

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No S/4105164/2016**

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**Held in Glasgow on 6, 7, 8, and 13 February 2017**

**Employment Judge: F Jane Garvie**

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**Mrs L Orman**

**Claimant  
In Person**

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**Mars Chocolate UK Limited**

**Respondent  
Represented by:  
**Mr P Grant-Hutchison –  
Advocate****

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The judgment of the Tribunal is that the claim should be dismissed.

**REASONS**

**Background**

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1. In her claim, (the ET1) presented on 7 October 2016 the claimant alleged that she was constructively unfairly dismissed. Her claim was rejected as it did not appear that there was a relevant connection with Scotland. This was set out in a letter dated 7 October to which the claimant replied by e-mail dated 10 October 2016. That application was considered by Employment Judge Lucy Wiseman who directed that it should now be  
35 accepted as at the date of first presentation. This was acknowledged by letter of 13 October and a copy sent to the respondent advising that the response (the ET3) required to be received by 10 November 2016. The response was duly received and parties completed date listing letters.

2. The respondent denies that the claimant was constructively unfairly dismissed. The parties were informed that a Preliminary Hearing would be arranged on the directions of Employment Judge Mary Kearns. This was arranged by way of a Telephone Conference Call on Friday, 16 December  
5 2016 before Employment Judge James Hendry. He issued a Note dated 4 January 2017 in which he granted certain Witness Orders that were sought by the claimant.
  
3. There was then further correspondence from the parties and a letter was sent on 9 January 2017 on the directions of Judge Robert Gall. Notices for  
10 the Final Hearing were issued on 10 January 2017 directing that 5 days had been allocated, namely Monday, 6 February through Thursday, 9 February and the following Monday, 13 February 2017. However, the Tribunal did not sit on Thursday, 9 February 2017.
  
4. Following further correspondence a direction was made that there should be  
15 a Preliminary Hearing by Conference Call to deal with outstanding issues that had arisen. This took place on 1 February 2017 and a Note was issued on 2 February 2017 with a direction that further matters that were still outstanding would be dealt with on Monday, 6 February 2017 at the start of the Final Hearing and this would again be by way of a Preliminary Hearing  
20 held in private. The issue of witnesses' attendance was discussed as well as the issue of an Anonymisation Order in relation to one individual who was not a witness but who would be referred to during the course of the Final Hearing. It was agreed that she should be referred to as Ms X. An Order was duly issued.
  
- 25 5. It was also confirmed that the Witness Orders which had been granted for four individuals on the claimant's application were no longer required and they were accordingly informed that their attendance would not be necessary at the Final Hearing. The Final Hearing then commenced.
  
6. A joint bundle was provided. Witness Statements were also available and  
30 these had been exchanged in accordance with earlier directions.

7. The claimant gave evidence on her own behalf. In addition, evidence was given on her behalf by Mrs Julie Copeland. For the respondent, evidence was given on their behalf by Mrs Laura Walters, who was currently the respondent's acting HR Director, Mrs Melissa Jack, the respondent's Head of Demand Finance and Mr Joseph Todman, the respondent's Research and Development Product Director for the UK.

### **Findings of Fact**

8. The Tribunal found the following essential facts to have been established or agreed. The claimant commenced employment on 4 April 1994 with Pedigree Petfoods which is another division within the respondent's organisation. She moved to the Chocolate division as a Field Sales Manager (FSM) on 3 February 2008 and she remained in that post until 12 August 2016. All the respondent's staff are referred to as Associates, regardless of their seniority.
9. As an FSM the claimant had a number of Territory Development Managers (TDM's) who reported direct to her as their Line Manager. As an FSM the claimant's region covered Scotland, Northern Ireland and North East England. Each of the TDM's had their own area within the region and their role involves calling on independent retailers and promoting the respondent's chocolate products. In addition to their roles as TDM's they would be encouraged to take on what were referred to as Champion or Championship roles so as to enable them to understand different areas of the respondent's business. The claimant, in turn, reported to a Mr David (Dave) Langford whom she would see each month at team meetings along with all the other FSM's. In total there are five FSM's who cover various regions in the UK. The claimant's own work involved working from home as well as travelling widely within her region. The claimant would see Mr Langford most frequently at meetings at the respondent's Head Office in Slough. In addition to the claimant's Line Manager, Mr Langford she also had a second Line Manager. He was referred to as LM1 and the second Line Manager as LM2. The latter was a Ms Carrie Martin until early 2016

when that role was assigned to another individual. Ms Martin and her replacement were also in turns, Mr Langford's Line Manager. If Mr Langford was not available then the claimant's immediate Line Management contact was her LM2. It was not in dispute that the claimant was a loyal and hard working employee for many years.

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10. As part of the claimant's role as an FSM, the claimant would work alongside her TDM's from time to time, for example, on what are referred to as WWD ("Working with Days") where they would work alongside the claimant. One of the claimant's TDM's, Ms X was based in Northern Ireland. There was also another TDM in Northern Ireland. The claimant first met Ms X in March 2008.

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11. As well as the respondent promoting and selling their chocolate products they work closely with a third party organisation called CPM. Ms X had previously worked for that organisation as a Confectionery Consultant.

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12. In addition to the claimant working alongside her TDM's there would be meetings held with them as a group, mostly these were held in hotels since she and her team covered a wide geographic area. The claimant appeared to form a good working relationship with Ms X but it was apparent from early on that Ms X had a number of mental health issues,

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13. The claimant was aware that Ms X had raised complaints or grievances about fellow employees as she had done so primarily by contacting the claimant who, in turn, had given her advice and, where necessary sought, advice herself from the respondent's HR Department known as P&O, (People and Organisation). The claimant had understood these to have been resolved informally.

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14. Ms X raised a formal grievance about the claimant in late 2015. By this time Ms X had been absent on lengthy sickness leave in terms of the respondent's sickness absence policy. By letter dated 5 January 2016, (pages 91/92) the claimant was advised by a Ms Yvonne Ewen, an Associate Relations Manager with the respondent that a grievance had

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5 been received from Ms X regarding the claimant's alleged behaviour towards her over a period of time which the claimant was informed had been described by Ms X as "bullying and harassment". The claimant was invited to attend an investigation meeting on 7 January 2016 at the respondent's headquarters. She was asked to bring along "any memories of the following events". This referred to four occasions, one being a team meeting in August 2008, another a Christmas party in December 2008, the third a CPM conference in January 2009 and the fourth, a Christmas dinner held at Dalkeith House in December 2013. The claimant was also asked to provide any information she might have regarding Ms X's absences from work and conversations she had about the absences and anything relating to absence management together with memories and/or notes of any personal circumstances that Ms X had shared with her, the claimant's PDP (Personal Development Plans) records for Ms X and the feedback that she gave her in December 2013.

15 15. The claimant was advised that she could bring a companion along to assist in taking notes and it was for her to choose a fellow associate. The claimant was also informed that she must not discuss with any colleagues, apart from her two line managers and any support person who attended the meeting with her, that there was a grievance about her and nor was she to contact Ms X.

20 16. A grievance investigation meeting was held with the claimant who chose not to be accompanied. Notes of that meeting were prepared, (pages 95/101). The claimant then provided annotations to those notes, (pages 102/108).

25 17. The grievance raised by Ms X was against both the claimant and other associates.

30 18. At the investigation meeting Mrs Walters who had been appointed to investigate the grievances from Ms X, asked the claimant about the four occasions that had been specified in the original letter from Ms X. Ms Walters accepted that Ms X had mental health problems and it was

apparent to her that the claimant had given Ms X “a lot of support”. Mrs Walters did not know the claimant and so was regarded as independent and an appropriate person to chair the investigation.

5 19. During the meeting the claimant was asked whether she had made comments about Ms X, particularly whether she had referred to how Ms X was dressed at the Christmas party in December 2008. She also questioned the claimant about the CPM conference the following January 2009. This was a large conference attended both by many of the respondent’s associates as well as representatives of CPM. There was also reference made to an organisation called Forever Living which is a brand that specialises in aloe vera products. It was known that the claimant was a representative for it and had been for some time; some of the respondent’s associates had themselves either bought its products from the claimant or indicated an interest in becoming involved themselves as acting  
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15 as representatives for the organisation. There was no objection to their doing so from the respondent. Provided this did not interfere with their work for the respondent. The claimant was also questioned about the Christmas Dinner held at Dalkeith House in December 2013.

20 20. Having interviewed the claimant, Mrs Walters continued her investigations. This involved her interviewing some other associates. As indicated, in addition to the grievance brought against the claimant, Ms X had raised by way of her grievance issues about other employees/associates. These were also investigated by Mrs Walters.

25 21. By letter dated 22 February 2016, (pages 121/122) Ms Ewen informed the claimant that, as a result of Ms Walters’ grievance investigation, a decision had been taken that the claimant should attend a disciplinary hearing. This was to be conducted by Mr Joseph Todman and he would consider the results of the investigation and give the claimant the opportunity to comment on these matters.

30 22. Four issues were specified as follows:-

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- “• You used inappropriate language with Ms X regarding her attire at a team meeting in December 2008. In your grievance meeting with Laura you acknowledged that you made reference to Ms X’s attire at the Christmas party 2008, but cannot recall whether you commented that Ms X was “dressed like a slapper”. Laura then found that it therefore appears likely that you used the word slapper or something similar.
  
  - 10 • You used inappropriate language to describe Ms X at the CPM conference 2009. In your grievance meeting with Laura you acknowledge referring to Ms X and her colleague as “dumb and dumber” during a CPM presentation 2009.
  
  - 15 • Your behaviour at a team meeting held in Dalkeith House, December 2013. Specifically you called a meeting late at night after you and the team had been drinking, you informed the team there would be job losses, you had a row with one team member, one team member fell asleep during this meeting.
  
  - 20 • Bullying and harassment to Ms X to join and promote Forever Living Company and Products. Specifically, during a work with day at Belfast Airport, you filled out the application forms for Ms X to join, put your credit card details to pay the £200 joining fee saying she could pay you back later.”
23. Enclosed with that letter was a copy of the respondent’s disciplinary and bullying and harassment policies, notes taken during the meeting with the claimant as well as enclosures which contained relevant information gathered from other associates during the course of the grievance investigation.
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24. The claimant was informed that she was entitled to be accompanied by someone and could choose a fellow associate, another worker on site or a trade union official. She was informed of the serious nature of the

allegations and that this may result in a disciplinary action against her, up to and including, dismissal.

25. The disciplinary hearing was to take place on Wednesday, 24 February 2016. The enclosures were set out at pages 123/140.

5 26. By letter dated 23 February 2016, (pages 141/142) a solicitor acting for the claimant wrote to Ms Ewen, informing her that she had advised the claimant not to attend the meeting as she required adequate time to prepare for the meeting. That letter also set out the position in relation to more information being sought. This was acknowledged by Ms Ewen by e-mail dated 23  
10 February 2016, (page 143).

27. There was then further correspondence between the solicitor and Ms Ewen.

28. A request had been made that the claimant should call certain witnesses to the disciplinary hearing. The respondent decided that the hearing be postponed and that the disciplinary hearing manager would interview the  
15 witnesses whom the claimant wanted to call. The claimant was asked to provide a list of those involved and questions to be asked of them. Mr Todman then met the various witnesses and notes were taken of these interviews and these were then copied to the claimant. Mr Todman then met two of the witnesses again after receiving comments from the claimant.

20 29. By letter dated 15 April 2016, (pages 284/285) the claimant's solicitor enclosed a grievance which the claimant wished to take against the respondent. This was enclosed and is set out at pages 286/288, being an e-mail from the claimant to Ms Ewen followed by the formal grievance set out at pages 289/297.

25 30. By letter dated 22 April 2016, pages 298/299 (Ms Lisa Meads) a Manager within the respondent's P&O acknowledge receipt of the claimant's letter of 15 April 2016 and confirmed that the grievance hearing would be held by Mrs Jack on 27 April 2016.



31. In the meantime, the disciplinary hearing had been suspended. The claimant had wanted the disciplinary procedure to continue the respondent's view was that it should be suspended until the grievance was resolved.
- 5 32. In preparation for the grievance meeting Mrs Jack met Ms Meads and was given a copy of the respondent's grievance policy as well as copies of the claimant's grievance letter, the disciplinary hearing invitation and enclosures. She was then sent copies of Mr Todman's meetings with the various witnesses, (pages 176 to 181, 192 to 203, 216 to 223, 229 to 245, 253 to 257 and 260 to 278).
- 10 33. Mrs Jack noted that the claimant had identified witnesses and provided questions which she wanted Mr Todman to ask them. She was aware that this was outlined in detail in Mr Todman's statement. Mrs Jack reviewed the documents in preparation for the grievance hearing.
34. She then met Ms Meads again on 26 April 2016 to discuss the grievance hearing and the questions that she wanted to ask the claimant.
- 15 35. The claimant was invited to attend the grievance hearing on 27 April 2016 which she did with a Ms Collie present to take notes. The claimant chose to be unaccompanied. The notes are set out at pages 302 to 315.
36. Mrs Jack noted that there were four parts to the claimant's grievance which were:-
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- (a) A perceived lack of support from her Line Manager, Dave Langford, and P&O.
  - (b) The Respondent's handling of the grievance raised by Ms X.
  - (c) The disciplinary procedure against the claimant.
  - 25 (d) A lack of duty of care shown to all associates.

37. The claimant was questioned about support she had received. She indicated that it was only in the last 2 years that she had asked for support and made requests because Ms X was becoming more difficult to manage. She explained that she had informed her Line Manager, Mr Langford that she was struggling with her work load, including a number of performance management issues with her team and was concerned about what Ms X might do. Her view was that Mr Langford's response was to "push back" and say that she had to provide solutions but she would have liked Mr Langford to sit down and make her feel that he understood where she was struggling. She also indicated that she felt that Ms Apaloo who was her direct contact in P&O would "feel that she had been heard when she expressed concern about Ms X raising a grievance."
38. They next discussed the handling of the grievance procedure raised by Ms X. The claimant was concerned about the time it had taken to complete the investigation and that handwritten notes were taken rather than them being recorded and that she had been given only 48 hours notice of the meeting and that neither Ms Toyne or Mr Langford had been contacted as part of the investigation process.
39. Next, they discussed concerns the claimant had about the handling of the disciplinary procedure. Again, there was reference to the 48 hours given to her to prepare and that she was only provided with information relating to "upheld allegations", that the disciplinary hearing manager had not been provided with details relating to all the allegations, that the claimant was not allowed to interview her own witnesses and what she thought was a lack of objectivity.
40. Lastly, there was a discussion about the claimant's complaint about a lack of duty of care being shown towards all associates. The claimant explained that she felt the situation with Ms X had impacted on her team, particularly another associate based in Northern Ireland who was close to Ms X and this was over a number of years.

41. The claimant provided a file of documents that she wished Mrs Jack to review before she reached her conclusion.
42. Subsequently, Mrs Jack met Mr Langford and notes of the meeting were set out at pages 328/332. His position was that the claimant had not raised concerns about her ability to line manage Ms X nor did he consider she had mentioned any support was needed. In relation to Ms X he had advised the claimant to focus and process and follow advice from P&O and Occupational Health.
43. He also explained that he had discussed the claimant's work load and how to prioritise matters and did not think that further support could have been provided.
44. He also provided a time line document set out at pages 398A and 398B.
45. Mrs Jack then met Mrs Walters on 11 May 2016. Notes of the minutes were set out at pages 333 to 334. Mrs Walters' position was that she had considered the accounts of Ms X, the claimant and other witnesses and had upheld four aspects of the grievance. She did not interview Mr Langford because he did not witness or was not involved in any of the events in question.
46. By e-mailed dated 13 May 2016, (page 339) Mrs Walters asked the claimant what she wanted to achieve from the grievance procedure. Her reply was received dated 16 May 2016, (page 338). Meanwhile, on 13 May 2016 Mrs Jack contacted Ms Ewen to check if Mr Langford had been aware of aspects of Ms X's grievance relating to the claimant which had been upheld, (page 341).
47. Having conducted her investigation Mrs Jack reached conclusions, set out in a letter dated 18 May 2016, (pages 342 to 347).
48. In relation to an alleged perceived lack of support her conclusion was that she would uphold in part the claimant's grievance relating to a lack of

support over the previous 2 years and she made several recommendations in that regard namely:-

- That P&O view their internal processes and ensure there was a greater focus on record keeping.
- 5       • That P&O and Occupational Health review together the support provided to line managers handling complex health/long term sickness absences.
- That P&O give more proactive support to line managers handling multiple performance improvement plans amongst  
10       members of their team.
- That P&O review the role they have to play in informal performance improvement plans.

49. In relation to the respondent's handling of Ms X's grievance she noted it had taken 34 working days to complete the process and, while she  
15       acknowledges the claimant's view that that had taken too long, she did not consider there had been any unreasonable delay.

50. In relation to the minutes of the meeting between the claimant and Ms Walters her conclusion was that, if the claimant felt the minutes were not accurate she should have flagged this. She did not consider that recording  
20       the meeting (which would not be the respondent's usual procedure) would have impacted on the outcome of the grievance and therefore she did not uphold that aspect of the claimant's grievance.

51. In relation to the complaint that the claimant had been given 48 hours' notice she considered that if the claimant was unhappy with this she could have  
25       raised this and so she did not uphold this aspect of the claimant's grievance.

52. In relation to the claimant's complaint that Ms Toyne and Mr Langford were not spoken to, she concluded this would not have changed the outcome and she noted that the claimant had only suggested in the grievance meeting that Ms Walters should speak to Ms Toyne.
- 5 53. However, she concluded that it was remiss for the grievance manager not to have met with these individuals for completeness and so upheld this part of the claimant's grievance.
54. In relation to the disciplinary procedure she did not uphold the issue of 48 hours for preparation as the claimant had complained only about  
10 information about the allegations raised by Ms X which were upheld. Since the others were unsubstantiated she did not consider them to be relevant and did not see that the claimant needed to see the full details of those allegations and so she did not uphold that part of the grievance.
55. Regarding the claimant's complaint about the disciplinary hearing manager  
15 not being provided with details of all allegations by Ms X, Mrs Jack concluded that this information was not relevant to the disciplinary hearing procedure and the disciplinary hearing manager could form a view based on interviews with witnesses and so she did not uphold that part of the claimant's grievance.
- 20 56. In relation to the complaint that the claimant was not able to interview witnesses personally, Mrs Jack understood why the respondent had not granted this request and considered the comments made were reasonable and appropriate and so did not uphold that part of the claimant's grievance.
57. Finally, with regard to the complaint about a lack of objectivity Mrs Jack felt  
25 that that was the role of the hearing manager to form a view on that issue.
58. In relation to the lack of duty of care shown to all associates, she focused on the duty of care owed by the claimant to Ms X as her line manager but since the claimant was raising a grievance she acknowledged the difficulties of managing an associate with significant mental health concerns who had

been in and out of work over a long period. Her conclusions were that these were areas that the respondent could improve on and she recommended that P&O and/or Occupational Health she would ensure that line managers had what they needed to support the particular associate in question and the wider team. She did not consider that the respondent had neglected its duty of care to the claimant and so did not uphold that part of the grievance.

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59. As the claimant and Mrs Jack were due to be on holiday on the week of 23 May it had been agreed by Ms Meads that Mrs Jack would communicate her findings in writing rather than wait until after they had returned from their holidays. A grievance outcome letter was sent to the claimant on 19 May 2016, (pages 342/346) by Mrs Jack.

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60. By letter dated 20 May 2016, (pages 348/349) the claimant tendered her resignation indicating that her last day of employment would be 15 August 2016 being "in accordance with my statutory notice period".

61. Her letter continued as follows:-

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"It is with sadness that I resign after 22 years loyal service. I have now received my grievance outcome which does not properly address the issues raised by me. I see no point in appealing as it is clear the business does not acknowledge the position they have put me in and I have no confidence that it will support me objectively moving forward.,

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I have, through no fault of my own, been placed in an intolerable position since 5 January 2016 when I was advised that a grievance had been raised against me. The upshot is that I faced disciplinary proceedings the outcome of which is that I could be summarily dismissed. I have made clear to the business its failures in this long process; as evidenced from my own and my solicitor's communications, which will be relied upon.

In particular I cite the following as unresolved issues from the grievance outcome:

**Duty of care:**

5 The business says that I could have reached out to P&O Occupational Health and LM; I did do these things my LM was involved in investigation despite him telling me otherwise, so had lied to me (therefore I have no confidence in him supporting me fairly). Also as documented in the outcome of my grievance (P&O's notes should have been more robust) i.e. I was speaking with P&O on a regular basis, but again I wasn't getting any support. I would only contact Occupational Health if I were unwell, which I wasn't, so why would I have contacted them? Therefore I cannot see what I should have done to be supported more effectively.

15 **Recommendations will be made to P&O with regard to how they support LM's moving forward.** That doesn't give me confidence that anything will actually change. There is no consideration of how I continue to do my job with disciplinary and potential summary dismissal hanging over me. Despite the comments from Melissa stating that all feedback from those interviews save that "everyone has spoken well of me and my commitment to the business and the support that I have given to my team and direct reports", this does not help me moving forward. None of my concerns have actually been addressed.

25 Mars, as my employer, has fundamentally breached the implied term in my contract of employment of trust and confidence. This amounts to a repudiatory breach as the whole process has been manifestly unreasonable. I am now left with no option but to consider, and be advised upon, the legal avenues open to me.

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62. Her e-mail was acknowledged by Ms Meads on 23 May 2016. This indicated that Ms Ewen would be in touch to “agree the next steps”.
63. By e-mail 24 May 2016, (pages 354/355) she explained that the claimant’s e-mail had been passed to her to reply. She indicated that she was encouraging the claimant to withdraw her resignation and continue with the process.
64. The claimant did not do so. She did however choose to attend the disciplinary hearing which was held on 10 June 2016, (pages 356/365). Mr Todman had been appointed to conduct the disciplinary hearing. As with Mrs Walters and Mrs Jack he did not know the claimant before he was appointed to conduct the hearing.
65. By letter dated 14 June 2016, (page 366) Mr Todman informed the claimant that he would reconvene the hearing on 15 June 2016. He thought this was held by a Skype discussion but the claimant thought it was a telephone discussion.
66. In any event the discussion did take place and the claimant was informed of his decision. On 15 June 2016 Mr Todman wrote to the claimant by letter of that date, confirming his decision, (pages 367/368). He indicated that, as discussed with her, his decision was that there should be a first written warning issued to her and that this would remain on her file for a period of 12 months. The claimant was given the right to appeal but chose not to do so.
67. Mr Todman set out four points which caused him to reach the conclusion that a first written warning should be given to the claimant to remain on her file for a period of 12 months.
68. As indicated above, it is appropriate to record that although the claimant also had the right to appeal against the outcome of her grievance she chose not to do so.



69. It appears that during the period 22 February to 20 May 2016 the claimant was considering whether resignation would be an option for her. In terms of the information provided in her claim at pages 7, 12 and 13 of the joint bundle the claimant asserts that the events generated had destroyed her trust and confidence in the respondent and made her position untenable. She further asserted that they had failed to support her at all stages particularly in relation to the grievance raised against her and during the grievance and disciplinary procedure. She continued as follows:-

“They (the respondent) intended to find against me from the start in order to avoid issues with Ms X. They had no regard for my health or reputation or how this could affect my role going forward. These actions of Mars led me to resign and I claim that I was therefore constructively unfairly dismissed.”

70. By letter dated 7 January 2017, (page 423) an extract of a report from the claimant’s General Practitioner was provided in which he indicated that she was not currently well enough to be seeking employment.

71. The claimant was eligible to receive a pension from the respondent and she decided to take that pension early.

72. The claimant seeks compensation.

73. At the conclusion of the evidence on 13 February 2017, the claimant and Mr Grant-Hutchison addressed the Tribunal. It was agreed that Mr Grant-Hutchison would give his first and then the claimant provided hers. Both subsequently provided their submissions in writing. These are set out below, starting with the claimant’s submissions.



### Resigning with notice

4. Under common law principles, a party faced with the choice of accepting a repudiatory breach or affirming the contract must resign without notice. However, [section 95\(1\)\(c\)](#) of the ERA 1996 gives an express exception to this principle in a constructive dismissal context, by providing for termination “with or without notice”. The words “with or” were inserted to remedy the injustice of seeing an employee who is considerate enough to give notice ending up worse off than one who leaves without notice ([Western Excavating \(ECC\) Ltd v Sharp \[1978\] ICR 221 \(CA\)](#)).

5. The following elements are needed to establish constructive dismissal:
- Repudiatory breach on the part of the employer. This may be an actual breach (as in my case) or anticipatory breach, but must be sufficiently serious to justify the employee resigning.
  - An election by the employee to accept the breach and treat the contract as at an end. The employee must resign in response to the breach.
  - The employee must not delay too long in accepting the breach, as it is always open to an innocent party to “waive” the breach and treat the contract as continuing (affirmation) (subject to any damages claim that they may have).

### Employer must be in repudiatory breach

6. Constructive dismissal requires the employer to be in repudiatory breach of an express term or an implied term. The breach may be actual or anticipatory. The breach may consist of a one-off act or a continuing course of conduct extending over a period, culminating in a “last straw”. I have identified what constitutes the repudiatory breach of contract by the employer in this case:

- I have identified the alleged breach of contract.
- I have established the evidential basis of my claim. The facts although in dispute support my case.
- I believe I have satisfied the tribunal that the facts as proven are sufficient in law to amount to a repudiatory breach of contract.

### Inept handling of disciplinary matters

7. Where an employee is suspended or presented with allegations about their conduct, there is scope for them to claim repudiatory breach where the suspension or allegation is manifestly unreasonable, particularly in cases where the allegation is of the utmost seriousness.
8. For example, in [Gogay v Hertfordshire County Council \[2000\] IRLR 703](#) suspension of an employee alleging sexual abuse was found to be “knee-jerk” and constituted a breach of trust and confidence
9. In [Working Men’s Club And Institute Union Ltd v Balls UKEAT/0119/11](#) the employer was in repudiatory breach when it initiated disciplinary proceedings against an employee, alleging dishonest behaviour, without any adequate basis for doing so and when it conducted those proceedings in an unreasonable way. It was apparent, from the evidence, that the employer had rushed into making formal allegations and that further inquiry was called for before the allegations were put to the employee.

### What constitutes a repudiatory breach? Case examples

10. A repudiatory breach may occur where there has been the breach of an express or an implied (as in my case) term of the contract. Whether the breach is sufficiently serious to be classed as repudiatory is a question of fact and degree. It was indicated in [Morrow v Safeway Stores plc \[2002\] IRLR 9 \(EAT\)](#) that, where the implied duty of trust and confidence has been broken, this will “inevitably” be serious

enough to constitute a repudiatory breach. Below are some examples from case law, based on subject matter, about what does and does not constitute a repudiatory breach.

- 5 11. In [Woods v M Car Services \(Peterborough\) Ltd \[1981 IRLR 347\]](#) the EAT stated in their judgment:

10 “It is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee..... The Employment Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be  
15 expected to put up with it”

- 20 12. In [Leach v The Office of Communications \[2012\] IRLR 839](#)) the Court of Appeal cautioned against overusing or invoking too easily alleged breach of trust and confidence, stating that it is not a convenient label to stick on any situation. However, I believe it can be asserted in my case that my employer’s conduct is sufficiently serious to constitute a repudiatory breach.

- 25 13. The Tribunal is not required to concentrate upon the “immediate cause” of the resignation. In [Wright v North Ayrshire UKEAT0017/13 the EAT](#) held that the correct question is whether the breach of contract “played a part” in the dismissal, not whether it was the principal element; the degree to which it played a part may effect compensation

- 30 14. I did not resign from Mars on the 20<sup>th</sup> May 2016 because I wanted to, I resigned because I felt that I had no other option. My employer materially breached my contract of employment by treating me in the

manner described which is in breach of the implied term of trust and confidence entitling me to resign and claim constructive dismissal.

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15. Throughout the Tribunal Hearing there was recognition from the Respondent that Ms X had on numerous previous occasions raised unfounded allegations against other Associates without any consequence to her. Ms Walters confirmed during her evidence that despite Ms X having raised 10 pages of allegations against me and various other Associates, she did not believe that Ms X's allegations were malicious. From the extract from Ms X's Grievance **[core Page 127]** it's clear that her recollection of events was considerably embellished but this fact was not considered as concerning by Ms Walters
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16. Ms Walters confirmed that Ms X had not raised her Grievances in a timely manner in line with Mars Policy expectations **[Page 417, Point 4.1]** but felt that this was acceptable due to Ms X's history of long term sickness and mental health issues. She also confirmed that Ms X did not know what remedy she was seeking to the allegations she'd raised. Ms Walters did not mention that Ms X had lots of opportunity over the years when speaking with Occupational Health or Personnel, which she did on a regular basis, to raise any concerns that she might have had nor that Occupational Health and Personnel had always fed back to me Ms X's commendations of me as her LM.
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17. The Respondent has a Duty of Care to all Associates not just those with a mental health issue or disability. Where ongoing concerns are being raised about any Associates behaviour impacting on other Associates' careers and wellbeing, supported by considerable evidence as per my statement and also statements taken from Claire Toyne **[Core. Page 220, PG 5]** , Donna McDonald **[Core. Page 346/347]**, Jo Morrison **[Core. Page 261/263]** then the Respondent has an obligation to address those concerns with the Associate responsible regardless of any mental health illness. The Respondent
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acknowledged throughout the Tribunal that I had frequently raised my concerns over a number of years. The Respondent failed in their obligation to me.

- 5           18. The Respondent acknowledged throughout the Tribunal Hearing that I had repeatedly raised concerns about my workload and challenges within my team to my LM and asked for his support, but that it was my responsibility to go to him with solutions and that he claimed that I had not done that (**core. Page 343, PG 8**) Its evident from my statement and interview with MJ that I had often tried to take solutions to my LM without success which led me to speaking with my LM2 to seek advice about how I could better secure support from my LM (**core. Page 221, last 3 PGs**). It's not acceptable that conscientious and capable LMs have to go to such lengths when they do need additional support.
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- 15           19. The Respondent claims that their Grievance and Disciplinary Policies are "Best Practice" and in line with ACAS recommendations. Laura Walters confirmed during her evidence that the Mars Policy is transparent and fair. They do not however inform Associates that they are entitled to call witnesses in their defence to a Disciplinary Hearing. Despite the policy (**core. Page 429, Point 5.4**) stating that Associates should be allowed sight of allegations made against them, I was not permitted to have this information and LW confirmed that she felt that the four events documented in my "Invite to Investigation" letter [**core Page91/92**] was enough information to enable me to prepare effectively to answer questions put to me from Ms X's 10 pages of allegations, regardless of the time lapse since alleged events had taken place (2-7 years). This can in no way be considered as fair and transparent.
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- 30           20. Laura Walters confirmed that she did not know that Ms X had a history of raising Grievances against a number of Associates and claimed that had she known it would have made no difference to how she investigated Ms X's allegations. Ms Walters said there was no ceiling

5 to the number of Grievances that an associate could raise and that she was bound to investigate them all. Ms Walters also confirmed that she did not know that both Stuart Bell and Alastair Dick were friends of Ms X or that both were or had been Performance Managed over a considerable period of time. She said that had she known this it would not have influenced her decision to rely on their evidence as credible witnesses. Ms Walters acknowledges that Alastair Dick had said that I had not had a stand up fight with him at a meeting so she therefore should not have included that in the allegations that were upheld. She also confirmed that she had interviewed 5 or 6 witnesses during her 6 week investigation but that she had not interviewed my witness or LM claiming that she already had the information that she needed to uphold four allegations. She also claimed that she had no memory of me offering her text messages from Ms X confirming her willing participation in FLP or congratulating me for having won a Line Manager Excellence award that she had nominated me for in 2013 at the same time as 2 of the allegations upheld had taken place **[Core. Page 382/395]**. Nothing said by Ms Walters suggested to me that her investigation was fair, mutual or objective.

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21. From the parts of my allegations that were partially upheld during Melissa Jacks investigation in to my Grievance against Mars **[Core. Page 342/346]**. I have never had any further communication from the Respondent to confirm what actions had taken place from the recommendations that Melissa Jack had made to them. Ms Walters felt confident that Mrs Jack's recommendations would have been addressed but did not provide any evidence of this. It would seem reasonable that an Associate who has had a Grievance upheld should expect some form of update from the Respondent regarding actions taken.

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22. The Respondent denied that my LM had lied to me about his participation in the investigation process or felt that his conflicting statement raising concerns about me were a deliberate attempt by him



to discredit me. This however does not change the fact that he had lied to me or that his recollection of events from his first statement [Core. Page 196/203] to his second statement [Core. Page 268/278] changed significantly when he was challenged

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23. From that allegations that were upheld during the Disciplinary Hearing on 10<sup>th</sup> June 2016 [Core. Page 367/368] I disagree with the findings for the following reasons:

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i) **1<sup>st</sup> Point – Inappropriate Language:** There was no evidence that I called Ms X a Slapper or said anything inappropriate. My comments were about my concerns regarding Ms X going out on a freezing cold night with hardly any clothes on [Core. Bottom of Page 357 and top of Page 358] Donna McDonald also confirmed that nothing inappropriate was said in her statement.

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ii) **2<sup>nd</sup> Point – Inappropriate Language:** I explained during my statement that my “Dumb and Dumber” comments were what Ms X and Ms McDonald called themselves, but when I realised that Ms X was upset I had gone after her to resolve the problem which I believed was fully resolved [Core. Page 359, PG’s 5-8] Donna McDonald also confirmed this in her statement [Core. Pages 231, PGs 4 onwards to Page 232, PGs 1-5] Claire Toyne also confirmed this in her statement [Core. Page 220, PGs 3-7]. As the issue was resolved as per Mars Policy [Core. Page 420, Point 3] I do not believe that it is then fair to uphold this in a grievance made 7 years later

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iii) **3<sup>rd</sup> Point - My attempts in work time to try to persuade my direct reports to join FLP:** I informed Joe Todman during my statement that when I was first involved with FLP I’d shared my involvement with my team and told them that I thought that the business and its products were fabulous. I also said at that time

5 that if anyone was interested and wanted to know more I'd happily share details with them. I also informed my LM, Senior Managers and Peers of my involvement **[Core. Page 361, PG 4 and first 3 lines of PG 5]**. No one interviewed including my LM said that they felt that I had tried to persuade them or that I was promoting FLP on company time. Dave Langford **[Core. Page 202, PGs 1-2]**, Claire Toyne **[Core. Page 222, from 1<sup>st</sup> line to 2<sup>nd</sup> PG from bottom]**, Donna McDonald **[Core. Page 129, Row 12-18]**, Jo Morrison **[Core. Page 265, 4<sup>th</sup> PG from bottom to 10 5<sup>th</sup> PG on Page 266]**. Everyone interviewed prior to the Disciplinary Hearing, also confirmed that after I initially mentioned FLP to them, it was never mentioned again.

15 iv) **4<sup>th</sup> Point – Conflict of Interest:** Policy States – Outside Employment is permitted as long as it does not interfere with or detract from your work at Mars. If you have employment outside of Mars, it must be limited to times when you are not on the job for Mars. As all witnesses above confirm that I was not working for FLP on company time I fail to see “the conflict of interest”.  
20 Julie Copeland also confirmed during her evidence, and in her statement the lengths that I had gone to, to separate Mars from FLP.

25 I also offered Joe Todman sight of text messages from Ms X at the end of the Disciplinary Hearing as I had done previously with Ms Walters. Joe, like Ms Walters did not want to see these as evidence to support my case **[Core. Pages 382/395]** I also made reference to these texts during my interview with Joe Todman **[Core. Page 361, 4<sup>th</sup> line from bottom]**

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24. In summary, I believe that Mars have fundamentally breached the implied term in my contract of employment of trust and confidence. This amounts to a repudiatory breach as collectively the Respondents lack of Duty of Care and support since March 2014 and Objectivity

throughout the Grievance and Disciplinary process has been grossly unfair.

5 25. I have been asked why I did not seek support from Occupational Health and as the honest answer is that I knew that I could no longer work for a company who:

26. Did not consider, or give support to me as an Associate throughout this process.

10 27. Would not address the issues that this Associate was causing within my team and third party teams despite the evidence provided, as their only concern was to ensure that should this Associate make a Tribunal claim against them, they could prove beyond any doubt that she had received every possible support, which was evident.

15 28. Expected me to continue to fight for additional support when I most needed it from my Line Manager and from Personnel

20 29. Expected me to accept allegations made against me despite the accuser's obvious malicious intent, in the hope that the accuser would feel satisfied and leave the business without further incident, which she then did.

25 30. Did not follow a fair and objective Grievance and Disciplinary process.

30 31. Expected me to continue to manage a team when the majority had been involved in the investigation including one Associate who had been Performance Managed over a number of years putting me at further risk of additional Grievances being raised. My credibility as a manager was destroyed given knowledge that I had been disciplined and was subject to a disciplinary sanction was widely known and that my team, in particular, were involved, as stated. My position was rendered untenable by the unreasonable and unfair actions of my employer.

32. It would therefore be compromising my values and beliefs to expect that the business should pay me for sick leave when I knew that I could not possibly continue to work for them. Likewise, I have been asked why I worked my 12 weeks' notice period as most people don't. As above it would have been wrong of me not to honour the contract that I'd signed regardless of how I felt that I had been treated by the business.

## 10 **Respondent's Submissions**

### Background

The Claimant has raised a claim for unfair constructive dismissal. At the time that she terminated her employment contract she held the position of Field Sales Manager. She terminated her contract of employment on 20<sup>th</sup> May 2016 although she worked out her 12 week notice period which finished on 12<sup>th</sup> August 2016. The Respondent is a manufacturer of chocolate confectionary and has a substantial number of employees. The claim was accepted on 7<sup>th</sup> October 2016. The Claimant had participated in a grievance investigation raised by a Mrs X who had, at the time, been an employee of the Respondent and an immediate subordinate of the Claimant. Said grievance was directed primarily against the Claimant but it was also directed against others. Mrs X had some mental health issues, and had over time complained about other employees. At the time the grievance was raised Mrs X had been physically absent from her employment for on or about 18 months. Some of the background is reflected in the findings in fact.

### The Issues

Is Section 95 ss 1 (c) of the Employment Rights Act 1996 engaged?

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(1) What was or were the Claimant's reasons for resigning?

5 (ii) If said reason or reasons were directly related to the conduct of the Respondent did said conduct amount to a material breach of the contract of employment between the Claimant and the Respondent such as to constitute a repudiatory breach of said contract thereby allowing the Appellant to terminate the contract?

(iii) Was said "constructive dismissal" unfair?

10 (iv) If the Claimant has indeed proven the reason for her resignation and the other questions are answered in favour of the Claimant then what is the measure of quantum? Should quantum be limited to the principal reason for the breach of contract? Was there contributory fault?

Findings in Fact

- 15 1. The Claimant commenced employment with Mars Petcare UK on 4<sup>th</sup> April 1994 and TUPE transferred to the Respondent on 3<sup>rd</sup> February 2008. She resigned from her employment on 20<sup>th</sup> May 2016. She worked a three month notice period.
- 20 2. At the time of her resignation she was a field sales manager. This was a particularly demanding position in that she had many subordinate employees (termed associates) who reported to her and covered a wide geographical area. The Claimant had found the job to be particularly demanding in the 2 years prior to her resignation. Her duties were particularly demanding in that since 2008 she required to manage a Ms X who had mental health difficulties. Ms X had been on sickness absence for some 18 months prior to the Claimant's resignation from her employment. Ms X during her period of employment had made complaints about fellow employees but until
- 25 3. For on or about 3 years before the Claimant resigned from her employment she had sold health care products for an organisation called Forever Living. She sold said products to other employees of the Respondents and recruited and attempted to recruit some of said
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employees to also sell said products. She was paid a commission for any individual that she so recruited. There was a potential to obtain a share of the earnings of such employees.

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4. In December 2015 Mrs X raised a formal grievance against the Claimant and others. A Mrs Laura Walters, then Head of Business Partnery and Associates was appointed to be the “grievance manager”. Much of Mrs X complaints were held at an earlier stage to be unfounded. The initial complaints that were thought worthy of investigation were (a) events relating to a team meeting in August 2008 (b) in 2008 the Claimant had used inappropriate language at a team meeting to describe Mrs X attire in December 2008 (c) at a conference in 2009 involving some 200 non employees of the Respondent the Claimant used inappropriate language to describe Mrs X and another employee. She described them in a presentation as “dumb and dumber” and (d) at a team meeting in December 2013 the Claimant had behaved inappropriately by discussing with her team at a late night meeting, after they had been drinking, potential job losses. In the course of the investigation from the Claimant’s own evidence it became apparent that the Claimant had lent Mrs X money to assist her joining Forever Living Limited (see page 98 of joint bundle).
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5. As a result of the matters upheld in Ms X’s grievance the Respondent required the Claimant to attend a disciplinary meeting on 24<sup>th</sup> February 2016. The letter was sent on 22<sup>nd</sup> February 2016. Said meeting was convened by a Mr Todman. The invitation narrated the four complaints to be considered at the hearing and provided the claimant with the notes of the meeting with her taken during Ms X’s grievance procedure copies of notes of the contents of interviews with 3 employees taken as part of said grievance procedure, and copies of the bullying and harassment policies (see production 121). Mr Todman and Ms Walters had no discussions with each other in matters pertaining to the Claimant. On 23<sup>rd</sup> February 2016 the Claimant’s solicitor wrote to the Respondent requesting that the meeting be postponed and that further information about the parts of Ms X’s grievance which had been upheld
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should be disclosed. The letter advised that the Claimant wished to call witnesses at the disciplinary hearing. The Respondent decided that the hearing be postponed and that the disciplinary hearing manager would interview the witness that the Claimant wished called. The Respondent requested and received a list of questions that they would ask.

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6. Mr Todman met with all the witnesses suggested by the claimant, took notes of the meetings and sent these to the Claimant. Mr Todman had a further meeting with two witnesses after receiving the comments of the Claimant.

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7. On or about 2<sup>nd</sup> April 2016 the Respondent received a letter from the Claimant's solicitor informing them that the Claimant intended to raise a grievance. The Claimant did raise such a grievance (see pages 288 to 297 of Joint Bundle). The Claimant wished the disciplinary procedure to continue. The Respondent decided to suspend the disciplinary procedure until after the grievance was resolved as the matters raised were inter related.

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8. Sometime between 22<sup>nd</sup> February 2016 and 20<sup>th</sup> May 2016 the Claimant began to form the view that she would resign. (See the claimant's oral evidence in cross examination and in reply to questions from the Judge. Arguably the evidence shows that she was forming a very strong view in this regard).

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9. Ms Melissa Jack was appointed grievance manager. She examined the Claimant's grievance letter as aforesaid, a copy of the grievance policy, the disciplinary invitation letter and enclosures (pages 121 to 130), notes of Mr Todman's interviews with witnesses (pages 176 to 181, 192 to 202, 216 to 223, 229 to 245, 253 to 257 and 260 to 278). The Claimant was invited to a grievance hearing scheduled for 27<sup>th</sup> April 2016 (pages 298 to 299). (The notes of the meeting are at pages 302 to 315). The meeting discussed the four parts of the Claimant's grievance being:-

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- (a) a perceived lack of support from her line manager, David Langford and P&O
- (b) the Respondent's handling of the grievance raised by Mrs Irvine
- (c) the disciplinary procedure against Mrs Orman
- (d) a lack of duty of care shown to all associated.

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At the end of the grievance hearing the Claimant presented Ms Jack with documents p102-108, 131-140, 182-196 and 204-215; 141-143, 145-147, 150-151, 224-247, 248-252, 259, 279-283 and 300-301 (see Ms Jack's written statement). Ms Jack made further investigations including meeting various witnesses (see her witness statement). She upheld the Claimant's grievance in relation to lack of support over a 2 year period and in relation to the failure to interview 2 witnesses in relation to Ms X's grievance procedure. She made suggestions as to how the duty of care to the Claimant could be better discharged (see page 6 of said witness statement). The Claimant resigned before said suggestion could be implemented. The grievance outcome letter was sent to the Claimant on 19<sup>th</sup> May 2016. Prior to this on 13<sup>th</sup> May 2016 Ms Jack had contacted the Claimant by letter dated 13<sup>th</sup> May 2016 (see Ms Jack's witness statement at page 6 and page 339 of the Joint Bundle). The Claimant replied on 16<sup>th</sup> May 2016 (see pages 338 and 339). The email which is to be found at p338 states, *inter alia*, "I.LO wants the business to acknowledge how exposed LM's are when managing associates with disabilities or mental health issues. Despite repeatedly asking for support/help and sharing her concerns about how she believed Ms X would raise a grievance against her, no support was given and her concerns were ignored".

10. The Claimant did not appeal the outcome of the grievance although such a procedure was available to her.



11. On 15<sup>th</sup> June 2016 the disciplinary manager found that the Claimant had used poor judgement in the use of her language and that trying to persuade her subordinates to join Forever Living amounted to a conflict of interest and/or abuse of authority. A first written warning was imposed (see page 367).

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Findings in Mixed Fact and Law

12. The claimant has failed to prove the real reason for her resignation (compare the Claimant's resignation letter pages 348 and 349 and the claimant's oral evidence).

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The Law

13. It is for the Claimant to show that she resigned in response to a repudiatory breach of contract.

14. The standard to which she must satisfy the Tribunal is the balance of probabilities. Lawful conduct by an employer is not capable of constituting a breach of contract let alone a repudiatory breach of conduct even if such conduct may be unreasonable or unusual (see **Western Excavation (ECC) Ltd v Sharp [1978] IRLR 27**. In deciding whether there has been such a breach it is the employer's conduct which must be considered. However the employee's conduct is important in relation to both the "effective" reason for resignation and as to whether or not she has waived her right to repudiate any such breach.

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15. In **Western Excavation** Lord Denning MR stated *inter alia* "An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract". The employee in these circumstances is entitled to leave without notice or to give notice but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover the employee must make up his mind soon after the conduct of which he

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complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will have his right to treat himself as discharged.

- 5 16. When is a breach repudiatory? It is not every breach of contract which is repudiatory (see **Hutchings -v- Coinseed Ltd [1998]IRLR 190**). It has sometimes been said that the employer must be acting “arbitrarily” or “capaciously” (see **Murco Petroleum Ltd v Forge 1987 IRLR p50**). The last straw doctrine - a repudiatory breach can be constituted by the undermining of trust and confidence over a period of time (see **London Borough of Waltham Forrest v Omilaju [2005] IRLR p35.**)
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17. However a repudiatory breach can still be fair (see **Savoia v Chiltern Herb Farms Ltd 1982 IRLR p161**).

#### Applying the Law to the Facts

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18. The Claimant has given many potential and contradictory reasons for resigning. Accordingly she has failed to show the principal or effective reason for resigning. It is tempting because of the timing of the resignation to find that it was the “last straw doctrine which applied. However the second part of the resignation letter refers to having “[no] confidence that anything will actually change”. In this letter the Claimant appears to be criticising a recommendation in her favour. It appears that she has already lost trust in the Respondent. In her email at page 338 of the Joint Bundle the Claimant appears to be unclear as to what she wishes from the Respondent. In her evidence in cross-examination she stated that she started to form the view that she was going to resign shortly after 22<sup>nd</sup> February 2016 (i.e. when she heard of the outcome of Ms X’s grievance). In her resignation letter the Claimant states, *inter alia*, “I have through no fault of my own, been placed in an intolerable position since 5<sup>th</sup> January 2016 when I was advised that a grievance had been raised against me”. It must be said that if the “last straw” doctrine is not applied then it is difficult to explain why the Claimant continued in her contract of employment until May.
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However sometimes on the balance of probabilities test there is just no answer. In any event it is not easy to explain why she carried on working until August, 2016.

5 19. In addition at the end of her cross examination or in reply to questions from the Employment Judge she made repeated references to a breach of the duty of care to her but she did so with repeated references to the standard of care shown to Ms X. In her claim she states, "It was clear from the many allegations made by VI that her intent was malicious, but she was not disciplined as per Mars  
10 Grievance policy despite many of her allegations".

15 20. The facts do not readily give any support to a constructive dismissal but if I am wrong in the foregoing then it is possible for the Tribunal to find that the real reason for termination is that the Claimant having supported Ms X for a long period and having become close to her she had a deep seated sense of injustice when the Respondent dared to even consider Ms X grievances let alone uphold some of them. Indeed her evidence in cross-examination was that thought that a grievance was coming (in which of course she was correct) and that she thought that P&O and line management should have "headed it off at the pass".  
20 The Claimant thought that she should be protected from it. If this is indeed the real reason for the termination of the contract, with or without, the addition of the Claimant's disappointment in the result of her own grievance complaint, then this cannot be a breach of contract. The Respondent in order to preserve the implied duty of trust and  
25 confidence in Mrs X's contract had a duty to at least investigate same. The complaints may have been somewhat historic but they were being made by an individual who had been quite seriously ill for a considerable period of time. At least on one occasion the incident complained of involved a considerable number of people. It also must  
30 be remembered that Ms X's grievance procedure was just that a grievance procedure - it did no more than open the door to a disciplinary procedure. Although important from the Claimant's perspective judging by the employer perspective it is not an actual

disciplinary procedure. It has the same status as an investigatory meeting. It seems to have been conducted competently by Ms Walter.

5 21. No doubt if the passage of time had rendered the evidence unreliable then nothing further would have occurred. However Mrs Walter's evidence was to the effect that to a substantial degree her findings were based on the claimant's own evidence. What had occurred was a difference in interpretation of the facts between her and the claimant. Any criticisms made of the procedure by an unconnected grievance manager, Ms Jack, were minor.

10 22. If what is being suggested is that it is Ms Jack's application of the grievance procedures that were flawed and that that is what lead to the resignation then such flaws were again minor in the context of the overall procedure. Although such flaws were again minor in the context of the overall procedure. Although the test of "reasonableness"  
15 has to some degree been incorporated into the test as outlined in Western Excavation by subsequent case law, it is still not to be understood in the same way as the statutory test in the more usual unfair dismissal case. Any "unreasonableness" or failures of procedure has to be of such a degree as would allow the tribunal to find that they  
20 would actually or would be likely to harm the trust and confidence of an employee. The employee being the "man in the Clapham omnibus" or as the ordinary employee of normal sensibilities. In any event any such defects could have been cured on appeal. Such an ordinary employee with or without the assistance of a solicitor would have  
25 instituted such an appeal. From the perspective of the actions of the employer they made an appeal procedure from any grievance procedure available. The employer had not concluded the disciplinary procedure before the Claimant resigned.

30 23. In her claim form (at page 13 of the Joint Bundle) the Claimant complains that the business interviewed more than 50% of her team during the investigation (It is not entirely clear which investigation she is referring to) while they expected her to manage them. From the

5 employer's perspective an employer frequently either in a grievance or disciplinary procedure has to interview a number of employees who either work with, are subordinate to or are the managers of the person who is subject to the procedure. It simply cannot be avoided. Indeed the Respondent in this case has been criticised for not interviewing enough witnesses. The Claimant also complains that it may (she herself was not entirely certain) have been better to have been suspended from duties during investigations. The difficulty for any employer is that an employee can frequently interpret suspension as a premature punishment. In the circumstances of this case the Respondent has generally considered the Claimant to be a more than competent employee barring certain incidents that resulted in a first written warning. The Respondent had no pressing need to suspend the Claimant.

15 24. In conclusion no individual error or action of the Respondent either taken individually or collectively constitutes a material breach of contract.

25 25. I would take this opportunity to renew my objections to the relevancy of much of the Claimant's evidence by way of witness statement.

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#### Quantum

26. Basic award - the effective date of termination being after 6<sup>th</sup> April 2016 the statutory limit on a weeks pay is £479. The Respondent accepts the calculation of the basic pay on the basis of the statutory cap. The Respondent submits that the basic weekly net pay is £550.

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#### Compensatory Award

30 27. It is far from clear on the Claimant's oral evidence how far her current medical condition is as a result of the alleged "constructive unfair dismissal". However on the claimant's own evidence she is a capable individual. The Respondent has never disputed that such is the case.

She has a long history of continuous employment. She will have little difficulty in finding employment. She can work for Forever Living. Any further loss should be restricted to 3 months from today's date.

5 Past loss from 12<sup>th</sup> August 2016 until 12<sup>th</sup> March 2017 - £15,400.

28. The Respondent is prepared to agree loss of statutory rights at £350.

29. No evidence has been led about the value of the company car, private health care or annual bonus and this cannot be agreed.

10 Future loss - £550 x 12 weeks: £6,600.

Total of compensatory award - £22,350.

30. However the Respondent submits that in the exceptional circumstances of this case there are two further matters that must be considered.

15 31. The Claimant has advanced multiple reasons for resignation. It is the Respondent's position that they do not amount to a repudiatory breach of contract. However if the Respondent is partially wrong in that and one or more, but not all, of the reasons do not amount to a repudiatory breach then the Tribunal is obliged to consider whether or not the  
20 compensation should be limited to the reasons which are genuinely a repudiatory breach.

32. In **Wright v North Ayrshire Council (2014) IRLR p 7** it was held:-

25 "As to compensation we should note that where there are a variety of reasons for a resignation but only one of them is a response to repudiatory conduct the compensation to which a successful claimant will be entitled will necessarily be limited to the extent that the response is not the principle reason. A Tribunal may wish to evaluate whether in any event the claimant would have left employment and adjust an award accordingly. This does not affect the principle to be

applied in deciding breach; it is merely to recognise that the facts have a considerable part to play in determining appropriate compensation.“

5 33. If the Respondent is wrong in its primary submissions it invites the Tribunal to hold that a substantial part of the claimant’s decision to resign was her understandable but misconceived resentment about the way Mrs X was treated compared to herself. The Respondent would invite the Tribunal to make a 50% reduction in this regard.

10 34. The second matter that should be considered is the question of contributory fault. It is certainly an unusual concept taken in the context of Unfair Constructive Dismissal and yet it is a finding that has been made on many occasions and this is certainly an unusual case. The circumstances of the matter before this Tribunal are not entirely different from the circumstances to be found in **Morrison v Amalgamated Transport and General Workers Union 1989 IRLR p361**. In that case the Court of Appeal held “the three concepts of constructive dismissal, unfair dismissal and contributory fault are distinct and each requires a separate consideration and decision at a different step in an unfair dismissal claim. Thus a constructive dismissal may be fair and an employee who has been unfairly constructively dismissed may be held to have contributed to that dismissal. The statutory provisions allow a reduction for contributory fault in every kind of dismissal, whether express or constructive. “(see also **Polentarutti v AutoKraft Ltd 1991 IRLR p457**).

25 35. Given the Respondent’s position that it is difficult to conceive which of the many grounds of claim of constructive dismissal may be upheld it is difficult for the Respondent to advise as to the level of any further reduction that should be made to any award. The Respondent can only observe that in its view the claimant did commit acts that were blameworthy and given her duty to co-operate in the implementation of the contract she failed by neither appealing the results of the grievance procedure nor by allowing the disciplinary procedure to run its full course.

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36. A grievance procedure exists primarily to protect the employee. However a grievance procedure is also there to protect the good name and functioning of the business enterprise. This can also be said but with a different emphasis in relation to a disciplinary procedure. The claimant's failure to fully participate in these procedures should be reflected in a deduction of compensation because of her contributory fault.

**Relevant Law**

74. Section 95 of the Employment Rights Act 1996 states:-

**95 Circumstances in which an employee is dismissed**

(1) For the purposes of this Part an employee is dismissed by his employer if and, subject to subsection (2)...., only if –

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

(b) .... 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

**Observations on the Witnesses**

75. The Tribunal had no particular observations to make in this case as the witnesses all gave their evidence clearly and articulately. As indicated, witness statements had been provided and, apart from some supplementary questions, evidence began by way of cross-examination of each witness.



**Deliberation and Determination**

76. The issue for determination by the Tribunal is whether there was a material or fundamental breach of contract, entitling the claimant to resign as and when she did. The Tribunal took into account all that was said by the claimant in relation to the investigation into Ms X's grievance, the claimant's own grievance and the disciplinary process. It also noted that the respondent had explained why it required to carry out a formal investigation, having received the grievance from Ms X. It did so by arranging for various individuals to be interviewed, including the claimant. Only four of the allegations made against the claimant were upheld by Mrs Walters. The claimant was afforded but chose not accept the opportunity to appeal against the outcome of the grievance taken against her.
77. Separately, the claimant then instituted, as she was entitled to do, a grievance against the respondent at a stage when they had already indicated that they were inviting her to a disciplinary hearing in relation to four issues. Following correspondence with the claimant's solicitor the respondent decided it was appropriate to suspend the disciplinary process and allow the claimant's own grievance to be completed. That was duly completed. The claimant did not appeal against the outcome of that grievance. Instead, what the claimant did, almost immediately, on receipt of the outcome of her own grievance, (pages 342/347) was to tender her resignation, (pages 348/349).
78. It was not clear to the Tribunal why the claimant chose not to proceed with the appeal process which was open to her to do if she was dissatisfied with the outcome of her own grievance. It was also not clear why, on the one hand, the claimant maintained that she was unable to continue to be employed by the respondent yet she was prepared to work her full notice period.
79. The disciplinary hearing took place during the claimant's notice period and she was then advised of the outcome, (pages 367/368) which was that she was issued with a first written warning. Once again, the respondent's procedures allowed her to appeal against that decision but she chose not to

do so. It was unclear why, having received the outcome of that disciplinary hearing and having had a first written warning imposed which the claimant clearly considered was unjustified, she decided not to take any steps in relation to the appeal process but that was the claimant's choice.

5 80. However, it was significant that the claimant did not resign as a result of receiving the first written warning. Instead, she resigned following the outcome of her own grievance. While the Tribunal could understand that the claimant may have had a sense of disappointment and irritation that she had over a number of years indicated to P&O that there were issues with Ms X in relation to Ms X's mental health as well as her allegations that her Line Manager had failed to support her adequately there is no indication that, at any point, the claimant thought that she herself must seek some form of more formal assistance, for example, from Occupational Health or P&O to the effect that senior management and or HR needed themselves to look more closely at Ms X's behavior rather than leaving matters to the claimant as her Line Manager.

81. The Tribunal required to consider what was the fundamental or material breach which caused the claimant to resign. As indicated by Mr Grant-Hutchison, it was apparent to the Tribunal that the claimant had been considering resigning over a period approximately from February 2016 until May 2016.

82. The Tribunal was unclear how the respondent could have avoided dealing with Ms X's grievance. They were required to investigate it and they duly did so. As a result of that investigation, Mrs Walters concluded that there was sufficient information available to her to uphold four of the points made in relation to the claimant and that, in turn, instigated the disciplinary process. That disciplinary process was suspended once the claimant herself decided to proceed with a grievance against the respondent. That grievance was investigated by Mrs Jack who did not know the claimant. She gave clear evidence as to why she reached the conclusion that she did in relation to the various issues set out by the claimant in her grievance against the respondent. That was within Mrs Jack's remit as she had been

instructed to carry out the grievance investigation. She duly did so and issued her decision. The claimant chose not to appeal that decision.

5 83. The Tribunal noted that significantly the claimant resigned in relation it appears to the outcome of that grievance. It was not clear to the Tribunal what was the reason for the claimant's resignation and in this regard the Tribunal considered what the claimant set out in her letter and the evidence before it at the Final Hearing. In all the circumstances, the Tribunal concluded that the respondent's submission was well made that the facts did not readily support a complaint of constructive dismissal. It was suggested that if the claimant, having supported Ms X for a long period of time had a deep seated and sense of injustice, and that when the respondent dared to consider Ms X's grievances let alone uphold any of them, in circumstances where the claimant had thought a grievance was always coming and was something that should have been "headed off at the past" and she should have been protected from, then if that was the real reason for termination of the contract that could not, in Mr Grant-Hutchison's submission, be a breach of contract. The respondent had a duty to investigate Ms X's grievances. The Tribunal concluded that there was merit in that submission. It could not see how the respondent could have avoided dealing with Ms X's grievances in the sense of ignoring it or failing to carry out a detailed investigation. Their own procedures required them to do so.

25 84. The Tribunal noted that the claimant disagreed with Mrs Walters' conclusion. Mrs Walters was independent in that she did not know the claimant. She formed her own view as she was entitled to do and it was her decision that there should be a disciplinary process instigated against the claimant in relation to the four issues which she considered were worthy of investigation. In relation to any suggestion that Mrs Jack's application of the grievance procedure was flawed it was not clear to the Tribunal why the claimant did not then take the step open to her of taking an appeal against the outcome of that grievance. She chose not to do so and instead resigned.

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85. The Tribunal reached the conclusion that it could not say that there was any individual error or action of the respondent either taken individually or collectively that could, in law, constitute a material breach of contract.

5 86. It therefore follows, applying the law to the above findings of fact that the Tribunal concluded that there was no fundamental breach of contract by the employer, entitling the claimant to resign and claim constructive dismissal. Accordingly it therefore follows that this claim must be dismissed.

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15 Employment Judge: F Jane Garvie  
Date of Judgment: 10 March 2017  
Entered in register 10 March 2017  
and copied to parties

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