staff knew this, the claimant had not been told because of the confidentiality concern referred to above. I cannot fault the respondent for excluding the claimant from its confidence at

that point. It had proper cause to do so. The original complaint from Ms Michalkow named the claimant as the beneficiary of wrong doing by Mr Chaudry, and clearly raised a question about the integrity of the store's employment records. It was reasonable and legitimate management to isolate the claimant from store records until the evidence had been considered further; and reasonable and legitimate not to tell the claimant that that had been done. I accept that it was reasonable management to take each of the following steps: to disable or part-disable the laptop; to prevent Mr Chaudry during suspension from having access to it; to disable the claimant's laptop access; and not to take the claimant into the respondent's confidence about any of these steps until further investigation had been undertaken.

52. The last four paragraphs of the second grievance were about generally poor interaction between the claimant and Ms Michalkow. The only specific event was that the claimant considered that Ms Michalkow had been unsympathetic when she, the claimant, said that she had to leave work early on 7 August due to ill health.

53. Ms Gurrerio acknowledged both the claimant's emails on 7 August and confirmed that Ms Breen had been appointed to investigate them. The claimant was signed off on that day. The Med3 referred to, "work related stress with anxiety, loss of appetite and panic attacks" (157) and the claimant remained certificated with a similar diagnosis until her resignation the following January.

54. This hearing proceeded on the footing that the above two emails were the claimant's substantial grievances for the purposes of the remainder of her employment, the grievance hearing, outcome, and appeal, and the claimant's resignation. While the claimant reiterated part of the contents, nothing turns on whether there was reiteration or a third grievance.

55. The claimant's complaint emails were passed to Ms Breen, HR business partner, to deal with in accordance with the respondent's grievance procedure (148). In the course of August Ms Breen exchanged emails with the claimant with a view to taking the matter further. Their exchanges plainly gave Ms Breen two immediate concerns. The first was to find out whether the claimant wished to pursue a formal grievance as opposed to some form of informal resolution; and secondly, she wanted to establish what the claimant's objectives were. I find that these were both legitimate lines of inquiry. In that context, I note Ms Breen's email of 9 August (159) in which she clearly and politely informed the claimant what she (Ms Breen) was trying to achieve.

56. After a great deal of email traffic, the claimant and Ms Breen spoke by phone on 28 August. The claimant recorded the conversation. Ms Breen was not aware that she was being recorded. (This was the recording which was played at this hearing). The claimant made clear that she wanted to proceed formally. She declined to state her objectives, as she thought it premature to do so. A little later the same day, Mr Hart wrote to the

claimant to tell her that he had been appointed to investigate the grievances, and asked her to a meeting.

57. Supported by initially Ms Breen and later Ms Cameron of HR, Mr Hart carried out a number of interviews. Ms Cameron made notes of the interviews. He interviewed the claimant on 11 September, and wrote to her a week after seeing her to report the state of progress to her. In the course of the same month he interviewed other Brent Cross staff in person and by phone, and finally Ms Michalkov. The bundle contained notes of all the interactions, which I accept as broadly accurate summaries, without being transcripts.

58. Mr Hart gave the grievance outcome by letter dated 1 October. In the claimant's grievance outcome, Mr Hart wrote at sections 3a and 3c that the respondent accepted that there were miscommunication issues, leading to Mr Hart advising that he would "give feedback to Ms Michalkow regarding her communication style to help ensure further instances of this nature do not take place moving forward" (432). I accept that Ms Michalkow may have spoken abruptly to the claimant. I accept that English is not her mother tongue, and that when interviewed she referred at least once to that issue. I make no further finding about Ms Michalkow. Having seen the claimant over three days in tribunal, and heard on audio how the claimant spoke by telephone to Ms Breen, I am entirely confident of the claimant's abilities to express herself fluently and forcefully, and to speak up for what she saw as her rights.

59. By separate letter of 4 October Mr Hart informed the claimant that "information that has come to light recently, specifically whilst conducting my investigation into the grievance you raised" had led to an allegation of gross misconduct arising, for which he invited the claimant to an investigation meeting which he would chair (461). The allegation was, broadly, "serious abuse of the company time and attendance policy". Although the claimant was then off sick, she was suspended. Mr Hart was in due course replaced as the disciplinary investigator. Had the investigation proceeded, it would have been conducted by Catherine Kay. On 23 January 2019, and crossing with the claimant's resignation, Ms Kay invited the claimant to the disciplinary investigation meeting. As a result of the claimant's resignation, that meeting never took place.

60. On 8 October the claimant wrote to Ms Haynes to appeal against Mr Hart's outcome. She complained of bias, broadly using the language replicated in Judge Smail's list of issues. She referred (472) to "indicators of collusion amongst certain witnesses" and complained of "a clear tendency to accept certain witness statements over mine." The disciplinary investigation meeting was postponed until the appeal had been heard and decided.

61. Ms Haynes interviewed the claimant at length on 22 October 2018 (505) and again in December. The notes record that the meetings lasted a total of some four hours. She conducted other interviews in December and gave her outcome by letter of 8 January (628). The claimant resigned by letter on 21 January (650). It is a matter of chronology that by resigning with

immediate effect the claimant did not attend the adjourned disciplinary investigation meeting, which would otherwise have taken place on 6 February.

Discussion of the claimant's approach

62. The claimant's approach to these events, and to this case, showed flaws and misunderstandings which cumulatively lead me to the conclusion that her account was unreliable. In making that finding, I have the following matters specifically in mind, although I do not list them exhaustively or in order of priority.

The HR model

63. I find that the HR model in the respondent was a conventional one. The respondent at the time had about 200 small outlets. On any day, there might be an unforeseen need in any of them for HR advice. The respondent had a small HR team, operating centrally, who provided advice to managers on HR and employee relations issues. That might legitimately include advice on the drafts of letters or other management documents.

64. The role of the HR professionals was advisory. When advising a manager about a particular individual or situation, their remit was to advise about the choices open to the decision maker, in light of the respondent's procedures and decisions in similar situations. In so doing, they understood, and managers understood, that responsibility for any decision rested with the manager alone. Managers were free to ask HR to help them with drafting minutes, letters or emails. That was done on the same basis: ie the content of the final document was the responsibility of the manager alone.

65. The HR professionals had no line management authority over operational store staff. Ms Parisi was the line manager of other line managers. Mr Chaudry was the claimant's line manager. Ms Parisi had no authority or need to report a member of store staff to HR (in the claimant's phrase); and if she had done so, an HR professional would have batted the report back to her, or to another operational manager, to deal with, in accordance with HR advice.

66. Contrary to the claimant's suspicion, there was nothing improper or sinister about this pattern: it is conventional in businesses with a dispersed workforce. For that reason, it is particularly common in retail. It did not mean that operational managers were in some way under the direction of HR professionals, or that HR professionals were the real decision makers. If a manager sent an email which had been "tweaked" by an HR professional (101/274) that was a wholly unexceptional event.

Dispute resolution

67. There was considerable discussion, originating in the claimant's conversation with Ms Breen on 28 August, about the differences between formal and informal resolution of work place disputes. The respondent's

procedure (147) placed clear emphasis on informal resolution. That is not unusual, and is not a matter of criticism. It is a fundamental of conflict resolution to seek to contain and defuse conflict at an early stage. That is a legitimate policy objective of this respondent, and of countless other employers.

68. The claimant attached weight to Ms Breen asking whether she wished to proceed formally or informally. I find that that was a reasonable and legitimate line of inquiry. Ms Breen was entitled to test why the claimant had twice written that she was presenting a 'complaint' not a grievance. At the very least, Ms Breen had to be clear whether the claimant had used the word 'complaint' to show that she was not presenting a grievance; or to explain to the claimant that her emails would be dealt with under the appropriate procedure. Ms Breen was also entitled to be satisfied that the dispute could not be resolved informally.

69. The respondent regarded it as important to ask an aggrieved person what his or her objective was. The claimant appeared to regard this as improper. She was wrong to do so. The claimant did not understand the value of establishing the objectives of an aggrieved person. It is a commonplace of conflict resolution to inquire into the objectives of the aggrieved.

70. When Ms Breen asked on 28 August about the claimant's objectives, the claimant replied that she would decide on the sanction for Ms Michalkow once the respondent had reached its conclusions on her complaint. That answer seemed to me a significant indicator of the claimant's inexperience. It showed that she had adopted a win / lose stance which was at odds with the principles of conflict resolution. It also showed that she thought or expected Ms Michalkow to be punished in consequence of her grievance; and it showed that she thought that she would have an input into the choice of punishment. None of those assumptions was well founded, whether in usual management practice, the experience of the tribunal, or the specific facts of this case. It follows that the claimant embarked on the grievance process with unrealistic expectations.

Management discretion

71. The claimant repeatedly challenged management decisions which she asserted could only have been reached for the improper purpose of removing her from the company, or otherwise causing her harm. I find that that has not been proved in any instance or in any respect whatsoever.

72. For instance, the respondent was the assessor of its own priorities. Ms Michalkow's complaint of 16 July (309) was objectively more important than the claimant's email grievances. The respondent was entitled to attach greater priority of time and resource to them. The reason is that Ms Michalkow alleged multiple abuses of authority by Mr Chaudry, including financial abuse (311) and abuse of staff. Her complaint therefore contained the seeds of reputational damage as well as financial loss. The claimant's complaints were about the language or tone used in telephone conversations: they were inherently individual disagreements between two

people, unlikely to give rise to reputational or financial damage, or to any question which went beyond the individuals involved. The claimant appeared not to understand why others did not give her issues the importance which she did, when she did.

Evidence

73. The claimant's analysis of evidence was repeatedly flawed. It was notable how frequently she started questions with a formula to the effect of 'My feeling was…'. The claimant proceeded, at the time and at this hearing, as if an unestablished assumption had been proved. The assumption was that the matters of which she was complaining came about because there was a concerted effort and objective of removing her from the business. The claimant took that premise as a given, and regarded everything else as consistent with it.

74. I find that there was no evidence of a desire to remove the claimant from the business. In so saying I put substantial weight on how the respondent dealt with the allegation made against the claimant in Ms Michalkow's grievance. The respondent did not deal with the substance of that allegation at any point before the claimant's resignation. On the contrary, it exhausted the claimant's grievance procedure, and would, on conclusion of the grievance appeal, have then begun the formal investigation process into Ms Michalkow's allegations. If the respondent's intention had been to remove the claimant, Ms Michalkow's allegations against the claimant presented the golden opportunity to do so.

Lies and collusion

75. The tribunal should be cautious of putting too much weight on loose use of language by a litigant in person; equally, a claimant who stands by strong language must expect findings to be made about her usage. When I asked the claimant to explain in detail an instance of "lies" or "collusion" (words which she used several times) the instances which she gave of each did not withstand scrutiny.

76. One of many satellite issues was whether the claimant was to be interviewed by Ms Parisi on a working day (Tuesday or Friday) or a non-working day. Ms Parisi had on 23 July set up a potential timetable for investigating Ms Michalkow's allegations (73). She listed names of those to be interviewed at each of Mr Chaudry's stores, Enfield and Brent Cross. Interviews at Brent Cross were to be on Wednesday 25 July: the claimant did not work on Wednesdays. The list of interviewees included the claimant's name, with the letters "TBC" after her name (to be confirmed). When interviewed in September in the grievance process (270-271) Ms Parisi answered that she had never intended to interview the claimant on a day off; but, asserted the claimant, as Ms Parisi had written on 23 July that the claimant was to be interviewed on a Wednesday, she <u>had</u> intended to interview her on a non-working day. The claimant asserted that this discrepancy proved that Ms Parisi had lied to Mr Hart, and was not a credible witness. She asserted that it also proved that Mr Hart had relied on

falsehood, so that the process which he followed was tainted, and the outcome flawed.

77. This point concerns the proposed arrangements for a meeting which never took place, because the claimant refused to take part in it. Whether this meeting was to take place on a working or non-working day was a point of little real importance at the time. I find that Ms Parisi understood that she had no authority to interview the claimant on a non-working day. I find that for that reason there was no definite appointment for the claimant to be interviewed on 25 July, as is shown by the letters TBC on the 23 July email. Ms Parisi was interviewed about this by Mr Hart several weeks later. It does not follow that an apparently minor discrepancy in recollection about an inconsequential point of detail is a lie. I do not find the claimant has proved that Ms Parisi lied, or indeed that the claimant had a reasonable basis to think that she had lied. I find that the claimant's conviction that this sequence is evidence of a lie is a telling indication of the claimant's poor analysis of evidence.

78. The allegation of collusion was based on a few lines in the note of Mr Hart's interview with Ms Michalkow on 28 September. She was asked about her general working relationship with the claimant, and about a particular event on 7 August, when the claimant wanted to leave work early due to illness. Mr Hart was therefore on 28 September asking about a few words of conversation on 7 August (over seven weeks previously) at the time when Ms Michalkow had been acting store manager. The note reads (emphases added, 421),

> "JH: Can you talk me through what happened when you were both working on the 7th?
>
> JM: I don't think anything happened, I knew she was leaving and I had a second shift so I came at 12 and she was leaving at 1.
>
> JH: There was no exchange of conversation?
>
> JM: I can't remember anything.
>
> JH: Do you remember when you came in where she was?
>
> JM: Behind the till.
>
> JH: What did you do when you started your shift?
>
> JM: I can't remember? Do you have prompt? I can't remember anything to be honest.
>
> JH: Is there any reason for Sam to think you were rude to her on that day?
>
> JM: No, the only time she called me rude was when the laptop was not working and she made me do the record of conversation. Once I can't remember the day, I came in and there were customers waiting at the till and I said could you jump on the till and as she went she said "please" and she thought I was rude, but to me "could you" is the polite way of asking."

79. The claimant's point was that Ms Michalkow is recorded as having said a number of times that she could not remember. She is then noted to ask for "a prompt" after which she said that she was able to recall an alleged event. The claimant asserted that the note showed that Ms Michalkow could not remember anything, until she asked for a prompt; that a prompt (not noted) must have been given in response by Mr Hart or the note taker (Ms Cameron), which enabled Ms Michalkow to give her last answer. The claimant asserted that this is evidence of collusion, ie improper co-operation to achieve a desired outcome. She asserted that the note, and her interpretation, proved that Mr Hart followed an improper process, reaching a tainted conclusion.

80. I find that the note does not reasonably bear that interpretation. Ms Michalkow said a number of times that she could not remember a specific event. She then remembered a specific event when the claimant had called her rude. She then remembered a specific event when the claimant had said "please" to Ms Michalkow, which Ms Michalkow (almost certainly correctly) interpreted in context as a reproach for her own failure to use that word. The event which she remembered was a routine moment of workplace trivia. There was no evidence of any element of the word 'collusion.' I find that there was no evidence of Mr Hart and Ms Michalkow having collaborated to give an answer; and no evidence of their having done so in an improper way, or for an improper purpose. The claimant's conviction that this sequence was evidence of impropriety illustrates again the poverty of her analysis of the evidence.

81. A final instance of the same overarching failure of analysis on the claimant's part arises out of Ms Parisi's email to the claimant of 30 July (101). In it Ms Parisi set out a summary of the conversation in which the claimant had declined to co-operate in the inquiry into Ms Michalkow's grievance. Interviewed about this by Mr Hart, Ms Parisi was asked (274), "Did you consult HR first?" Her answer was, "Yes, this was on the back of [Ms Breen]'s advice, she did a few tweaks and then I sent it to her".

82. The claimant's assertion was two-fold. The first was that the resulting email was not that of Ms Parisi, but was from Ms Breen. I reject that assertion and find that the email was Ms Parisi's email, sent, after taking HR advice in the conventional manner set out above.

83. Secondly, the claimant asserted that this episode showed that Ms Breen was "involved" in these matters, such as to render it improper for her later to take part in the grievance procedures which the claimant had initiated. (In the event, Mr Hart's note taker was Ms Cameron, not Ms Breen). I do not accept that proposition. I do not accept that a 'tweak' of a draft email disqualified Ms Breen from further HR duties relating to the claimant. The claimant's submission shows a lack of understanding of the role of HR, and implies a standard of impartiality which is akin to the judicial standard, not the standard of the reasonable employer.

List of issues

84. I now refer to the list of issues identified by Judge Smail on 19 December 2019, which, inexplicably, was not in the bundle. I follow Judge Smail's lettering.

85. At issues 2a and 2b the claimant complained of Ms Breen's failures to deal with her grievances and in particular to deal with "Ms Michalkow's hostile behaviour towards the claimant at the store she worked in even though the organisation knew it had become a conflicting environment". The quoted words add nothing to the point: in any event, the environment at the store was managed in part in response to Mr Chaudry's suspension, and it is to be noted that the claimant last attended the store at 1:00pm on 7 August 2018.

86. Issue 2b referred to the long-term absence policy, and whether Ms Breen had applied it correctly. I was referred in submission by Ms Omar to the correspondence trail between the claimant and Ms Breen between 31 July and 28 August 2018. This was summarised in a document prepared by Ms Breen (684), which shows that Ms Breen emailed the claimant on 31 July and then on 1, 2, 6, 9, 12, 15, 20, 22 and 24 August before their telephone call on 28 August. After that, Mr Hart was appointed more or less immediately as the grievance hearer and wrote to the claimant the same day.

87. I do not find that there was a failure to deal with grievances on the part of Ms Breen as pleaded. I note that from 7 August, the claimant was not in the workplace, so the issue of an immediately safe environment did not arise in the short term. If there was delay, I find that it arose out of Ms Breen's attempts to clarify with the claimant whether she wished to initiate a grievance, and proceed formally; and then to establish her objectives. I accept that there were routine delays in the normal course of business. If appointing the investigation manager were delayed by Ms Breen's pursuit of informal resolution and objectives, I find that that was a wholly proper cause of delay.

88. As to 2b I make two findings. The material part of the long-term absence policy (32) was "a sickness absence of three weeks or more will trigger the long-term sickness procedure" which in turn included welfare meetings, access to reports, and possible medical examination. I accept that the procedure was on paper triggered on 28 August. I accept that it was delayed and diverted by other events, notably by the grievance investigation.

89. On 21 September the claimant was sent the form to complete for consent to occupational health referral (285), which she did not return until 30 October (532) after which she was immediately referred to occupational health.

90. I do not find that there was the pleaded failure to implement the long-term absence policy; I accept that there was delay between 28 August and 21 September, which was plainly attributable to the focus on the grievance process. There was no evidence that the claimant, despite her awareness

of what she saw as her rights, and despite being engaged in confrontational grievance, raised an issue about this at the time.

91. The second limb of issue 2b was a complaint of a failure "to engage with the store manager who would have confirmed the claimant's pre-existing health condition that affected certain aspects of the claimant's job and which led to absences due to illness". This part of the claim is thin to the point of threadbare. The store manager was Mr Chaudry. The issues of the claimant's absences and the reasons for them did not at that time involve the claimant, but potentially did involve Mr Chaudry. There was no issue affecting the claimant upon which Mr Chaudry could contributed at that time. He had been suspended, and his reliability was in question. There was no obligation on the respondent to consult Mr Chaudry about the claimant's grievance.

92. Issues 2c, d, e, f, g and h are essentially all challenges to the process conducted by Mr Hart, expressed in a number of respects. It is worth in context recalling the outline chronology of Mr Hart's engagement with this matter. Mr Hart was appointed on 28 August to conduct the grievance investigation. On the same day he invited the claimant to a meeting on 4 or 5 September (191). At that time Ms Breen had been appointed to support him, (209). Within a brief time she had been replaced as his support by Ms Cameron of HR. On 31 August the claimant's meeting was rescheduled to 11 September (216).

93. The claimant met Mr Hart, accompanied by her union representative, for 2 hours on 11 September (229). A week later Mr Hart emailed to update the claimant on the progress of the investigation (249). On 21 September Mr Hart interviewed Ms Breen, Ms Parisi, Ms Vares, and Ms Jones (263-284). He also considered a volume of documentation which he was sent. On 28 September he interviewed Ms Michalkow (415). His outcome letter was dated 1 October (429) and appears to have been sent on 4 October.

94. It is important to bear in mind that the grievance which Mr Hart was tasked with investigating concerned short telephone conversations. He would have been reasonably entitled to the view that all he needed to do was speak to the claimant; then speak to the two people she complained about; and in the absence of any recording or written record of the conversations, proceed to a swift resolution. It is obvious that he undertook a more detailed, thoughtful and meticulous investigation than that.

95. I find that his approach was that of a reasonable manager, applying a standard of reasonableness based on huge knowledge and experience of the business. I attach considerable weight to the way in which he expressed his outcome, upholding one grievance; rejecting others; and attributing other complaints to communication issues on which guidance was required.

96. I do not accept that he faced or avoided the telling of lies. I accept that his investigation was selective, but properly selective. He was under no obligation to widen the investigation beyond its scope.

97. Issue 2e was that, “Mr Hart conducted both my grievance investigation and his own investigation (that led to the allegation of gross misconduct) at the same time. This should have been done separately.” This is a more complex point, on which I have some sympathy for the claimant’s point.

98. As matters went on after 16 July, there were three simultaneous processes. One was the disciplinary involving Mr Chaudry. One was the claimant’s grievances. The third was the possible disciplinary case against the claimant, which emerged in September during her grievance investigation. The claimant’s point is that the respondent should have ensured that the latter two were kept clearly separate from each other. The claimant attached enormous weight to the notes of Mr Hart’s interview of Ms Michalkow, which opened, “The notes would be used in the wider investigation” (415). After several pages of questions, the note continued, “I now need to ask questions in relation to Samantha’s grievance.”

99. I accept Mr Hart’s evidence, which was that he was tasked with investigating the claimant’s grievances. He was aware of the issues surrounding Mr Chaudry, and was not personally involved in them (the claimant did not challenge this latter point). In the course of his interviews, Mr Hart was troubled by indications of poor working relationships at Brent Cross, and by comments from a number of sources about the claimant’s poor attendance.

100. I accept that during his investigation Mr Hart was troubled by indications that the claimant’s attendance at Brent Cross was poor, and inconsistent with the level of her payment. He formed the view that this required a separate investigation under the disciplinary procedure. Having completed the grievance investigation, he triggered the formal investigation procedure into a potential disciplinary case against the claimant which in the event was never heard. In the first instance he wrote that he would conduct the disciplinary investigation.

101. The claimant was convinced that there were separate investigations being conducted concurrently, and that there was some impropriety involved in this taking place, and some form of deception. I agree with the claimant that clearer and earlier disentanglement of her actual grievances from her potential disciplinary might have taken place. I agree that when Mr Hart informed the claimant in October that there was to be a disciplinary investigation, he should have stood down then from being the investigator of the disciplinary (he did so later, before the first scheduled investigation meeting). I agree that those steps would have been better practice. I do not agree that the failure to take them, or to take them earlier, came close to meeting the definition of repudiatory conduct, or was for improper cause.

102. I find that Mr Hart conducted his formal investigation into the claimant’s grievances in accordance with procedure. I find that he pursued a separate line of inquiry into allegations that came to him relating to the claimant’s attendance. That line of inquiry came to him through answers in interview, and as he said in evidence, was not something which he set out to elicit.

Once he had heard the answers, he could not disregard them, and therefore triggered what would have been a separate disciplinary investigation.

103. During this hearing, there was some discussion about the distinction between an inquiry and an investigation. As I understood it, the parties agreed in principle that an informal stage, outwith any written procedure, was an inquiry; but once a process was triggered, that would be an investigation. The claimant appeared to feel strongly about the distinction between the two; I accept that Mr Hart saw plainly the distinction between looking into matters before triggering formal process and undergoing formal process. While I may have confused the two words while giving judgment, it is difficult to see what turns on it.

104. In the event, the sting of issue 2e fails. The claimant's right to a fresh impartial investigation, within the safeguards of the disciplinary procedure, into attendance and payment allegations, was fully preserved by Mr Hart when he invited her to a separate meeting which would have commenced that process.

105. Issue 2f was that the claimant's confidentiality was not appropriately handled. That outcome was upheld (430). Mr Hart found that Ms Michalkow had breached confidentiality by telling the claimant that her name had been mentioned in an investigation. Viewed objectively I do not regard this small event as calculated or likely to destroy or seriously damage the relationship of trust and confidence. It was no more than one person's momentary slip of the tongue.

106. Issue 2g was about the discrepancies between the transcript of the 28 August conversation with Ms Breen, and the answers which Ms Breen gave about the same conversation in her interview with Mr Hart on 21 September. The pleaded allegation was that Ms Breen "stated many untruths about what was said by the claimant." Ms Breen in particular told Mr Hart (265) that the claimant had used the phrase "How dare you talk to me about my complaint" and that she, Ms Breen, had apologised to the claimant. Neither of these is heard on the audio. (The specific instance of "how dare you" was referred to in evidence a number of times).

107. I agree with the claimant that Ms Breen did not give a wholly accurate account of the telephone conversation to Mr Hart. Between the telephone conversation and Ms Breen's interview there had been 24 days. I do not find that Ms Breen lied to Mr Hart, because as a matter of human experience, I do not find that Ms Breen can have had a verbatim recollection of the telephone conversation after a time lapse of 24 days.

108. I find that Ms Breen's answers to Mr Hart were consistent with the spirit and tone of the conversation, not apparent from the transcript, but clarified from hearing the audio. The claimant presents on audio as the dominant speaker in the conversation, and her voice presents as louder, angry and emotive. Ms Breen presents as emollient. The claimant conveys a sense of outrage towards Ms Breen, consistent in emotion with the phrase "how dare you." Ms Breen did not in terms apologise to the claimant, but attempted to

dampen the claimant's anger and conflict. I do not find that allegation 2f has been made out.

109. Issue 2h related to the claimant's suspension. The claimant (although off sick) was suspended on 1 October 2018. Suspension is provided in the disciplinary procedure (27). It is commonplace in a case where it is in the interests of the respondent to exclude a claimant from premises in case there is the slightest risk to the integrity of evidence. Issue 2h must fail because the claimant's suspension, no matter how hurtful to her, was in accordance with the contractual rights and procedure.

110. Issue 2i is a reiteration of the claimant's complaint about the process and outcome followed by Ms Haynes. It fails because I find that Ms Haynes followed the process that was reasonably open to her in the circumstances, and for the same reasons as Mr Hart, and for the reasons given here, reached conclusions which were reasonably open to her on the material before her.

Summary

111. I find that the respondent has not broken any express term of the contract of employment which is of a repudiatory nature. I find that viewed objectively, it has not conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. I find that the actions of which the claimant complains against it have been for proper cause. Ms Omar put no case on the reason for the claimant's resignation; I find above that by resigning when she resigned the claimant avoided attending the disciplinary investigation meeting. My finding is of sequence, not causation. It follows that I find that the claimant resigned her employment of her own volition. She was not constructively dismissed, and her claim fails.

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Employment Judge R Lewis

Date: ……01.06.2020……..

Sent to the parties on: ..01.06.2020.....

.....T Yeo.....
For the Tribunal Office