



EMPLOYMENT TRIBUNALS

BETWEEN

Miss Esther Harwood (Claimant)	and	Archways Care Ltd (Respondent)
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Held at: Birmingham, remotely by Cloud Video Platform (CVP)

On: 1 and 2 March 2021

Before: Employment Judge T Coghlin QC, sitting alone

Representation:

Claimant: Miss Julie Duane, counsel

Respondent: Mr Tim Sheppard, counsel

RESERVED JUDGMENT

The claimant's complaint of unfair dismissal succeeds.

Directions for the determination of remedy issues are set out at paragraphs 68 and 69 below.

REASONS

1. This is a complaint of unfair dismissal. The claimant says that she was directly dismissed or alternatively that she was constructively dismissed.

2. The issues in the case were established by Employment Judge Dean at a preliminary hearing on 1 July 2020 as follows:

Unfair dismissal (direct dismissal)

1. Was the Claimant directly dismissed by the Respondent in circumstances where she alleges she was placed under pressure to resign and informed that if she did not she would be dismissed? The Respondent disputes that the circumstances are such for the Claimant's resignation to amount to a dismissal.

2. If yes, was there a potentially fair reason for this dismissal?

3. What was the potentially fair reason?

4. Did the Respondent follow a fair procedure in dismissing the Claimant?

5. Was the dismissal within a band of reasonable responses in the circumstances?

Unfair dismissal (constructive dismissal)

6. What was the most recent act (or omission) on the part of the Respondent which the Claimant says caused, or triggered, her resignation? The Claimant alleges she resigned in response to an alleged ultimatum between the choice to resign or a potential unsuccessful capability process [para. 27-30 ET1].

7. Has she affirmed the contract since that act?

8. If not, was that act (or omission) by itself a repudiatory breach of contract?

9. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of mutual trust and confidence? In particular, the Claimant alleges and relies on the following to amount to a series:

a. On 28 June 2019, the Claimant was told to resign immediately or be placed on a capability process upon her return from sickness absence [para 10 ET1];

b. The suggestion to place the Claimant on a capability process was unfounded in any event, and she was used as a "scapegoat" for the Ofsted Report's findings [para. 12-16 ET1]

c. On 1 July 2019, the Claimant was told that Ofsted were watching "to see what [R] would do with [C]" and was told that being off sick would raise further concerns with Ofsted [para. 19 ET1];

d. The Claimant was subsequently told that various oral complaints had been made against the Claimant with the theme that other members of staff did not want to work for the Claimant. The Claimant was told that should she come back to work, she would face disciplinary action in relation to the complaints [para. 21 - 22 ET1];

e. In an attempt to persuade the Claimant to resign, the Respondent confirmed that she would be able to serve her notice on garden leave [para. 24 ET1];

f. On 2nd July 2019, the Respondent places pressure on the Claimant to resign by informing her that should she choose to return to work, and a capability process is unsuitable, her position as Registered Manager would need to be considered, with the possibility of her being dismissed without notice [para. 27 ET1].

10. If the Tribunal find that the above allegations do amount to a series, which viewed cumulatively amount to a repudiatory breach of contract, did the Claimant resign in response to the "last straw" outlined at paragraph 10(f)?

The hearing before me

3. This was a fully remote hearing which was not objected to by the parties. The hearing was conducted by video, using Cloud Video Platform (CVP). A face to face hearing was not held because it was undesirable given the Covid pandemic and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 373 pages, and some further documents were added by the parties during the hearing.
4. I heard evidence from the claimant herself, and from two witnesses called by the respondent, Mr Chris Aristidou and Bryan Orchard, both of whom are directors of the respondent company.

The facts

5. The respondent provides care services to vulnerable young people at three care homes. One, called Badgers Rest, in Kidderminster, is where the claimant was based. The others are called The Elms and Hill Farm.
6. The claimant was employed by the respondent on 1 November 2010. In July 2015 she became deputy manager of Badgers Rest. In early 2017 she became acting manager of Badgers Rest. She became the Registered Manager (RM) in April 2018. At all relevant times Mr Aristidou was the respondent's Responsible Individual (RI) and at some points he also acted as manager of The Elms and/or Hill Farm.

7. I heard evidence as to the claimant's performance prior to 2019. Certain concerns and complaints are recorded as having been raised about her but these were not upheld at the time and Mr Aristidou's evidence was that matters pre-dating 2019 played no part in his decision-making during the relevant events in June and July 2019 which I shall describe below. There was also evidence of good performance and of her being praised in supervision meetings.
8. There was an unfortunate gap in the supervision meetings for the claimant in 2018 and 2019. These were meant to happen every other month, but none took place between the summer of 2018 and April 2019, a gap of some nine months. Part of the reason for that hiatus appears to have been that in December 2018 Mr Aristidou asked Mr Orchard to assist him by undertaking supervision meetings with the claimant, to which the claimant responded that she wanted to be supervised by Mr Aristidou not Mr Orchard. The respondent sought to say that this was intransigent behaviour and that the claimant was to blame for the subsequent failure to conduct supervisions with her until April 2019. I do not accept that. The claimant did not outright refuse to be supervised by Mr Orchard, and anyway it is the employer's responsibility to ensure that regular supervision meetings take place. However the gap in the claimant's supervision meetings is not of any great relevance to the events which unfolded in June and July 2019.
9. The appraisal in April 2019 painted a mixed picture. Both Mr Aristidou and the claimant acknowledged that high staff turnover was an issue for the home, and Mr Aristidou encouraged her to engage with her team and to get their opinions on what can be improved so that they felt listened to and valued. Mr Aristidou noted that "Once the staff crisis is sorted Esther must spend time focussing on her managerial duties. Staff need to be empowered and have the confidence and skills to deal with the day to day care issues that causes Esther to be over worked and distracted from her managerial obligations and duties." Under the heading of "capability / conduct issues"

(which related both to the manager and others), Mr Aristidou wrote “none.”

By way of feedback on overall performance, he wrote this:

“Esther is working extremely hard and the home is running really well. After a blip in confidence and energy, Esther is working really well and her confidence is building within her role. Bryan has much praise for her hard work ethic and ability. There must be a focus on her addressing the issues around staff retainment. Before her next supervision, I want Esther to have appointed a deputy.”

10. On 8 May 2019 Mr Aristidou and Mr Kevin Reynolds, who had responsibility for quality assurance, addressed with the claimant a concern which had arisen that she had permitted one of the young residents in the home to be in her bedroom with her boyfriend and the door closed, which Mr Aristidou and Mr Reynolds considered unacceptable, largely due to the example which it set to other young persons within the home. They also raised other issues where the claimant had not taken adequate steps to safeguard young people while away from the home, one in December 2018 and the other in February 2019.

11. Mr Reynolds conducted monthly quality assurance reports following what are referred to as “Regulation 44 visits” at the home in late April and late May 2021. These painted a mixed picture. There were examples of good practice but overall Mr Reynolds was concerned that the quality of the home was deteriorating under the claimant’s management. The biggest concern appeared to be in relation to the high turnover of staff at the home, though Mr Reynolds recognised that “every effort is being made to recruit and retain a full staff team”. He noted that the issues at the home were being addressed with a particular focus on staff recruitment and retention.

12. The claimant at this stage was under stress and was working long hours, perhaps 60 hours a week. Just after midnight on the night of 2-3 June 2019 she emailed Mr Orchard, cc’d to Mr Aristidou, and said this:

“As I said on the phone I will be back in on Tuesday. For my own health I need to reduce my hours for a period of time and will need to work a 4 day week. I will be working a 32 hour week for a month or two otherwise I’m going to make myself very ill and am not prepared to sacrifice my mental health any longer. I intend to

take Fridays off so I can have 3 days off together to get myself right. I will still do my on calls.”

13. She drew attention to certain current issues with the home, and concluded by saying that her phone would be off from 10am in the morning.
14. That morning, 3 June 2019, a two-day unannounced OFSTED inspection of Badgers Rest began. The claimant was on leave for the first day of it.
15. At the end of the inspection on 4 June 2019, the inspectors gave oral feedback to Mr Aristidou, Mr Orchard and for part of the discussion to the claimant. The feedback was very critical. The key areas of concern were that management oversight of physical intervention records was poor; staff turnover at the home was high; staff did not have the skills and understanding to effectively manage young people's challenging behaviour; the staff lacked experience and skills; and there was a lack of pride and investment from managers and staff in the fabric and upkeep of the home.
16. During the inspection, certain further allegations were made against the claimant. These issues were investigated and found to be unsubstantiated in a report which written by Mr Aristidou on 9 June 2019.
17. On 12 June 2019 the respondent was issued with a compliance notice by OFSTED. This referred to failings identified in the OFSTED inspection to which I have referred above. It said that OFSTED was of the respondent had failed to comply with the requirements of its registration with respect to Badgers Rest, and that it had failed to comply with regulation 13 of the Children's Homes (England) Regulations 2015, the relevant part of which was set out as follows:

“The leadership and management standard

(13) (1) The leadership and management standard is that the registered person enables, inspires and leads a culture in relation to the children's home that - helps children aspire to fulfil their potential; and promotes their welfare.

In particular, the standard in paragraph (1) requires the registered person to -

2(c) ensure that staff have the experience, qualifications and skills to meet the needs of each child;
understand the impact that the quality of care provided in the home is having on the progress and experiences of each child and use this understanding to inform the development of the quality of care provided in the home.”

18. The compliance notice stated:

“At the inspection on the 4 and 5 September 2018 a requirement was raised in relation to leadership and management. The inspector found that the manager [the claimant] did not have good monitoring systems in place to help her to understand the impact the quality of care provided had on young people. She did not promptly review all behaviour management sanctions or consult young people to help to plan better how staff can improve young people's outcomes.

On 3 and 4 June 2019 inspectors judged the home to be inadequate. Inspectors found significant shortfalls regarding the leadership and management of the home.”

19. The notice further stated that:

“The responsible individual [Mr Aristidou] has not provided effective oversight of the management of the home. A lack of effective leadership and management has led to a deterioration in the quality of care provided to young people.”

20. The notice stipulated that by 14 July 2019 three steps must be taken to rectify the breach of Regulation 13:

“Ensure that managers devise and implement effective monitoring systems to recognise and respond to shortfalls in the quality of care provided to young people.

Ensure that managers effectively review all physical intervention records, including when the registered manager is involved in an incident of restraint. Ensure that young people are spoken to about what happened by someone who was not involved in the incident.

Ensure that managers review all staff training to identify gaps in training and what the staff training needs are. In addition, ensure that there is a clear plan to deliver this training to staff in a timely way.”

21. The notice stated that non-compliance was a criminal offence, would call into question the respondent's fitness to continue as a provide in respect of a children's home, and would be a ground for cancelling its registration.

22. On 13 June 2019 the claimant was signed off work until 1 July 2019. The medical certificate stated that the reason was “recurrent depressive disorder; stress.”

23. On 27 June 2019 OFSTED issued its formal report on Badgers Rest. The overall rating for the home was Inadequate, in contrast with a Good rating following the previous inspection in September 2018. The effectiveness of leaders and managers was also identified as inadequate, as was the overall experience and progress of children and young people and how well children and young people were helped and protected. The report observed that

“There are serious and widespread failures that mean children are not protected or their welfare is not promoted or safeguarded and the care and experiences of children are poor and they are not making progress.”

24. The report contained a series of criticisms of the way the home was being run. Mostly these were matters for which the claimant as Registered Manager of the home had primary responsibility.

25. It is not necessary for me to set out the contents of the OFSTED report in great detail. The claimant accepted in cross-examination that the report was very critical, that it raised very serious issues about how the home was being managed, that it was appropriate for the respondent to take steps to turn the situation around, and that one reasonable way of doing so would be for the respondent to implement a capability process in relation to her. In my judgment the claimant’s acceptance of these points was realistic and correct.

26. On 27 June 2019 the respondent’s independent reviewer, Mr Reynolds, was advised that “the registered manager [the claimant] was not at work due to illness and was not expected to return in the immediate future.” This was a striking remark in that the claimant’s medical certificate was due to expire only three days later on 1 July. Mr Aristidou accepted that it is likely that he was the source of this remark. He sought to explain it in cross-examination

by saying that in his experience people with depression tend to take longer than two weeks to return to work. I did not find that a plausible explanation, and it raised a question as to whether he had already made up his mind that he would persuade the claimant not to return to work.

27. On 28 June 2019 the claimant and Mr Aristidou met at Hopwood Services, at the claimant's request. The claimant wished to discuss her return to work, and in particular what support would be provided to her. Their discussion was not noted by either of them, and their accounts of the meeting differ. It is impossible to know exactly what was said or in what order. However I am satisfied that the discussion touched on the OFSTED report, and that Mr Aristidou made it clear to the claimant that she faced a choice of resigning or facing a capability procedure on her return to work. He did not give details of what the capability procedure would entail, but he told the claimant that she would be supported through it. The claimant asked Mr Aristidou what would happen if she resigned and he said that she was entitled to three months' notice but would not be required to work that notice. I accept the claimant's evidence that Mr Aristidou sought to persuade her that the best thing for her to do was to resign. Mr Aristidou describes the claimant as having been "timid" in this discussion, and not at all herself.

28. Later that day the claimant was signed off work again for another three weeks, until 19 July 2019, the reason again being recorded as "recurrent depressive disorder; stress". The claimant informed Mr Aristidou of this by text message that day.

29. On 1 July 2019 the claimant telephoned Mr Aristidou to check that he had received her text message. Once again there was no note taken by either party of this call, but I accept that the claimant's account of it was broadly accurate. Mr Aristidou asked the claimant if she had had further thoughts following their discussion on 28 June. He told her that OFSTED would be watching to see what he would do with her. He also said that the fact that the claimant was absent with a mental health condition would be a concern

for OFSTED. He advised the claimant that she should resign, as he had done during their previous meeting. He told the claimant that further complaints had been made against her and that if she returned to work she would face disciplinary action.

30. At 8.05 that evening the claimant emailed Mr Aristidou, cc'd to Mr Orchard. The subject heading of the email was "My notice". The email read:

"Can you please put in writing the offer you made to me.
You said you would pay me for 3 months but I would not be required to attend work.
Can you also let me know in writing if I would be entitled to my untaken annual leave and last year's bonus for getting good. I have not received bonuses despite earning it last year and the year before.
I had a verbal agreement with Bryan I would receive it when the company was bringing more money in."

31. Mr Aristidou replied a little over half an hour later at 8.43pm:

"I confirm receipt of your notice.

You will be paid three months notice, any bonus owed and annual leave accrued. You will not be required to attend work during your notice period."

32. Mr Aristidou had mis-read the claimant's email. She had not given notice of resignation, but Mr Aristidou assumed that she had from the subject heading of her email ("my notice"). What is notable about this email is that Mr Aristidou accepted what he took to be the claimant's notice, given at a time when she was off sick, without making any attempt to persuade her to stay. I found this difficult to reconcile with his oral evidence that "I wanted her to stay, because she's a good manager, we could have worked through it."

33. The claimant replied at 9.38pm to clarify that she was not handing in her notice, but that she was asking for the offer which Mr Aristidou had made on 28 June 2019 be put into writing, which he had now done. She said she would consider this and take legal advice.

34. At 8.37 the next morning (2 July 2019), Mr Aristidou emailed the claimant:

“Just to confirm, this is not a redundancy offer. This is what would happen if you decided to resign from your post as Registered Manager. Your contract stipulates three months notice. If you were to leave, we would not require you to work it. However, since I met with you on Friday, I have had a chance to digest the full Ofsted report for Badgers Rest, in which every area was judged inadequate. For the sake of clarity, I would like to point out that if it is felt that capability is an unsuitable option, your position as registered manager would have to be considered and no notice period would be required if it was felt that you were unable to undertake the role of Registered Manager satisfactorily.

I await your decision, prior to any action/offers being undertaken.”

35. The claimant’s evidence, which I accept, was that she felt pressurised by the prospect which Mr Aristidou now raised that she might be dismissed with no notice pay. She replied later that morning, saying that her position at Badgers Rest had clearly become untenable and that she was resigning from her position. Mr Aristidou replied acknowledging the claimant’s resignation and wishing her the best for the future.

36. Mr Aristidou was asked in oral evidence about his reference to the possibility of the claimant’s job being taken away without notice. He confirmed that he did not consider that the claimant was guilty of gross misconduct. He said that when he said “if it is felt that capability is an unsuitable option” he was referring to the possibility of OFSTED forming that view. He explained that he would submit an action plan to OFSTED and that if they were not happy about it, they might say that a capability process was not acceptable. However he said that in his experience of residential care he had never had experience of OFSTED taking such a position, and that he had no reason to think in this instance that OFSTED would not regard a capability process as being an appropriate course to take.

37. The natural reading of Mr Aristidou’s email was that the claimant was at risk of being dismissed without notice if she did not resign. There was no actual or potential contractual entitlement to dismiss her without notice, in circumstances where the claimant was neither guilty of nor even accused of gross misconduct.

38. In his oral evidence Mr Aristidou suggested that his email was intended to mean that the claimant might be *demoted* without notice rather than *dismissed* without notice. I doubt that he had this distinction in mind at the time: he admitted in evidence that he did not know whether there was a contractual power to demote without notice. More importantly, given that the respondent's conduct is to be viewed objectively, if he did have this distinction in mind at the time, his email did not spell this out.

39. Was there in fact any power to demote? It was argued on behalf of the respondent that the respondent's employee handbook, which has contractual status, confers such a right on the respondent. I do not accept that submission. It is true that the handbook refers to the possibility of demotion, but the part of the handbook which does so is expressly non-contractual and so cannot override the express (and statutorily implied) terms of the contract as to notice. In any event, demotion is provided for only as an alternative to a misconduct dismissal, and misconduct dismissals, in turn, are only provided for in only three circumstances, none of which applied here: where the individual is within their first two years of service; where there are live disciplinary warnings; and where there has been gross misconduct (which was not alleged against the claimant, either then or subsequently).

40. I therefore conclude that there were no facts from which either dismissal without notice or demotion would be contractually justified.

41. The claimant's employment ended on the expiry of her notice on 30 September 2019.

The law

42. Section 95(1) Employment Rights Act 1996 (ERA) provides that an employee is dismissed by her employer if:

(a) the contract under which he is employed is terminated by the employer (whether with or without notice), or

...

(c) 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.

43. The law is not in dispute. It was accurately summarised by Mr Sheppard in his closing submissions:

1. To proceed with a complaint of unfair dismissal, the Claimant has to prove that there was in fact a dismissal in accordance with section 95(1) of the Employment Rights Act 1996 ("ERA 1996"), rather than some other action short of dismissal. The burden, on the balance of probabilities, is on the Claimant.
2. If an employee is told she has no future with an employer and is expressly invited to resign, then that employee is to be regarded as having been dismissed; **East Sussex County Council v Walker** [1972] 7 ITR 280, NIRC.
3. An employee is dismissed if the employee terminates her contract of employment in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct¹.
4. An employee can treat herself as discharged from the contract if she can demonstrate that the employer has been guilty of a significant breach going to the root of the contract: a fundamental breach².
5. An employer breaches the implied term of mutual trust and confidence if it conducts itself in a manner, which is likely to destroy or seriously damage the relationship of mutual trust and confidence³. The question is whether the conduct, viewed objectively, was likely to have that effect⁴.
6. Actions that do not by themselves constitute fundamental breaches of contract may have the cumulative effect of undermining trust and confidence, such that an employee can resign and claim constructive dismissal⁵. A 'last straw' must contribute in some way to the breach of the implied term of trust and confidence⁶. The test is objective.
7. An employee must in addition show that she left because of the alleged breach of contract at issue; **Walker v Josiah Wedgwood & Son Ltd** [1978] ICR 744.

Direct dismissal

¹ Employment Rights Act 1996, section 95(1)(c).

² **Western Excavating v Sharp** [1978] ICR 221.

³ **Malik v BCCI** [1997] IRLR 462.

⁴ Ibid.

⁵ **Lewis v Motorworld Garages Ltd** [1985] IRLR 465, CA and see **London Borough of Waltham Forest v Omilaju** [2005] IRLR 35.

⁶ Ibid.

44. The first way in which the claimant's case was put is that she was directly dismissed. It is said that she was placed under pressure to resign and informed that if she did not she would be dismissed. I do not consider that this case is made out on the facts. While the claimant was in my judgment placed under pressure to resign, she was not told that the alternative would inevitably be dismissal or that she had no future in the company.

Constructive dismissal

45. Was the claimant constructively dismissed?

The alleged acts

46. The alleged acts relied on as amounting individually or cumulatively to a breach of the implied duty of mutual trust and confidence are as follows. I shall set out my factual findings on each before turning to whether there was a breach of that duty.

(a) On 28 June 2019, the Claimant was told to resign immediately or be placed on a capability process upon her return from sickness absence

47. The claimant was not "told" to resign or face a capability process, but she was told that these were her options. In substance therefore I am satisfied that this occurred.

(b) The suggestion to place the Claimant on a capability process was unfounded in any event, and she was used as a "scapegoat" for the Ofsted Report's findings

48. I do not accept this. The claimant herself admitted in cross-examination, rightly in my judgment, that a capability process was not an unfounded suggestion. I do not find that the claimant was used as a scapegoat.

(c) On 1 July 2019, the Claimant was told that Ofsted were watching "to see what [R] would do with [C]" and was told that being off sick would raise further concerns with Ofsted

49. I am satisfied that this occurred.

(d) The Claimant was subsequently told that various oral complaints had been made against the Claimant with the theme that other members of staff did not want to work for the Claimant. The Claimant was told that should she come back to work, she would face disciplinary action in relation to the complaints

50. I accept the claimant's evidence that this occurred.

(e) In an attempt to persuade the Claimant to resign, the Respondent confirmed that she would be able to serve her notice on garden leave.

51. I accept that the respondent sought to persuade the claimant to resign, though I see nothing objectionable in the respondent saying that the claimant would be able to serve her notice on garden leave.

(f) On 2nd July 2019, the Respondent places pressure on the Claimant to resign by informing her that should she choose to return to work, and a capability process is unsuitable, her position as Registered Manager would need to be considered, with the possibility of her being dismissed without notice.

52. I find this proved.

Breach of contract?

53. I am satisfied that the matters which I have found proven amount, cumulatively, to conduct which, viewed objectively, was likely to destroy or seriously damage the relationship of trust and confidence which should exist between employer and employee. Over the period from 28 June to 2 July

2019 the respondent sought to pressure her into resigning. That pressure was in my judgment inappropriate and overstepped the mark into what amounted to a breach of trust and confidence. The claimant was in a vulnerable position, and at all times was off sick suffering from depression and stress, as the respondent knew. There was nothing wrong in the respondent proposing to implement a capability process, since real issues of concern had been raised as reflected by the OFSTED report and the compliance notice. However, that needed to be addressed with sensitivity, particularly if it was going to be raised at a time when the claimant was off sick. I do not consider that it was raised sensitively and on the contrary it was coupled with repeated suggestions that the claimant should resign.

54. The respondent's actions culminated in Mr Aristidou's email of 2 July 2019 in which he raised the prospect of dismissal without notice. This was a threat, the foreseeable effect of which was to pressurise the claimant into resigning through creating the apprehension of financial hardship, and which was entirely unjustified, since there was no reason to think that OFSTED would reject a suggestion of a capability process, and there was anyway no contractual power to dismiss (or demote) without notice.

55. In addition to my finding of the cumulative effect of the respondent's proven actions between 28 June and 2 July, I conclude that, in the context of what had gone before, Mr Aristidou's email of 2 July 2019 in itself amounted to conduct which was both calculated and likely to destroy or seriously damage trust and confidence.

56. It is not suggested that there was reasonable and proper cause for the respondent seeking to persuade the claimant to resign, and I find that there was no such reasonable and proper cause, particularly in circumstances where the claimant was unwell and vulnerable.

57. As to his email of 2 July 2019 Mr Aristidou's evidence was that the reason he had referred to the possibility of the claimant losing her job without notice

was that she had wanted to know what was going on, and to make an informed decision. But that does not provide a rational explanation of why he would raise, in unqualified terms, the possibility of OFSTED rejecting a proposal of a capability process when he had no reason to think was likely to occur. If he was raising it only as a remote or theoretical possibility, and if he was trying to give the claimant clear factual information from which to make an informed decision, he would and should have made the remote or theoretical nature of the possibility clear.

58. Further a desire to give the claimant the facts from which an informed decision might be taken does not explain or provide any justification for suggesting that there may be a dismissal (or demotion) without notice when the respondent had no power to take such steps. I conclude that there was no reasonable and proper cause for him saying this. In my judgment the reason why he did was to put pressure on the claimant to resign.

59. For these reasons I conclude that the respondent was in breach of the implied duty of mutual trust and confidence. In reaching that conclusion I have stepped back and asked myself whether the respondent's conduct was properly to be regarded as repudiatory such as to justify the claimant immediately resigning without notice, and I am satisfied that it was.

60. Any breach of the implied duty of mutual trust and confidence necessarily amounts to a repudiatory breach of contract: **Morrow v Safeway Stores plc** [2002] IRLR 9.

Resignation and affirmation

61. I am satisfied that the claimant resigned in response to the respondent's breaches of contract: both its overall conduct as I have found proved between 28 June and 2 July 2019, and Mr Aristidou's email of 2 July 2019 in particular.

62. The claimant resigned on 2 July 2019, within hours of Mr Aristidou's email. In my judgment there is no basis for saying that the claimant affirmed the contract and lost the right to resign and claim constructive dismissal.

Constructive dismissal: conclusion

63. The claimant was constructively dismissed by the respondent.

Unfair dismissal

64. The remaining question is whether the claimant's dismissal was fair or unfair. The respondent's pleaded case was that if it constructively dismissed the claimant, such dismissal was fair. The potentially fair reason was a breakdown in relationship due to the claimant's failure to take constructive criticism or responsibility. The respondent contended that this amounted to "some other substantial reason" or alternatively a reason relating to the conduct of the employee.

65. I do not accept that there was a breakdown in relationship, or a failure on the part of the claimant to take either constructive criticism or responsibility. Nor did the respondent have a belief in such matters, and neither were there grounds on which such belief could reasonably be held. Further, the respondent did not in any event act reasonably, and my reasons for holding that there was no reasonable and proper cause for the respondent's actions apply here too.

66. I conclude that the claimant was unfairly dismissed.

Conclusion

67. The complaint of unfair dismissal accordingly succeeds. The matter will now be listed for a remedy hearing.

Directions for the determination of remedy

68. Within 7 days of the date when this judgment is sent to the parties the claimant shall inform the respondent and the tribunal whether he intends to seek reinstatement and/or re-engagement.

69. Within 21 days of the date when this judgment is sent to the parties the parties must send to the tribunal proposed directions (agreed so far as possible) for a remedy hearing. Those directions should include an agreed time estimate for that hearing (to include time for tribunal deliberation and judgment), and details of the parties' availability to attend a hearing of that length up to the end of December 2021.

Employment Judge Coghlin QC

25 March 2021