



EMPLOYMENT TRIBUNALS

Claimant: Ms A Atkinson
Respondent: Saxon Court Management Company Limited

Before: EMPLOYMENT JUDGE CORRIGAN
Sitting Alone

Representation

Claimant: Mr D Barnett, Counsel
Respondent: Ms Y Montaz, Counsel

HEARING BY CVP

On: 18-21 January 2021
In Chambers: 27 January 2021

RESERVED JUDGMENT

This was a remote hearing which was not objected to by the parties. The form of remote hearing was V – Video (CVP). A face to face hearing was not held because it was not practicable.

1. The Claimant was constructively unfairly dismissed by the Respondent.
2. The Claimant was constructively wrongfully dismissed by the Respondent.

REASONS

1. By her claim dated 22 April 2019 the Claimant brings complaints of constructive unfair and wrongful dismissal.
2. The issues were discussed at the outset and agreed to be as set out in the Case Management Order dated 5 November 2019 at pages 33 c) to d) save that the Respondent also took issue with affirmation and the Claimant's reason for resignation (which were then later dropped by the end of submissions).

3. If the Claimant was constructively dismissed the Respondent accepted that it was unfair.
4. The Respondent also seeks to argue that even if the Claimant had not resigned it is likely she would have been dismissed due to the breakdown in the relationship and the breakdown of trust and confidence and that she contributed to her dismissal. The Respondent also takes issue with the Claimant's mitigation of loss. By the end of the hearing it was agreed these matters will be dealt with at the remedy stage.
5. By the end of the hearing the Respondent conceded that two of the allegations at the investigation stage were not likely to have gone forward to the disciplinary stage (the alleged misuse of the Claimant's Tesco Clubcard and the installation of CCTV).
6. The Respondent also accepted that Retirement Security Limited acted as agent of the Respondent, save in respect of the allegation involving Linda Clement.
7. The parties also agree the Claimant was entitled to 5 weeks' notice of termination (in the event she was dismissed).

Hearing

8. I heard evidence from the Claimant on her own account and also from Ms Kelly Wilshire (former Services Manager and formerly the Claimant's Line Manager) and Richard Sharples (former CEO of Retirement Security Limited (RSL)) for the Claimant.
9. I heard evidence from Ms Lisa Osbourn (former Duty Manager, now Court Manager), Ms Linda Clement (Court Manager and Director of RSL), Mr Mark Von Bergen (Owner resident and current Chair of the Respondent's Board), Ms Kate Dennis (Senior Services Manager, RSL) and Mr Nick Chriscoli (Estates Director, Retirement Security Limited (RSL)) on behalf of the Respondent.
10. A number of other people were referred to in the evidence and documents and are mentioned below. Only those who gave evidence are mentioned by name. Otherwise I have referred to people by role, given these reasons will be published online.
11. There was a bundle to which pages were added, with the agreement of both parties, during the hearing. By the end of the hearing the main bundle was 291 pages and there was a further supplementary bundle of 19 pages. Where there is an 'e' following a page number below it is a reference to the electronic page number rather than the actual page number.
12. The Claimant's representative prepared a written submission and both parties made oral submissions.

13. Unfortunately there has been a delay in producing this reserved judgment and written reasons due to the early commencement of my maternity leave, meaning that I was not able to deliver the judgment orally on 11 February 2021 as had been planned with the parties. I note however that the majority of the findings of fact had been made in chambers on 27 January 2021. Any changes made during the writing up have been made by reference to the documents, statements and my written notes. Again, a number of my conclusions were reached in chambers on 21 January 2021. Where I have expanded on these it has been by reference to the findings of fact, documents, statements, written notes and the Claimant's written submissions.

14. Based on the evidence heard and documents before me I found the following facts.

Facts

15. The Respondent is a Very Sheltered Housing complex run by a voluntary Board of Directors who are owner residents elected by the owner residents of apartments within the complex. The Respondent has a managing agent Retirement Security Limited which is also the freeholder of the building, although the Respondent is free to self-manage or hire a different managing agent, after requisite notice. The Respondent had delegated to the managing agent, Retirement Security Limited, the responsibility of appointing the Claimant and control and oversight of her employment, including taking disciplinary action.

16. At the relevant time there were another 30 similar complexes with similar arrangements with Retirement Security Limited, where it was both the freeholder and the managing agent.

17. The Claimant was employed as Court Manager of the Respondent from 2 January 2015. The role was the executive arm of the Respondent's Board of Directors and she had responsibility for the day to day operation of the Court. The Line Manager responsible for her supervision was a Services Manager at Retirement Security Limited (RSL) and not employed by the Respondent.

18. The line management chain is visually represented at p208 of the bundle. It places the Board of Directors of the Owners' Company at the top, followed by the Managing Agent & Company Secretary (Retirement Security Limited) then the Manager.

19. The owner residents range in age from their 60s through to their 90s approximately. It is agreed the average age of the owners was 75-80 years old. The emphasis of the complex is on maintaining the owner residents' independent living. There are about 50 owner residents, out of whom about 10% have mental health issues or short term memory loss. Although more than 10% of the residents have Powers of Attorney in place the Respondent's witnesses agreed most are capable of making decisions. In particular Mr Van Bergen confirmed that about 90% of the owners have "no or nominal cognitive impairment". It was agreed the Board of Directors tends to comprise some of the more capable residents. At the beginning of 2019

there were four Board members. One was in her 60s, one in his late 80s or 90s and two in their 90s.

20. The Claimant's job description explains that it is the Claimant's role to ensure appropriate relationships between staff and owners. It says she is likely to need a good deal of support from Service Managers (at RSL). It says owners are particularly susceptible to exploitation and that there is a danger of misunderstanding and corruption. It also says that although her primary role is at the development for which she was appointed she is part of the team who ensure that Retirement Security Limited discharge their responsibilities of management of the courts.
21. The Employee handbook has both Saxon Court and Retirement Security Limited on it. It sets out a right to search an employee and their property when on the premises (p58). These searches are random and do not imply suspicion. Where practicable a search should be in the presence of a colleague of the employee's choice. The employee has the right to refuse but it is said this could result in dismissal. The Manager has the right to open any e-mail or check the use of the internet. There is a list of misconduct that constitutes gross misconduct at page 77e of the bundle.
22. The Claimant had a clean record. There had been an issue with a visitor and her dog not being on a lead which had led to a complaint against the Claimant in July 2016. Ms Osborne made a note supportive of the Claimant's handling of the incident and critical about the behaviour of the visitor (pp89-91).
23. By way of background in 2017 there were some issues with staff at Retirement Security Limited. It was said that Mr Sharples and the Compliance Officer had investigated some allegedly improper claims for Attendance Allowance on behalf of owners leading ultimately to the termination of Mr Sharples' contract of employment. A number of RSL managed Courts had concerns about this which were shared with the Claimant, who reported the matter back to the Respondent's Board. She says they asked her to get legal advice about this, which she did, and which led to the letter from the Board of Directors at Saxon Court to Retirement Security Limited expressing their concerns. This letter was written by the Claimant, she says on the instruction of the Board, who all signed it (p92).
24. By Autumn 2018 this situation was ongoing. Not all Courts agreed, with at least one Court's Board of Directors stating they did not wish to be involved in the "politicking and infighting" around the case of Richard Sharples. They asked to be excluded from it and urged everyone else to consider the greater good of Retirement Security Limited. The Claimant clearly took the other side, supporting Richard Sharples, and responded in her name and in the name of the Respondent's Board of Directors copying in that Court and the Board of Directors of Retirement Security Limited. Her response was very light on detail but strongly worded against RSL, suggesting if the Courts did "not take a stand at this outrageous behaviour ...[they would] be left with an RSL that is corrupt and dishonest" (pp93-95). She also corresponded with the Chairman on 16 October

2018, again copied to the whole board, using very strong language and mentioned that the Courts were seriously considering their future. The strength of her message was emphasized by the use of capitals and exclamations (pp187-189). I note that she was responding to a message from the Chairman of RSL which said that he had suspended the offer of lease extensions to Saxon Court owners due to the Claimant having raised the question of whether or not to terminate the management agreement with RSL. He said that the rule was that lease extensions are only available to homes with management agreements with RSL (p187).

25. On 17 October 2018 Mr Chriscoli telephoned the Claimant and took issue with her copying correspondence with him to the rest of RSL's Board. There is a recording of this call which I listened to. The transcript is at page 190. I do not agree that Mr Chriscoli was shouting at the Claimant but he was forthright, launched straight into the reason for his call and did ask her in strong tones to cease and desist copying in the entire RSL Board "about something and nothing". There was some disagreement, he did talk over her as reflected in the transcript, and the Claimant did hang up on him.
26. On 18 October the Claimant emailed Mr Chriscoli as follows, again copying in the RSL Board:

She said (p264):

" ...

1. You are neither my employer nor a representative of my employer: I work for [the respondent]. It is therefore entirely inappropriate for you to seek to reprimand me in any way.

2. On the contrary, I am the authorized representative of a company to which you provide services on a paid basis. Thus you are our servant and I must ask you to behave with appropriate courtesy in our dealings.

3. I consider myself to have been subject to abuse tantamount to harassment. If there is any repetition of this behaviour I will pursue a legal remedy,,,,,and ask my employers to terminate our contract with RSL.

4. I will continue to copy correspondence to the RSL Board as I see fit. This will expose your performance and actions to proper scrutiny.

..."

27. The Claimant's message does not accurately reflect the relationship between the Respondent and RSL. The Respondent had delegated management responsibility for the Claimant to RSL and RSL did indeed have authority to both discipline and dismiss the Claimant if appropriate (subject to the Board of Directors agreeing, according to Mrs Dennis). The Claimant was employed to manage the Court and to enact the Board of Directors' decisions under RSL's line management. It was completely inaccurate to refer to RSL as her or the Respondent's "servant".

28. Ms Clement who was newly appointed to the RSL Board but also was Court Manager at another Court for some 27 years replied to this “wearing her hat” of Court Manager of 27 years, copying in the rest of the board, as follows:

“I have obviously had a long relationship with RSL, seen them go through many changes of personnel...but throughout all that time I have not lost sight of the fact that I accept supervision and guidance from them (as stated in my contract of employment...as I am sure is also the case with yours) and furthermore they are both the Freeholder and the Company Secretary of the Courts so they do in fact, have every right to contact you on any matter relating to the running of the court.

Whilst it is true that the Courts pay a management fee to RSL, I would not...refer to them as our ‘servant’. Neither would I call myself ‘the authorized representative’ of the Court, as if the Board had no say. I see my job very much as a partnership between myself, our Board, our staff and our Management Company...

I am concerned about the tone of your communications, which appear to be getting angrier by the minute, and I would advise you to take a deep breath and give yourself time for a rethink before rushing into any more published print. Otherwise, I fear the only performance and actions exposed to proper scrutiny may turn out to be your own, and I’m sure that isn’t what you are hoping to achieve.”(p97).

29. This is a more accurate reflection of the employment arrangement between the Claimant, the Respondent and RSL. The description of the communications being angry is also fair given the tones of the Claimant’s emails. Nevertheless no action was taken against the Claimant at that time. I accept that this communication was, as Ms Clement said, from herself as a fellow Court Manager and not sent on behalf of the RSL Board.
30. The Claimant accepts that she kept the Board of Directors at Saxon Court apprised of what she heard about the situation at RSL with respect to Mr Sharples and provided copies of anything printed that she had documented from other Court Managers or Boards.
31. On 18 October 2018 there was an informal meeting of the Directors at Saxon Court to receive an update on Mr Sharples’ case and it was attended by his union representative. All the Directors voiced disapproval of the dismissal of Mr Sharples.
32. The Claimant asserts and it has not been disputed that there was an Order for Interim Relief made by consent in Mr Sharples’ employment tribunal case.
33. The Claimant continued to be involved in working with the union representing Mr Sharples and with other Court Managers in deciding how to respond to the situation at RSL. On 16 January 2019 the Claimant and the Respondent’s Deputy Chair attended a meeting of Court Directors and Managers at which a number of courts (possibly 8) indicated they were considering terminating their contract with RSL. The Deputy Chair of Saxon Court and the Claimant then attended the RSL AGM at which the Deputy Chair spoke against RSL. The Claimant asked a question about the staff Tribunal claims.

34. After the AGM they both then also met with the Head of Care, Quality and Compliance at RSL. He had investigated alleged attendance allowance fraud but since resigned alleging constructive unfair dismissal. The Deputy Chair wanted to terminate the Court's contract with RSL as managing agent.
35. There was then a Saxon Court Board meeting in the Deputy Chair's flat on 15 January 2019. It was not quorate as only three Directors were present and the Claimant. The Claimant reported back on the AGM and the meeting with Court Managers and Directors on 16 January 2019. The minutes are at pp103-104. They suggest a detailed discussion of what was described as the continuing problems with RSL and state the Board concluded that the breaches of RSL's obligations were negligent and that termination of RSL as managing agent without notice was justified. They record that the Manager was asked to draft a suitable letter to be sent to the Chairman of RSL. This was signed by the three Board Members present. The Claimant's statement does not mention this decision being put before the Owners themselves, indeed she says it was a conscious decision not to do so "because the owners....had little or no knowledge or understanding of the events that had led to the conclusion that the contract should be terminated".
36. On 18 January 2019 the Claimant forwarded a draft letter of termination of RSL as managing agent, written by Mr Sharples' union representative (p286). She sent it by email to the Chair and Deputy Chair. The Deputy Chair replied that morning saying "Looks like a good letter" (p286). The Claimant said she would send it if everyone on the Board of Directors was happy with it. The Claimant had forwarded the union representative's message to the Chair and Deputy Chair, and she referred to him by his first name in her accompanying message. She also referred to Ms Wilshire and Mr Sharples by their first names when referring to an issue about putting the necessary insurance in place for once the managing agreement was terminated. This suggests the Claimant was working with Mr Sharples and the union with the Board's knowledge. The language used by the Claimant suggests she believes she and the Board were working with a common aim.
37. On 21 January 2019 there was also a meeting of all the Owners at short notice. They were informed of the meeting that morning. At this meeting there was a presentation by Mr Sharples about his new company Spring Retirement. The Claimant's briefing note for this meeting is at pages 108-113. She presented an account of the Attendance Allowance situation which was mostly not within her personal knowledge. She said she had pieced it together from information sent to her. The one part in her own knowledge was the call with Mr Chriscoli which she reported inaccurately. She said he had shouted at her and told her not to contact the RSL Board. In fact he had asked her to stop copying the entire Board into operational matters. She said this broke down communication with the RSL Board. She said that she needed help to run the Court from an open, honest and supportive Managing Agent. She said she had not been having that support over the last 12 months. The decision to terminate the agreement with RSL was presented as a decision already made by herself and the Board. She went on to say why Spring Retirement (Mr Sharples' company) would be an "excellent" option. One of the reasons given was that Ms Wilshire would be Services Manager

again. At that time that was not correct as Ms Wilshire had not yet decided what she was going to do and whether she was going to join Spring Retirement. Mr Van Bergen was present at that meeting as an ordinary owner resident (rather than Board member) and he described the Claimant's speech as a diatribe in his evidence.

38. The question of terminating RSL was put to Owners and the majority voted in favour. All the Board of Directors had spoken in favour of terminating the agreement in the discussions, although Mr Van Bergen suggests that there was some confusion and doubt about the rush to make a decision, from two of the Directors in particular. He confirmed that the majority of the Directors were present, save possibly one who had already resigned by then. None spoke against the proposal. He said that there was then a marked change over the next 2-3 weeks as the Chairman of RSL had come to visit and reassured them. He said one of the Directors had already had her disquiet. She had not signed the letter and did not attend the Board meeting.
39. Mr Van Bergen had not known about the proposal until 21st January. He said he asked if there would be other potential managing agents presenting and had been told there were no other suitable agencies by the Claimant. The Claimant gave him a copy of her presentation at that meeting.
40. The letter terminating the agreement with RSL was sent on 22 January 2019 giving only one month's notice, rather than 12 months. It was signed by just three Directors and the Claimant (pp290-291).
41. The Claimant was then unwell but working from home until 30 January 2019 and then had three weeks holiday in India from 31 January 2019. As things stood this would mean the home would have become without a managing agent just as the Claimant returned from holiday.
42. In response to the termination letter the Chairman of RSL wrote to the Owners directly. This letter has not been disclosed. I accept that given he had already referred to the lease extensions being conditional on a management agreement that his letter likely did make reference to this. The Claimant intercepted this and /or also sent her own letter responding to his letter, setting out her reasons why she felt the Board needed to move managing agents. She makes reference to the Chairman having raised the issue of lease extensions. She said that he was attempting to "blackmail" the owners with this issue and urged them to resist his "threats" (pp105-106). She finished this letter saying she was now on holiday but would be pleased to talk to Owners on her return (when the notice to terminate the agreement would have ended). There was a further notice from the Claimant (at p107) telling Owners that if they received a letter from the Chairman of RSL they should not do anything with it until she got back from holiday and she would discuss it with the Board. She therefore was not acting with the Board's agreement in sending that notice.

43. On 25 January 2019 the new Service Manager at RSL made contact with the Court and spoke to Lisa Osborne, one of the Duty Managers, who raised a concern about what was going on in respect of the termination of the management agreement and the Claimant's role in it. She later wrote the statement on pp121-122 stating there was a lot of upset and distress amongst owners, who asked questions of the Board Members, leading two of them to resign as they felt they could not cope. She was present at the owners meeting on 21 January 2019 and her statement covers her own concerns about the Claimant's role in that meeting. On 31 January 2019 Ms Dennis spoke with the Deputy Chair of the Respondent's Board who also had concerns about the situation by this time. Ms Dennis says she was highly emotional and unwell as a result.
44. The new Service Manager and Mrs Dennis the Senior Service Manager then visited the Court to speak to staff (pp 101-2). In that meeting staff expressed concern about the proposed change in managing agent and how it was being handled. They were concerned that owners' families and Power of Attorneys were not aware. The minutes state: "All staff have stated they have not seen any decline in the service provided by RSL. The only time there has been a change is since Richard Sharples set up Spring Retirement." There was a generic suggestion that the Claimant was unprofessional and screamed and shouted at staff.
45. Mrs Dennis and the new Service Manager also entered the Claimant's locked office with a key and searched it. Neither the Respondent nor RSL broke into the Claimant's locked office. The spare key was supplied by the Chairman of the Respondent's Board of Directors and the office was therefore entered without breaking in. It was supposed to be accessible as part of RSL's premises. They found, read and copied the correspondence with the union (p98) which references a meeting as early as 7 November 2018 at which Mr Sharples was to attend and explain his plans.
46. Mrs Dennis reported the situation to the local council as an urgent safeguarding issue on 31 January 2019. The Claimant's use of a Tesco Clubcard was reported to the police via 101.
47. Statements were obtained from the Board of Directors as well as staff. See the Deputy Chair's statement pp 133-134. She set out what they had been told by the Claimant with respect to Richard Sharples. She said the Claimant encouraged them to go with his new company as managing agency. In her statement she says "to my mind everything appeared sensible until the Board Members were told not to inform owners as they would just become worried... [The Claimant] informed us that it would be best if the Board resigned from RSL before informing the owners. At this point both myself and another board member refused to allow this to happen, without the owners being informed as to what was happening. This I must say was a struggle. [The Claimant] then informed us that RSL had breached their management agency contract therefore we could resign within one month. Instinctively this all felt too rushed but we were told that she was going on annual leave for 3 weeks and the Duty Managers had no line managers as they had all resigned. There was also a rush for everyone to join up with Spring Retirement... When asked why we couldn't have a selection of agencies to choose from we were told by [the Claimant] that she had looked into it and there did not seem to be any other agency that was appropriate plus the staff that were setting

up Spring Retirement were known by the owners and knew how Saxon Court functioned”.

48. She said she began to feel more and more uncomfortable as it felt rushed and she no longer knew who to believe. She said the other Board members were in their 90s and she began to feel responsible for what was happening. She said she felt she had “been coerced into an unsavoury position”. She said she had resigned from the Board on 20 January 2019. In the event this was not actioned and she remained on the Board.
49. There was also a special Board of Directors meeting on 13 February 2019 (198e) attended by four Directors and the RSL Chairman, the Services Manager and the Senior Services Manager. The Board was told that staff had made allegations of bullying and coercion against the Manager which had to be investigated. There are then records that some of the Board Members made accusations during that meeting. The Deputy Chair said she did feel she was coerced to make a decision. Another Board member said she felt coerced although she had only ever been treated with kindness by the Manager. She said had been asked to sign the paperwork to leave RSL just as she was on her way out somewhere and although she asked for more time she said the Claimant had said it needed to be done then and therefore could she just sign it. The Chairman of the Court Board said he personally could not say the Claimant had ever done anything wrong. He said the Claimant had been “a dream”. With regard to the Management agreement the Chairman of RSL said “...The Board of directors have the final say on whether they wish to terminate. This is perhaps the most serious decision the Board can make and it is not one to be taken upon lightly. It would be wise to ask at least three companies to show what they can offer as Managing agent. These could come in the form of recommendations from the Manager and the Board.” One of the Directors is recorded as saying “it sounds very disloyal to [the Claimant] but we as the Board were not informed properly and we were not given all the information when looking at changing the Management Agent.”
50. Some new members were co-opted. The Chairman resigned due to personal reasons which was accepted.
51. The Board agreed to suspend the Claimant upon her return from holiday to safeguard owners, staff and the Claimant herself, pending investigation. The meeting also records that the locks to the Claimant’s office had been changed.
52. The minutes appear to run onto p195. One of the new Directors was then present, and the Chairman of RSL had left. The Board then decided that looking at changing Management Agent at this time would not be advantageous and RSL would stay in place. One Board member (the same who said she had not been sure what she was signing for the Claimant) said she had not been sure of the reasoning to leave RSL anyway.
53. When the Claimant returned to the UK on 21 February 2019 she was told by an anonymous source that her office had been searched and the locks changed. She was also told the Deputy Chair of the Respondent’s Board had started a petition (date stamped 4 February 2019) that said the court owners had been pressured to leave RSL. The first two signatories are the Board Members who said they felt coerced, including the Deputy Chair. The owners petition stated they had been pressurised into signing a statement that they wished to terminate the appointment

of RSL (though in fact only 3 Board members had signed). It requested reasonable time to consult with families before any final decision was made and proposed an Owners meeting on 22 February 2019 (p120). In the event RSL has remained the Managing Agent.

54. The Claimant returned to work on 22 February 2019 (the date the one month notice to RSL would have expired) and was called into an investigatory meeting with the Services Manager and Senior Services Manager at RSL. Having anticipated this from the message from the anonymous source she had attended accompanied by her union representative. The allegations being investigated were: using her Tesco Clubcard on court purchases for personal gain, failure to notify staff of installation of CCTV, bullying and coercion of staff and safeguarding concerns for owners. The meeting notes are at pp139-152 and additional documents pp 264-285.
55. In the meeting it was said that initially the major concern that was raised was the turmoil and upset that the owners had regarding the letter stating they would be leaving RSL, the letter from the RSL Chairman followed by the Claimant's letter saying to do nothing until she returned from annual leave. The Claimant was told that the Board had made statements that they had been bullied and coerced into handing in notice to RSL. Mrs Dennis said that it did not matter which agent the board go with but it does to the owners and their concern was they were not informed. The Claimant said that they had had a meeting, but Ms Dennis said it was called on the same morning as it was held and there were lots of Powers of Attorney that could not attend. It was put to the Claimant that she had told the owners what they should be doing, with her note saying to wait her return from annual leave. The Claimant said she did not know that Powers of Attorneys needed to be invited to meetings to include everyone. She confirmed that there had been one Board member who had disagreed with the decision for the Board to make the decision without the owners. She said they had discussed it at length many times and the relevant Board member was then fine with it. She said sometimes it was discussed with her on her own and sometimes in a Board meeting. She confirmed one Board member had resigned and was told there had also been another. It was also discussed that there was no Company Secretary present at the Board meeting where the decision was made to give notice to RSL, as is required. When asked if she had given the Board a choice her response was that she had, "that RSL was so rotten to the core and all the issues with them that we could no longer stay there, but we could go to another". She accepted that she had not yet sourced a choice of three other agents. She said no decision had yet been made to go with a particular company although accepted that a management agent had come in to do a presentation with one day's notice.
56. The Claimant was told that the matter had been reported to the safeguarding team at the local council who were also investigating the matter. This was not accurate as they had said they were not taking it further.
57. The Claimant was also asked about whether she had installed CCTV cameras in the staff's private rest area without informing them. The Claimant disputed it was a changing area as alleged, but accepted not all staff had been informed, though notices had been placed on the door to the room. She said RSL had been aware of the decision. Mrs Dennis agreed in evidence that at worst this allegation was

that CCTV had been installed and then the notice alerting staff had only been put up a few days after.

58. The Claimant was also asked about the fact that she used her personal Tesco Clubcard to gain points when shopping for the Court. The Claimant confirmed this and said she used the points to buy things for the Court, like napkins and table cloths. She confirmed she would be able to evidence this, though she also said she did not know how many vouchers were hers and how many were the Courts. Mrs Dennis said that she had been in touch with the Clubcard department who had said the vouchers had not been used for any kind of grocery shopping. She later said they were putting a fraud case through with Tesco. This was not correct. There was no formal case with Tesco and Tesco were not investigating. When the Claimant asked if Tesco consider it fraud, Mrs Dennis said "...I don't think that's up for discussion today and I think it's very silly to bring that up with us". Mrs Dennis also reported this matter to the police who said they would not take any further action (p114). The Claimant was not aware of this.
59. There are statements in the bundle in respect of approximately four other staff's complaints against the Claimant and she was asked questions about them in cross examination however I cannot see that they were raised with the Claimant in her investigation meeting. Her evidence was that she became aware of that evidence during these proceedings. The complaints were dated around 14 February 2019 and included historic complaints, hearsay or issues with management style. Ms Osborne spoke negatively of the Claimant, including in relation to the incident referred to at paragraph 22 above, when previously she had been supportive of the Claimant in respect of her role in that incident. I accept that the fact that staff raised these complaints at this stage when they had not been raised earlier suggests that any and every piece of evidence against the Claimant was being gathered. There was also a complaint from a resident (p136) in respect of a letter that had been written by the Claimant in June/July 2018.
60. After the meeting the Claimant was suspended by letter dated 28 February 2019. This was to allow investigations to take place into the use of Tesco Clubcard to gain financially for purchases made on behalf of owners; failure to notify staff of installation of CCTV in an area they used to change without notifying them or placing signs; and alleged breach of trust and confidence in that she failed to act in the best interest of the owners; and over a number of months bullied staff by creating a culture of fear. The letter stated the suspension was a holding action pending further investigation.
61. On the same day the Claimant's union (the same as Mr Sharples' union) distributed the newsletter at page162e amongst residents which states that it will be the Owners who will have to pay damages (in the order of £40,000) and legal costs of about £15,000 in addition to the union's costs of at least £15,000(164e). They also picketed Saxon Court. The Claimant says she did not give permission for this but that she was aware and did not stop it as it was a way to get her case, and the "truth", out.
62. The Claimant resigned in writing on 5 March 2019. Her reasoning in the letter was:
"The treatment meted out to me whilst I was on holiday and since my return were such, and are so serious, that no employee could reasonably be expected to remain in your employment. The board and the individual directors have behaved

disgracefully and clearly have given in to pressure from RSL for my dismissal even though I have only ever carried out your legitimate instructions. My employment rights and the principles of natural justice have been comprehensively ignored.

I will submit a claim for constructive unfair dismissal at the Employment Tribunal...I will authorise my trade union to publicise my case, the behaviour of the individual Saxon Court directors and the conspiracy with RSL to the maximum extent possible”.

63. In the meantime the Respondent continued the investigation with investigatory meetings on 8 March 2019. The Claimant was invited by letter dated 11 March 2019 to reconsider her resignation (sent in the same envelope as the suspension letter). The letter only referred to the investigation into the use of the Tesco Clubcard and the installation of the CCTV. It said the intention was to follow proper disciplinary procedures and the outcome had not been pre-judged. It also referred to the grievance procedure.
64. The Owners' Manual sets out that it has been agreed by RSL, as the Freeholder, that the Owners' lease can be extended to 125 years for a fee of £300 plus VAT and disbursements. It states the right can be exercised at any time....(pp5 and 9 of Supplementary bundle). Despite this there is evidence in the bundle that RSL has been operating a policy that this right is dependent on the particular Court keeping RSL as managing agent. It is suggested, and I accept it is likely, that the intercepted letter from the Chairman of RSL raised this issue with the Owners.
65. Both Mr Sharples and Ms Wilshire had left RSL. Ms Wilshire gave her three months notice to RSL on 14 December 2018 and began working for Spring Recruitment in April 2019. Mr Sharples set up Spring Recruitment and in due course Ms Wilshire also became a Director. The Claimant now works for Spring Recruitment but not the managing agency side.
66. In 2019 RSL managed 30 Courts and now manage 26. Others had also left in the past. There were 6 others contemplating a change at the relevant time. Mr Chriscoli said that it is all about self determination and it is not a problem if a Court chooses to be managed elsewhere, which I accept.
67. Mr Van Bergen became Chairman of Saxon Court's Board in November 2019 and has been happy with the services provided by RSL.
68. It is asserted in the ET3 and was not contested that at some stage the Respondent requested RSL engage a third party to investigate the allegations of attendance allowance fraud. This found no wrongdoing and was communicated to all residents (though not produced before me).
69. Mr Sharples case was settled on confidential terms.
70. Ms Wilshire confirmed in evidence that as the Claimant's Line Manager she had been aware of the Claimant's use of the Tesco Clubcard and the installation of the CCTV and could see no conduct issue in respect of these matters.

Constructive dismissal

71. Section 95 of the Employment Rights Act 1996 states:

(1) For the purposes of this Part an employee is dismissed by his employer if . . . _

. . .

(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.

72. The leading authority is *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221. For section 95 (c) to apply the following must be shown:

72.1 a repudiatory breach of contract by the employer (i.e. a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract and which entitles the employee to leave without notice);

72.2 the breach caused the resignation; and

72.3 the employee did not delay so long before resigning that he is regarded as having affirmed the contract and lost the right to treat himself as discharged.

73. There was an implied term in the Claimant's contract of employment as described in *Malik v Bank of Credit & Commerce International* [1997] IRLR 462 that the employer shall not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

74. A breach of the implied term involves conduct which seriously damages or destroys the trust and confidence between the employer and employee. Both sides are expected to absorb lesser blows (*Croft v Consignia Plc* [2002] UKEAT 1160_00_3009).

75. A series of actions culminating in a "last straw" can cumulatively amount to a breach of the implied trust and confidence, but the "last straw" must contribute something to the breach, it cannot be entirely innocuous (*Omilaju v Waltham Forest LBC* 2005 ICR 35).

Conclusions

Did the following occur:

Nick Chriscoli shouting at the Claimant on 18 October 2018? If so, was he an agent of the Respondent?

76. Nick Chriscoli did not shout at the Claimant in their telephone call on 18 October

2018 but he was forthright, launched straight into the reason for his call and did ask her in strong tones to cease and desist copying in the entire RSL Board “about something and nothing”. He was referring to emails raising operational matters. He did talk over the Claimant as reflected in the transcript of the call. On the Claimant’s part there was some disagreement and she did hang up on him. She had copied the entire Board into complaints about his work. It is agreed he was acting as an agent of the Respondent during this call.

Ms Linda Clement reprimanding the Claimant by email? If so, was she an agent of the Respondent?

77. I do not find Ms Clement was acting as an agent of the Respondent in her email, set out at paragraph 28 above. I accept that she wrote the message as one Court Manager to another. She did, as the Claimant had, copy in the others on the Board who had received the Claimant’s messages but I do not find she was acting in her capacity as RSL Board member.
78. Nor do I find her message a reprimand or threat of disciplinary action. She was responding to a chain of emails from the Claimant in which the Claimant was displaying her anger, taking clear sides in the Richard Sharples situation and overstating her own authority, including making threats to leave RSL as managing agent. The particular email in question showed the Claimant did not fully understand the authority RSL did have as agent of the Respondent and included some inappropriate comments such as referring to Nick Chriscoli, who sat above her in the Line Management chain, as her and Saxon Court’s “servant”. Ms Clement’s message corrected this and explained her own approach and that it had served her well. The final paragraph is a word of warning, intended for the Claimant’s benefit, about where the Claimant’s communications might lead if she persisted, rather than either a reprimand or threat. No action of any sort against the Claimant was taken at the time.

Breaking into the Claimant’s office without justification to conduct a covert search while she was on holiday in February 2019.

79. Neither the Respondent nor RSL broke into the Claimant’s locked office. The spare key was supplied by the Chairman of the Respondent’s Board of Directors and the office was therefore entered without breaking in. It was supposed to be accessible to RSL as the freeholder.
80. The Respondent does have a contractual right to randomly search staff and their property, although the staff member has the right to have a colleague present and refuse to consent.
81. However, it is not clear what the search was for, and the Claimant was not given a right to consent or not to the search. It did happen behind her back. She was not informed and was away on holiday.

82. RSL's staff found and read the Claimant's correspondence with Affinity at page 98 (the union involved in this case). On the one hand that was correspondence with her own union, but in those emails they were not acting in that capacity, rather they were involved in promoting Richard Sharples' new business. It is not clear if the Claimant knew this correspondence had been found, read and copied.
83. The locks were then changed. It is not clear why this was necessary.
84. The Claimant heard about this from a third party anonymous source.

Inventing an allegation that the Claimant had pressured Saxon Court residents into leaving RSL

85. There was evidence of potential pressure on the owners to leave RSL generated by the Claimant and the role she played in giving notice to RSL. She had been involved in the group of Courts that were siding with Mr Sharples and considering leaving RSL. She was working with Mr Sharples and his Union (also her Union) to achieve this aim. At the short notice meeting on 21st January she did make the statement about leaving RSL described as a diatribe by Mr Van Bergen. She promoted Mr Sharples' new business as an alternative and had not provided the owners with a choice of alternative managing agents. Not everything she relayed to the Board of Directors was within her own knowledge or accurate (for example the call with Mr Chriscoli). The evidence does suggest she was personally very invested in obtaining the result of leaving RSL and moving the management agreement to Mr Sharples' new company. She then did intercept the letter from RSL to owners and sent out her own letter that was very critical of RSL, using terms such as "blackmail" and "threats". She did send the notice instructing them to do nothing until her return from holiday (and the end of the notice period with RSL). It is clear from the face of the notice that that was done before any discussion with the Board.
86. Concerns about this had been raised by staff, in particular Lisa Osborn. Two of the Board members, including the Deputy Chair had either resigned or expressed a desire to do so. Ms Dennis in their telephone call on 31 January 2019 perceived the Deputy Chair to be very distressed and unwell as a result of the situation once the Claimant was on holiday.
87. In terms of the procedure, the Claimant had been against consulting the owners at all. When the meeting with owners did take place it was at very short notice and the evidence suggests that itself caused distress and concern. The Powers of Attorney and family members were not aware. The Directors and owners were not given the option of three different managing agents, or consulted about the possibility of self managing until a new managing agent was found (which the Claimant appears to have assumed they would do and they would have had to do once the Claimant returned from holiday and the notice expired). The Board meetings were not held with the requisite company secretary in attendance. The timing of the notice to terminate the agreement with RSL was badly handled with the Claimant planning to be away most of the notice period, when Owners predictably had a lot of questions. She was going to be returning

- just as the notice expired and the Court would become self-managing. The Board of directors felt unable to cope with the situation they found themselves in during her holiday and this caused a lot of distress to at least two Directors.
88. In short, I do not agree that this allegation was invented and the Claimant's actions did warrant an investigation. I note that by the time of the investigation the Board's constitution had changed with the Chair having resigned and two new members having been co-opted.
89. It is right that on the evidence before me the Deputy Chair had accompanied the Claimant to meetings and was at least initially of a similar view to the Claimant. She had spoken against RSL at meetings and had described the draft notice letter as a good letter.
90. I find that the majority of the Board of Directors were in agreement at least with the plan to terminate the arrangement with RSL and probably to instruct Mr Sharples' company as an alternative up to 20 January 2019. They were present at and signed the minutes from the meeting at which the decision was made on 15 January 2019 and some spoke in favour at the meeting with owners on 21 January 2019. It is clear from the way the Claimant referred by first name to the union representative, Ms Wilshire and Mr Sharples when forwarding the draft notice letter that the Chair and the Deputy Chair were aware of their involvement and were in agreement with the proposal up to that date. The Claimant clearly wrote in terms that show she believed she was working with them on a common aim.
91. However there is evidence that at least two of the board began to have concerns, including that it was moving too fast to give only one month's notice, and that they did not agree to make the decision without consulting owners, which is why the short notice meeting was called on 21 January 2019. I accept that once the owners received the communications from RSL and the Claimant and when the Claimant was away some Board members, including in particular the Deputy Chair, then felt out of their depth to deal with the upset amongst owners that had been created and became very distressed by the situation. There is evidence that at least two of the Board Members were genuinely confused or regretted their decision and given what they said in statements to RSL about feeling coerced, this did need to be investigated.
92. I do note that the letter from the Chairman of RSL linking the lease extensions to the managing agreement is also likely to have contributed to the distress.
93. I also consider that the petition that was started by the Deputy Chair and signed by another Director was an unnecessary and excessive response to their concerns, given that the Deputy Chair had responded to the draft notice letter stating it was a good letter and she had worked with the Claimant on the issue for so long. The petition is a public tool, signed by a number of owners, and was not necessary given that RSL were going to investigate.
94. It has been suggested that RSL's aim was to punish the Claimant for her role in the notice being served to terminate the management agreement. I do not agree. I accept the evidence of Mr Chriscoli, supported by the Chairman's

comments when he met with the Respondent's Board and Ms Dennis's comments to the Claimant in the investigation meeting, that RSL respect that the Courts they manage are free to self-manage or hire a different managing agent, after requisite notice.

Generating disciplinary allegations which it knew to be untrue (alternatively had no reasonable grounds to think true, alternatively knowing the acts had been done with the consent of the Respondent and/or RSL) and calling the Claimant into a meeting to discuss them , without notice, on 22 February 2019.

95. It was RSL that conducted the disciplinary investigation. It is not clear how much the Saxon Court Board (the Respondent) were aware of the detail as they had simply been informed that there had been staff allegations of bullying and had their own discussions of some feeling coerced around the change in Managing Agent.
96. RSL included the additional allegations in respect of the Tesco Clubcard and the CCTV. RSL did go over the top with these. Ms Wilshire's evidence as the Claimant's Line Manager at the relevant time was that she was aware of both matters and saw no conduct issue. It was finally admitted in cross examination that these two allegations were unlikely to have proceeded. However in the investigation Ms Dennis was over the top in how these were discussed, with for example an inaccurate reference to a fraud case with Tesco and referring to the use of the Clubcard as stealing. She had also reported it to 101 (though she did not make the Claimant aware of that). She had no actual evidence of how the Claimant was using her card to justify her position in respect of this.
97. With respect to the CCTV this allegation was merely that CCTV was installed with RSL's knowledge and then there was a short delay in putting up a notice. It is hard to see how that could be considered misconduct but again Ms Dennis argued this was misconduct in strong terms in the interview.
98. The Claimant was not given details of the alleged bullying complaints from staff but the evidence in the bundle up to the date of the investigatory interview shows these were historic, hearsay, or criticism of the Claimant's managing style. More statements were obtained on 8 March 2019 after the Claimant's resignation, which I have not considered at this stage.
99. Taken together the inclusion of all three of these additional charges in such strong terms does give the impression of RSL, acting as agent of the Respondent, going beyond reasonably investigating potential misconduct and trying to find any and every criticism against the Claimant, or as the Claimant's representative put it "scratching around to find mud to throw".
100. I have accepted that it was reasonable to investigate the Claimant's role leading to the termination of management agent and the distress caused to Board members and Owners by the situation, and that it was reasonable to call

the Claimant to a meeting to discuss this on 22 February 2019. I do not accept it was reasonable to include the other charges at this stage (or at all in the case of the CCTV or Tesco Clubcard).

Did the Claimant resign in circumstances where she was entitled to resign because of the Respondent's conduct?

101. The Claimant relied on the above conduct and the term of mutual trust and confidence.
102. I accept she resigned as a result of the above treatment in so far as it occurred once she was on holiday from 31 January 2019 and after her return given that the resignation letter stated: "The treatment meted out to me whilst I was on holiday and since my return were such, and are so serious, that no employee could reasonably be expected to remain in your employment. The board and the individual directors have behaved disgracefully and clearly have given in to pressure from RSL for my dismissal even though I have only ever carried out your legitimate instructions. My employment rights and the principles of natural justice have been comprehensively ignored".
103. As such, although there is some criticism above of Mr Chriscoli's behaviour in the phone call, I do not find it was why the Claimant resigned, as it occurred 3 or 4 months earlier. It is not conduct referred to in the Claimant's letter which is aimed at the Board and individual Directors. If I am wrong about that, then in any event this was a disagreement between colleagues in circumstances where the Claimant herself sent an inappropriate email and Mr Chriscoli was making a legitimate request that criticism directed at him not be copied to all of the board. Although his manner on the call can be criticised it is not so serious as to be conduct that is likely to destroy or seriously damage trust and confidence. Rather this is a lesser blow that colleagues are expected to absorb. The Claimant herself hung up on Mr Chriscoli.
104. I do not accept that the email from Ms Linda Clement was either a reason that the Claimant resigned or conduct that was likely to seriously damage or destroy trust and confidence. It would have been better to send the email privately rather than copy the board, but it was intended to be of benefit to the Claimant who was sending ill-advised emails, also copied to the board, at the time.
105. For the avoidance of doubt I do not consider there is any connection between Mr Chriscoli and Ms Clement's behaviour or comments and the subsequent disciplinary investigation. That was triggered by the reports made by staff and Directors in respect of their concerns about the Claimant's role in terminating the management agreement.
106. The Claimant did resign in response to treatment while she was away and since her return. I find this included the search of her office and the changing of the locks; the petition started by the Deputy Chair; and the wide ranging investigation interview, and her perception that all of this was because the Board had done a "u-turn" and given into pressure from RSL to dismiss her because of the

- letter terminating the management agreement.
107. I do not accept that RSL and the Board wanted to dismiss the Claimant because of the notice to terminate itself. I have found that the Respondent had reasonable and proper cause to investigate the Claimant's role in the termination of the management agreement based on the concerns of staff and statements by two of the board members. I have accepted that RSL do respect the Respondent's autonomy in choosing its own managing agent.
 108. However searching the Claimant's locked room and changing the locks is conduct likely to destroy or seriously damage trust and confidence. Although there are policies in place in respect of searching an employee's property I have not been provided with an explanation as to why this was necessary or reasonable in this case. There is no apparent connection with the concerns about the Claimant's role in terminating the management agent, apart from the involvement of Mr Sharples and his union. However, the fact that she was working with Richard Sharples and his union is not sufficient, given that up to the sending of the notice letter the Board of Directors was aware of this and agreed with it, and did have the right to change managing agent. It is not at all clear what RSL was looking for in the search other than evidence of a connection with Mr Sharples.
 109. I find the petition started by the Deputy Chair stating owners had been pressurised into signing the statement to terminate the appointment of RSL was excessive, even if she was beginning to have her own concerns and was becoming distressed by the situation (which I have acknowledged). She had been working together with the Claimant until the letter was sent, having told the Claimant it was a good letter. The majority of signatories of the petition had not signed any statement. The petition was a very public way of raising concerns about the way the matter had been handled. Given that the Deputy Chair had herself been working with the Claimant and confirmed she was happy with the termination letter, though I accept she later had concerns, the message sent to the Claimant by this petition (coinciding as it did with the search of the office and change of locks and wide ranging investigation) was that she and at least one other Board member had made a u-turn and were blaming the Claimant for the termination of the agreement. It sent the signal that those Board members at least could not be relied on to confirm that they had been working with the Claimant and had approved the letter that was sent. It was this u-turn that the Claimant considered to be disgraceful behaviour by individual board members. I find this conduct likely to destroy or seriously damage trust and confidence and there was no reasonable or proper cause for it.
 110. For the avoidance of doubt I find the public petition and the u-turn towards the Claimant that it evidenced to be a breach of trust and confidence. Whereas the Board members' increasing concerns once the Claimant had gone away including feeling there had been pressure or coercion did require investigation. This is not inconsistent. There was evidence to justify the investigation into the Claimant's role and whether intentionally or otherwise she had applied inappropriate pressure, even if the Board had been working with her. That was the proper process to follow, rather than air the matter by way of petition. An investigation into the Claimant's role would have been reasonable and proper, if

the Directors were fully forthcoming about the role they themselves had played. The problem with the petition is that it sent the message that at least one of the Directors could not be relied on to be forthcoming about their own role in approving the termination letter (indeed the email at page 286 was only disclosed very late in the proceedings) and instead were prepared to put all blame on the Claimant. It is that aspect about the Claimant's treatment that I find to be a breach of trust and confidence and that I find the Claimant was alluding to in her letter.

111. I find the addition of the other three allegations in the investigation to be conduct likely to seriously damage or destroy trust and confidence, without reasonable or proper cause. The use of the Clubcard and the installation of the CCTV were done with the knowledge of the Claimant's line manager and it is accepted were unlikely to be taken any further. Yet Ms Dennis spoke about these with the Claimant in the strongest terms, including saying the use of the Clubcard could be stealing and that there was a fraud investigation with Tesco which was not true. The allegations about staff bullying were not substantiated at all in the meeting with the Claimant. Taken together these send the message that the Claimant could not rely on a fair and reasonable process.
112. To conclude, there was a reasonable and proper basis to investigate the Claimant's role in the decision to terminate the agreement with RSL and promoting Richard Sharples' company to the exclusion of others. This is despite the fact that the Board appear to have been in agreement up to the sending of the termination letter. However the other behaviour of searching the office and changing the locks, starting a petition about having been pressured to sign the termination letter, and including other exaggerated or unsupported charges in the investigation all sent the message that the Claimant would not have a fair hearing or that she could not rely on Directors to confirm their own role in the situation accurately. Separately and together these were likely to destroy or seriously damage trust and confidence and there was no reasonable or proper cause for these actions.
113. This contributed to the decision to resign and it follows the Claimant was constructively unfairly dismissed (the Respondent having accepted that if the Claimant was constructively dismissed then it was unfair). The parties did not deal with the wrongful dismissal but it follows the Claimant was also wrongfully dismissed and, as already agreed by the parties, was entitled to 5 weeks' notice pay.
114. It was agreed that the issues of Polkey (whether or not there might have been a dismissal in any event) and contribution would be considered at the remedy hearing stage. It follows from the decision above that I find it was reasonable to investigate the Claimant's actions in respect of the decision to leave RSL and to promote Richard Sharple's company to the exclusion of others. These are set out at paragraphs 82-88 above. The parties are asked to be prepared to address what would have happened as a result of such an investigation.

115. The matter will now be listed for a remedy hearing to deal with the remaining issues above, and the question of whether the Claimant reasonably mitigated her loss.

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Employment Judge Corrigan
Ashford
22 February 2022