EMPLOYMENT TRIBUNALS

Claimant: Ms. M Carruthers

Respondent: Callacab (UK) Limited

Heard at: **London South, Croydon**
On: **1-3 February 2017**

Before: **Employment Judge Sage (sitting alone)**

Representation

Claimant: Represented on the 1 February 2017 by Ms. Ali of Counsel and thereafter in person.

Respondent: Mr Delaney Solicitor

REASONS

Requested by the Claimant.

1. By a claim form presented on the 27th May 2016, the Claimant claimed constructive unfair dismissal and breach of contract. Her employment commenced on the 13 January 2013 and ended when she resigned on 29 February 2016. In outline the Claimant claimed that she was asked to resign after the Respondent discovered that she had a second job, however, she refused to do so.

2. Following an incident on 13 December 2015, where a driver for the Respondent company was shouting at her on the telephone and refusing to listen, she accepted that she stated "I am not dealing with this dick head" but said that she spoke these words to her supervisor and not to the driver in question. The Claimant maintained the driver was rude and abusive to her and others and was shouting at her; she transferred the call to another supervisor. The driver submitted a complaint about the Claimant's conduct that night and she was called to a disciplinary hearing after a fact finding telephone call. During the hearing, a recording of the telephone call was played twice where it corroborated that the Claimant called the driver a "Dick Head". The Claimant asked for a copy of the recording but this was not provided. The Claimant was given a final written warning for her conduct. The Claimant maintained that after this warning

was given, her set days of work was reduced from 4 to 3 per week. The Claimant appealed her final warning which was unsuccessful.

3. The Respondent defended the claims and stated that the Respondent followed the correct and fair disciplinary procedure and denied that there was a breach of contract entitling the Claimant to resign and treat herself as dismissed. They will state that the conduct amounted to gross misconduct, but after taking into account the mitigating circumstances of the case and of the aggressive tone of the driver involved awarded a final written warning.

The issues

These were agreed to be as follows:

4. In respect of the claim for **constructive unfair dismissal**, did the Respondent fundamentally breach the Claimant's contract of employment so as to entitle her to resign and treat herself as dismissed by:
   a. subjecting the Claimant to disciplinary proceedings;
   b. issuing the Claimant with a final warning;
   c. failing to take action against the driver whose complaint led to the disciplinary proceedings against her, notwithstanding his aggressive and threatening behaviour;
   d. failing to provide the Claimant and her representative in the disciplinary proceedings with a full and accurate recording of the telephone conversation between the Claimant and the driver;
   e. removing the Claimant from the Respondent's rota for Thursday's with effect from 7 January 2016 without her agreement, and without prior warning or consultation.

5. If so was the Claimant's resignation in response to that fundamental breach of contract?

6. If so what is the appropriate remedy

In respect of the claim for **unauthorised deductions from wages** or breach of contract, the issues are as follows:

7. Did the Claimant have a contract entitlement to work for the Respondent from 19.00 until 01.00 each Thursday, if available;
8. if so did the Respondent breach that contract by removing the Claimant from the Thursday 19.00 to 01.00 rota without the Claimant's agreement and was such breach outstanding at the effective date of termination of employment;

9. If so did the Respondent make unauthorised deductions from the Claimant's pay and/or is the Claimant entitled to claim damages in respect of loss arising from the breach of contract.

Witnesses

For the Claimant we heard from;
Ms. Pierre-Pacquette

Mr Billington provided a statement but did not attend the hearing
Ms. Crooks
Ms. Campbell
For the Respondent we heard from:
Mr J Wilkinson, the Dismissal Manager
Mr S. Wilkinson Appeals Manager
Mr Arnold Shift Supervisor
Ms. Stemp Administration Manager.

Findings of fact

10. The findings of fact which were agreed or on the balance of probability are found to be as follows;

11. The Claimant was employed by the Respondent company on 23 January 2013 as a Booking Agent, the hours of work were stated to be from 7.00 to 19.00 or 19.00 to 07.00. The Respondent is a small family run taxi business based in Croydon employing about 22 people but had about 200 self-employed drivers on their books. The day to day business was run by Mr J Wilkinson and Mr B. Wilkinson and the father Mr S Wilkinson was a Director of the Company.

12. The contract was silent as to the number of hours' Claimant worked but it was not disputed that the Claimant was a full-time employee and hours of work were Thursday to Saturday 19.00 to 07.00 and Sunday 19.00 to 01.00. The Claimant attended university during the first two years of her employment attending on Mondays to Wednesdays. The Claimant stated in her contract that her normal working hours were 41 per week but her ET1 at page 5 of the bundle stated that her working hours were 36-40 hours per week. The tribunal find as a fact that the Claimant worked variable hours on a shift pattern that varied from month to month, there was no evidence that she was contracted to work any set days or hours. When the Claimant joined the Respondent company, she also had a second job working for a company called Credit Solutions Ltd, Ms. Stemp for the Respondent confirmed to the tribunal she was aware of the second job as it was discussed at interview but it was her understanding that the Claimant was shortly to leave that position on the grounds of redundancy. In any event, this job ended October 2013. The Claimant secured another part-time second job in July 2015 via Blue Arrow Limited.

13. It was not disputed that Ms. Stemp contacted the Claimant in 2015 (either in July, according to Ms. Stemp, or in September, according to the Claimant), voicing a concern that had been raised by the night shift supervisor that the Claimant had been falling asleep during working hours and she was asked to look into the matter. She accepted that she asked if the Claimant had a second full-time job and she confirmed that she did. It was the Claimant's evidence that she was asked to resign her full-time job and then apply for a part time job. Ms Stemp told the Tribunal in cross examination that she may possibly have suggested to the Claimant that she may have to resign from her full-time contract and then become part time, but she also stated that it would be up to Mr J Wilkinson as to what he wished to do. Mr J Wilkinson on the witness stand confirmed that he was not overly concerned that the Claimant fell asleep occasionally and there was no evidence that after this conversation the Claimant was

spoken to again. Although the Claimant told the tribunal that she was subjected to harassment, there was no evidence before the tribunal that this was the case. The Tribunal therefore find as a fact that the matter was raised with the Claimant and a conversation occurred but no further action was taken against the Claimant and there was no evidence of harassment [see page 37 of the Claimant's resignation letter].

14. An incident occurred on 13th of December 2015 at the Respondent's Croydon office, where a self-employed driver Mr Salako was sitting in his cab outside the office and had refused to take to customers (paragraphs 8 and 9 of the Claimant's witness statement). A few minutes after this incident, Mr Salako approached the office window and banged on it and was shouting at one of the employees. After the incident Mr Salako telephoned the office and the Claimant took the call. It was the Claimant's evidence given in paragraph 11 and 12 of her statement that he was aggressive and shouting down the phone. The tribunal had an opportunity of listening to short telephone conversation and the transcript of the words spoken on pages 104 to 105 of the bundle. It was clear from Mr Salako's voice that he was angry and confrontational in this short conversation, and that he perceived the Claimant's tone to be disrespectful towards him as he asked the Claimant to calm down and asked her not to "**talk to somebody like that okay?"** The Claimant's final comments on the recording was as follows **"well you are going to the bottom of the list here, it doesn't work like that. If you want to take the customers go into the car park, don't sit there and piss off the customers yeah? You dick head**", the call was then disconnected. Mr Salako then called for a second time and spoke to a lady called Mandy and that transcript was at page 106, this time she put the phone down on him. The Claimant stated the transcript in the bundle was not accurate and she denied calling the driver a Dick head (but did not deny that she used the phrase to describe him).

15. On 14 December 2015 Mr Salako sent in a complaint about the Claimant's conduct (see page 28 of the bundle); he complained that the Claimant had started using abusive words and called him a Dick head and he stated "**why call me a dick head, does this bullying allow (sic) in a place of work".** Following receipt of this complaint an investigation was conducted and the transcript of the telephone call was made and the recording was preserved (see pages 107-9 of the bundle). It was the Claimant's evidence that she had said to her colleague Mark Torre **"can you deal with this dick head**" and as it was a new phone, she said she did not do anything wrong and she did not know how to use the hold button on the phone and that Mr Salako must have overheard what she said when she handed the phone to Mark. She stated that the CCTV could be checked and that Mark had decided not to let Mr Salako into the office because he had been shouting at her colleague. At the end of the conversation, the Claimant told Ms Stemp that she had told Mark and Mr Arnold to let her know of the incident.

16. The Claimant made no mention in her statement of having a conversation with her supervisor (Mr Torre) that evening. No mention was made of it in her claim form, however, on the second day of the hearing she produced a witness statement, written in her handwriting, but allegedly

signed by Mr Torre. The Tribunal noted that this conversation was mentioned in the investigation (see page 109) but the Claimant had at no time disclosed the witness statement to the Respondent. In this statement dated the 27 December 2015 addressed to Mr Billington, he referred to informing Ms. Stemp when she attended work of the incident. This document was put to Ms. Stemp in supplementary questions and she confirmed that on the morning of 14 December she spoke to Mr Torre and he told her about the incident, she recalled that she specifically asked him if the Claimant called Mr Salako a Dick head and he failed to answer and left the room. It was Ms Stemp's view that he did not tell her the whole story about the incident and did not answer her questions.

17. Following the investigation, Ms Stemp wrote to the Claimant on the 16 December, inviting her to a disciplinary hearing on 22 December at 14:00 hours. The complaint against the Claimant was that a complaint had been received from Mr Salako and that the recording of the conversation confirmed that the Claimant had called the driver a Dick head. The charge the Claimant had face was that she had "**used abusive language to a driver…"** on the 13 December Saturday to Sunday shift during a telephone call. The Claimant was warned that offence was one of misconduct. The Claimant was also reminded of her right be accompanied by a work colleague or a trade union representative. The disciplinary hearing was chaired by Mr J Wilkinson.

18. The minutes of the disciplinary hearing were brief and appeared at page 30 of the bundle. The Claimant attended with Mr Billington who held himself out to be a trade union representative, but it was confirmed that the Claimant was not a member of a trade union and Mr Billington did not appear to be an accredited union representative. The meeting was also attended by Ms Stemp in her capacity as Administration Manager to answer any questions; there was no evidence before the tribunal that she strayed into areas of decision making.

19. The tribunal heard from Mr J Wilkinson who told the Tribunal that he was under the impression that Mr Billington was a trade union representative. At the hearing the tape recording was played twice. Mr Wilkinson told the tribunal that it clear to him that the Claimant had used abusive language. The Claimant denied any wrongdoing and did not apologise. It was the Claimant's evidence that she had made the remark to a fellow employee and not to the driver, however, Mr Wilkinson formed the view after listening to the call that the Claimant could be heard being abusive to the driver. The disciplinary hearing was short and the meeting minutes reflected that. Mr J.Wilkinson concluded after listening to the tape recording and on putting the allegations to the Claimant that she had given a false version of the events, he rejected her version that she had put the phone to her chest and was speaking to someone else as the recording did not reflect that. He concluded that from the evidence in front of him from Mr Salako which was corroborated after listening to the recording that the Claimant had called him a "Dick Head".

20. The tribunal heard the recording and it was clear that the Claimant could be heard by the person at the other end of the line refer to them as a dick head (whether or not she said to him directly or was describing him in

that way to another person). However, the Claimant denied that this was the complete recording. It was Mr. J. Wlkinson's evidence that he felt the fairest way of dealing with it was to play it twice in the hearing and he did not believe that he was under any duty to disclose a copy of the recording to the Claimant, he concluded that the recording was sufficiently clear for him to reach a decision on the facts. He also took into account that the Claimant did not apologise for her actions. He concluded, therefore, that the Claimant should be given a final written warning, which he felt to be proportionate and reasonable, taking into account the Claimant's employment record and that this was a stressful situation but he also considered the mitigating circumstances that the driver was aggressive.

21. It was put Mr J. Wilkinson in cross examination that it would be appropriate for him to send a copy of the recording and he replied that the Claimant was not going to lose her job. It was also put to him that he had not provided the Claimant with a copy of the staff handbook and he replied that **"I did not think you needed handbook know that you should not call someone a Dick head, if she had wanted a copy of the handbook she could have asked for it**". He admitted that the handbook was referred to at the start of the meeting but he did not have a copy on him as he felt that this was a straightforward matter and the handbook did not form part of the contract of employment. He was asked in cross-examination what the Claimant could have done to change his mind and he replied "**she could have held up her hands and given an apology**", he stated if she had done this, they could have moved forward. It was put to him in cross examination that it was his duty to give the Claimant the benefit of the doubt and to investigate her defence and he replied "**it was my duty to investigate what the drive had said about being called a Dick head**". Although he accepted did not write down everything that was said in the meeting, it was his view that he was only deciding on the offensive language used in this phone call and he wrote down her replies to that allegation. He accepted that he did not investigate the driver's conduct because no staff member had made a complaint about him, he was only investigating the driver's complaint about the Claimant's language used on the telephone, that was the reason he did not investigate further by speaking to other people who were in the office at the time.

22. Mr. Wilkinson was asked about the conduct of Mr Billington in the hearing and it was put to him that he interrupted Mr Billington's questions and he replied that he did so because he was being lectured on his knowledge of employment law and about Mr Billington's past in the Metropolitan police. He told the tribunal that he felt that Mr Billington was "**trying to intimidate me. Now I know he's not a union representative, I said I felt the phone call was good enough for me**". Mr Wilkinson accepted he cut him short because he did not feel there was any point in discussing employment law. The tribunal having seen the witness statement of Mr Billington (who did not attend to give evidence) find as a fact that he was seen to challenge Mr Wilkinson and to a certain extent, subjected him to cross examination and this was reflected in paragraphs 14 to 20 of his statement. It was noted at paragraph 20 that there was an exchange where Mr Billington stated that he was **"just letting him know what the law was..",** this corroborated the evidence of Mr. J. Wilkinson

that the approach of Mr Billington was to lecture him on processes, procedures, and the law rather than assisting the Claimant with the presentation of her defence in the disciplinary hearing.

23. The Claimant has alleged that she was provided with a copy of the warning letter at page 31A prior to the disciplinary hearing. This allegation was at paragraph 15 of the Claimant's witness statement and was advanced for the first time in the Claimant's statement and was not referred to in her resignation letter, in her claim form or during the appeal. Mr J Wilkinson provided a supplementary statement to deal with this matter together with exhibits. He denied that the warning letter was provided to the Claimant prior to the disciplinary hearing. He stated that the decision letter was drafted and sent to his solicitor on 22 December at 15:22 hours, his solicitor acknowledged the email the following day at 12:42 hours, thus providing evidence to show that the letter at page 31 and 31A was created after the disciplinary hearing and not before. When it was put to Mr. Wilkinson in cross examination that he had provided the outcome letter before the disciplinary hearing, he described the proposition as ludicrous as the letter did not exist prior to the hearing.

24. The tribunal find as a fact that the allegation Claimant makes that she was handed a letter with the outcome prior to the disciplinary hearing is not consistent with the evidence before the tribunal and is without foundation. It was taken into account that the first time this allegation was advanced was in the witness statement; had an incident of this seriousness occurred, it was felt to be inconceivable that this would not have been referred to by either the Claimant in the disciplinary or appeal hearing or by her representatives at the time. It was felt to be significant that this allegation was not mentioned in the dismissal letter and the Tribunal felt that had this occurred as alleged, this would have been mentioned in both the ET1 and when she resigned. The tribunal conclude that this allegation lacks merit.

25. The Claimant appealed the final warning by a letter dated 27 December 2015 at page 32 of the bundle. She stated that she did not admit what took place that day. The Claimant referred to the CCTV evidence and the fact that the supervisor Mark had informed Ms. Stemp what had happened on that shift, she denied falsifying the evidence and **"not appreciate being called a liar by yourself**". She also denied that she had been given an opportunity to apologise. At the end of the appeal letter she stated that "**I am appealing against your decision to tarnish my record accusing me off (sic) calling the driver a dick head over the phone when I advised Marc I am not dealing with this dick head**". The letter made no reference been given a warning letter prior to the hearing. The letter also made no reference to being denied access to the staff handbook in order to conduct her appeal or to being unclear of the process or procedure to follow.

26. The appeal was heard by Mr S.Wilkinson, a Director of the company (and the dismissal manager's father) and he gave evidence to the tribunal. The letter calling the Claimant to hearing was at page 34 and 34A of the bundle and the appeal was scheduled to take place on the 26 January 2016. The Claimant was advised of her right to be accompanied and the

hearing was stated to be by way of rehearing. The tribunal noted that no minutes were taken during the appeal hearing, however, Mr Arnold was present and he gave evidence to the tribunal as to the conduct of the hearing. It was admitted the hearing was brief, lasting only about 10 minutes. The Claimant was assisted by a representative called Ms Pierre-Pacquette, who described herself in her statement as being a union member of staff at Croydon Crown Court. The Claimant describes Ms Pierre-Pacquette as a trade union representative (paragraph 28), however it was noted that she was not an accredited trade union representative and was not even a member of a trade union despite communicating with the Respondent in writing describing herself as a trade union representative (see page 43 of the bundle). This was not accurate and the Tribunal find as a fact that it was designed to mislead Mr S. Wilkinson and he was misled as he described her in the outcome letter as a UNISON representative. Ms Pierre-Pacquette told the Tribunal that she was "standing in" for Mr Billington who was unwell. As the Tribunal have already found as a fact that he was not an accredited trade union representative, it is concluded that neither had a right of audience in the Respondent's internal disciplinary procedures.

27. Mr S. Wilkinson accepted in cross examination that he did not send the Claimant a copy of the recording of the phone call and he did not feel it should have been provided to her in advance. The recording was played during the hearing. He told the Tribunal that as the Claimant was represented by who he believed at the time to be a Trade Union representative, he did not think it necessary to look at or provide the Claimant with a copy of the Handbook or the disciplinary policy. He accepted that he made his decision without providing a copy of the audio file but it was listened to during the hearing. The Claimant referred to the audio as being "cut and shut" meaning that it was not the full recording and wanted to hear the whole recording and asked for it to be provided by the company who had the original. Mr Wilkinson said he would send a copy to the union representative. Both Mr Wilkinson and Mr Arnold told the Tribunal that the meeting was brought to a close by Ms Pierre Pacquette who was "**happy that we were not dismissing**" the Claimant and on hearing that clarification she "**ushered the Claimant out of the meeting**" (see paragraph 21-2 of his statement). Although this was denied by Ms Pierre Pacquette, the Tribunal on the balance of probabilities prefer the consistent evidence of Mr. Arnold and Mr S. Wilkinson, to that of the inconsistent and unreliable evidence of Ms. Pierre-Pacquette that very little was said by her and she brought the meeting to a close on discovering that the Claimant would not be dismissed.

28. Mr S. Wilkinson concluded that the final warning would be upheld. It was put to him in cross examination that he did not do a proper hearing but he replied that all the evidence was in front of him and the union representative was happy they were not dismissing the Claimant. He stated that he listened to the call and that was all that was required and there was no need to speak to others on duty that night or to look at the CCTV evidence.

29. The tribunal conclude on all the evidence presented that the appeal discussed the case and the evidence was looked at again. After considering all the evidence Mr S. Wilkinson found the charge to be

proven. The recording corroborated that the Claimant referred to Mr Salako as a dick head. The Claimant had provided not additional evidence or any further evidence in relation to mitigation.

30. The Claimant resigned by a letter dated the 29 February 2016 at pages 36-41 of the bundle. The resignation letter stated that the reason was because they had not provided her with a copy of the recording of the phone call, she felt that she had been "discriminated" for having a second job, they failed to follow the correct procedures in the disciplinary process by failing to carry out a full investigation and went for the "**worst sanction possible**". The Claimant in the letter referred to another person who had used foul and abusive language who had received more favourable treatment. The Tribunal heard from this comparator who was Ms. Campbell who admitted using foul language which was overheard by a customer, she received only a written warning because Ms. Stemp discussed the matter with her and she **"put up her hands straight away and apologized**"; the Respondent was therefore satisfied in this case that she had expressed remorse for the incident and accepted that her conduct had been unacceptable. This was the reason a written waning was given and not a final warning.

31. The Claimant stated that after this disciplinary process her Thursday sift was "**taken off me without warning or discussion**" on the 5 January 2016 and was given to another member of staff. The tribunal heard evidence from the Respondent that their level of business had fallen since Uber and the Tribunal were taken to evidence that reflected this down turn at page 128A which showed that the figures for January 2016 were less than the previous period in 2015 (54,204 in 2015 as compared with 53,683). The Respondent also told the tribunal that January was always their quietest month and they try during that month to ensure that all staff are provided with enough hours to meet their contractual obligations, this is what they did, the figures at page 128A also showed that the reduction of calls from December to January was in the region of 10,000 (as the statistics showed that in December 2015 the number of calls received was 62,449 whereas in January 2016 the number of calls was 53,683). The consistent evidence before the tribunal was that there was a significant reduction in business in January which resulted in a reduction in the number of hours that could be offered to the Claimant. It was noted that the Claimant's contract did not provide guaranteed hours and the tribunal have found as a fact that the Claimant worked variable hours; there was no evidence to support the Claimant's claim that failing to offer her hours on Thursdays for the month of January and the first two weeks of February was conduct that amounted to a breach of contract due to variable and flexible nature of the work. There was also no consistent evidence that the Claimant had suffered an unauthorised deduction from wages properly due as her earning for the year to date as at her date of termination was £21,215.88, her basic salary was £18,540.

32. There was no evidence that failing to provide the Claimant with work on the Thursday shift for the month of January and the first two weeks of February 2016 was a breach of contract, it was necessary to meet a business need due to the reduction in work available, there was no

evidence before the Tribunal that this was conduct that was designed to damage or destroy the relationship of trust and confidence.

The Law

Section 95(1)(c) Employment Rights Act 1996

"For the purposes of this Part an employee is dismissed by his employer if and subject to sub section (2) only if the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct"

Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 Paragraph 76(1)

"A tribunal may make a costs order or a preparation order and shall consider whether to do so, where it considers that – (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings or part have been conducted or (b) any claim or response had no reasonable prospect of success.

Cases Referred to by both parties in their submissions;

Western Excavating Limited v Sharp 1977 EWCA Civ 2
Omilaju v London Borough of Waltham Forest (20040 EWCA Civ 1493
Mahmud v BCCI (1997)
Buckland v Bournemouth University (2010) EWCA Civ 121
Hadiiounnou v Coral Casinos Ltd [1981] IRLR 352
Paul v East Surrey District Health Authority [1955] IRLR 305
Carmichael v AAH Pharmaceuticals 2003/0325EAT
Sandwell & West Birmingham NHS Trust v Westwood UKEAT 0032/09
Western Recovery Services v Fisher UKEAT/0062/10
Chindove v William Morrisons Supermarket PLC UKEAT/0201/13

Closing submissions

33. The **Claimant produced written submissions** which will not be replicated in this decision, paragraphs 1-15 dealt with the factual scenario and paragraphs 16- 18 gave a summary of the law. The Claimant submitted that the Respondent failed to conduct a fair and proper investigation and did not provide her with the transcripts of the evidence or notes of the meetings. She also maintained that she had not received a copy of the disciplinary procedure. The Claimant stated that the Respondent should have investigated by speaking to Mark and Brook and should have viewed the CCTV evidence. It was accepted that the Claimant failed to disclose to the Respondent a statement from a witness to the incident (Mark) and it was accepted that this should have been disclosed at the appropriate time but the Claimant was given advice not to disclose and she should not be punished for what was described as a "procedural error" (paragraph 29).

34. The Claimant was also not given chance to apologise whereas her comparator Lilly was.

35. The Claimant stated that Mr J. Wilkinson should have recused himself because he investigated the matter and as he was a Director and decision maker he had to avoid any accusation of bias. It was submitted that the "**Respondent's sole concern has been for the driver but little concern has been for how the Claimant felt after being abused by an aggressive driver**" (paragraph 42) and that she would have no motive to **"call a driver what she is alleged to have called him**" (paragraph 42). It was confirmed that the Claimant was challenging the fairness of the investigation and the band of reasonable responses.

36. It was stated that the Claimant resigned immediately on the breach and the final straw was described as seeing her rota for March. The Claimant also relies on what was described as "numerous breaches of the ACAS Code".

37. In addition, the Claimant produced an additional statement which was taken into account by the Tribunal.

38. The **Respondent's closing submissions** were in writing and again provided a detailed analysis of the facts and evidence in this case which will not be replicated in this decision. The Respondent referred to the five grounds relied upon by the Claimant to resign and treat herself as dismissed (see above at paragraphs 4-9) and stated that the Respondent was entitled to deal with the matter by way of the disciplinary procedure and that a final warning was appropriate and reasonable. The failure to take action against the driver and the failure to provide the Clamant with a copy of the recording cannot amount to a breach.

39. On the issue of whether the Claimant had her Thursday shifts taken away, the Respondent stated that all employees had their shifts reduced due to the seasonal downturn in business and due to the adverse impact of Uber Taxis on their business. They also stated that the Claimant had no fixed hours but at the time of her resignation, she had worked two Thursday shifts and was on the rota for Thursday shifts in March. The Respondent stated that the Claimant never raised a grievance about this.

40. The Respondent will state that there was no breach of contract as the Claimant was paid in excess of her contractual entitlement and denied they acted in breach of contract and denied making an unauthorised deduction from wages.

41. The Respondent submitted that the five grounds relied upon do not individually or cumulatively amount to a fundamental breach and deny that the Claimant resigned in response to any alleged breach, failing to resign until the 29 February 2016 after being informed of the outcome of the appeal on the 29 January 2016.

Decision

The decision of the tribunal is as follows:

42. The burden of proof is on the Claimant to show that the Respondent has committed a fundamental breach of contract, the issues referred to

above show that the Claimant relies upon five specific incidents to support her contention that she was entitled to resign and claim constructive unfair dismissal. The Claimant submits that she was entitled to resign because the Respondent subjected her to disciplinary proceedings. Detailed findings of fact have been made as to the circumstances that led to the Respondent deciding to call the Claimant to a disciplinary hearing. The Respondent was entitled on the evidence before them, after receiving a complaint from the driver that he had been called, or referred to, as a Dick Head.

43. The Respondent's investigation was reasonable in that Ms. Stemp interviewed the Claimant on the telephone, the recording of the call was listened to and the Respondent was entitled to conclude after carrying out the investigation that this was a matter that properly fell within their disciplinary policy as a potential act of misconduct. The only matter that was being investigated was the words spoken during the telephone conversation, the complaint was clear and the words spoken were audible on the recording. The Respondent was entitled on the evidence before them to conclude that this was a matter should be dealt with under their disciplinary procedure. This was a matter for the Respondent and their decision to escalate this cannot of itself amount to a breach of the duty of mutual trust and confidence, it did not show that the Respondent did not intend to be bound by the essential terms of the contract.

44. Turning to the second factual issue that the Claimant relies upon in her claim that the Respondent has breached the duty of trust and confidence is in relation the decision of Mr J Wilkinson to issue her with a final written warning. The Claimant stated in her resignation letter that this was the "worst sanction possible", however, there was never a possibility that the Respondent was considering the most serious sanction of dismissal, this was always a matter that was one of misconduct and not gross misconduct. The Claimant relies upon her comparator Ms. Campbell as evidence that she was treated more harshly, however there were evidential differences between the two cases. Ms. Campbell "put up her hands" and accepted that her conduct wasn't acceptable and apologised, whereas the Claimant did not, this was the reason the cases resulted in different sanctions. The conclusion was consistent on the evidence before the Respondent and was a decision they were entitled to make on the facts.

45. The Respondent was entitled to conclude on the evidence and after hearing the submissions of the Claimant and Mr Billington, that she should be given a final warning. The Claimant disputed the evidence, despite clear evidence that the act complained of by the driver had been corroborated in the recording, despite the Claimant's allegations that the tape-recording was what she called "**cut and shut**", which appeared to be irrelevant to the issues in the case. The allegation she had to answer was whether she used abusive language, the Claimant accepted she used the term Dick head and this was clearly audible from the recording. It was also undeniable that the driver heard her describe him in these terms, he was offended. It is difficult to understand why any other investigations were required of the Respondent in this case. Even on the Claimant's case, if the recording was obtained, which showed the call being passed to others,

this would not alter the fact that the Claimant had been heard referring to the driver in offensive terms

46. The duty an employer owes to an employee under a disciplinary process is to act fairly and reasonably and to conduct a reasonable investigation, one that is within the band of reasonable responses and also to comply with any contractual or in the absence of a contractual, a fair disciplinary process or procedure. This Respondent appeared to do. The Respondent was entitled to form a view on the evidence and on the Claimant's responses when the evidence was put to her and to reach a conclusion on those facts. The Claimant states that they should have extended their investigations to interview others and obtain CCTV evidence, however, these investigations appeared to be irrelevant to the accusation she had to face, which was solely in relation to the words spoken on the telephone. The Respondent therefore acted reasonably and fairly in the conduct of the disciplinary investigation and their conclusion that this conduct warranted a final written warning was also proportionate and fair, taking into account that this was a customer facing business. The Respondent was entitled to expect staff not to use demeaning and abusive language to their staff, self-employed drivers or to customers. The issuing of a final warning cannot be evidence of a fundamental breach of contract; there was no evidence that this would be a breach of any contractual term and there was no evidence that the conduct of the Respondent was in breach of the common law duty of trust and confidence owed by an employer to an employee.

47. The Respondent was seen to act in compliance with a fair process, there was an investigation, the Claimant was aware of the charges she had to face, the allegations were put to the Claimant in a hearing and appeal was conducted. There was no evidence of predetermination by Mr J Wilkinson, the Tribunal having rejected the Claimant's inconsistent and unreliable evidence on this point. The Claimant had a right to make representations in both hearings and she was afforded the right to be accompanied at both hearings. On that point the Tribunal has made findings of fact about the two representatives and it was concluded that their status was misrepresented to the Respondent. The Tribunal did not find Ms Pierre-Pacquette's evidence to be consistent or credible and it was disappointing that Mr. Billington did not attend to give evidence. The Tribunal have therefore preferred the evidence of Mr J. Wilkinson that he felt that his attendance at the hearing was designed to intimidate him.

48. Third ground relied upon by the Claimant is that the Respondent should have taken disciplinary proceedings against the driver. The findings of fact above have concluded that the driver was self-employed and therefore not subject to the disciplinary process. Secondly, no allegations had been made against the driver in respect of his conduct on that night. Those were the facts before the Respondent. It cannot be a fundamental breach of the Claimant's contract of employment to fail to take disciplinary proceedings against a person that is not employed by them, when no allegations have been made. It was also noted that a month after the incident with the Claimant, the driver was abusive to a controller member of staff and his self-employed contract was terminated. The evidence before the tribunal was clear, therefore, that when a complaint was made, appropriate action was taken.

49. Turing to the fourth ground relied upon by the Claimant in relation to failing to provide the full and accurate recording of the telephone conversation, this has been dealt with above. However, for the sake of completeness, failing to provide the original recording could not of itself, or cumulatively with other allegations amount to a fundamental breach of the contract of employment.

50. The fifth ground is that the Claimant stated that following the disciplinary process, her Thursday shifts were taken away from her for the month of January and for two weeks in February. The Claimant in her witness statement stated that part of the reason for resigning was that those shifts were taken away, which reduced her pay. The tribunal have preferred evidence of the Respondent's witnesses on this point that January was the quietest month and they had suffered a downturn in work; this necessitated reducing the Claimant's shifts for a period of time. The Claimant had no set hours of work as was seen from her ET1, it was shift work on variable hours and being offered fewer hours during the quietest months could not therefore amount to a breach of a contractual term. It was also noted that her hours were reinstated on 18 February onwards which reflected the variable nature of the work and the upturn after Valentine's Day, which the tribunal heard were seasonal variations.

51. The Claimant also seeks to rely upon a conversation that was accepted to have taken place with Miss Stemp sometime in 2015 about the Claimant falling asleep at work. Although there was a dispute as to when this matter was discussed, there was no evidence before the tribunal to suggest that the Claimant had been subjected to harassment or that this was anything other than one off conversation. A conversation alone or taken cumulatively with an entirely unrelated disciplinary hearing, resulting in a final warning cannot amount to a fundamental breach of contract.

52. Having concluded that Respondent has not committed a fundamental or any breach of contract, it is concluded that the Claimant has resigned from her employment. As the Tribunal have concluded that the Claimant was employed on a variable hour's contract (see above at paragraph 12) there was no entitlement to work (or be paid for) fixed hours. The reduction in the number of hours in January and February (see above at paragraph 30) was due to competition from Uber and due to seasonal variations, there was no evidence of a breach of a contractual term or that there had been an unlawful deduction from wages. The Claimant was not dismissed and therefore her claims for constructive unfair dismissal and for breach of contract are concluded to be not well-founded and are dismissed.

The Respondent's costs application

53. Upon delivery of the decision the Respondent then submitted their application for costs, which was in writing but in outline they submitted that they had raised the issue of costs with the Claimant's representative on the morning of the hearing on Wednesday. They stated that they could have completed the case in two days and not three. The Claimant made

two applications to postpone once on Monday and then on Tuesday and they were both refused by Judge Baron. This is a small business and the Claimant was given a number of opportunities to withdraw.

54. The number of witnesses bore no relation to the case, Crooks and Campbell were called to rubbish the Respondent. There was no need to call these witnesses. Time was then taken to deal with Ms Pierre Paquette and Mr Billington did not turn up. The Respondent's representative stated that he tried to call the Claimant on Monday to ask for the status of the union and she did not reply. The assertions made by the Claimant about these representatives were untrue.

55. The Respondent handed up written submissions in relation to the costs incurred showing that the Respondent's solicitors had exceeded the sum of £20,000 and they stated that the Claimant approached the case with a complete disregard and pursued what they described as an unsustainable case. The Respondent confirmed that even though their costs were in excess of £20,000 they consented to a summary assessment to avoid further costs in attending another hearing.

The Claimant's response

56. The Claimant was given time to consider the documentation and her response was that she had been aware that the Respondent had incurred costs of £12,000 as her solicitor had informed her of this. Her solicitor had contacted the other side due to non-disclosure of documents and her solicitor said that there were errors in the statement. She then said that she drafted some letters because she was not happy with her own solicitors. The Claimant told the Tribunal she was not aware that the Respondent's costs had jumped to £20,000 and at the time she was looking for new solicitors. She confirmed that she did not pursue the case to be spiteful or malicious, she stated that she would not bring a case for no reason. She told the Tribunal that she had paid her own solicitors £4,000.

Decision on Costs

57. Decision on whether to award costs: This is a case where costs should be awarded. Having taken into account in the findings of fact that the Claimant advanced a wholly unsustainable case of predetermination. The Claimant called witnesses who were irrelevant to the issues in the case and the evidence in relation to the purported letter being handed to her prior to the disciplinary hearing were unsustainable and had to be defended. It was also concluded that had this case been reasonably conducted could have been concluded within two days.

58. The Claimant was given a clear costs warning and taking into account the conduct referred to above, I conclude that this is a case where costs should be awarded.

Evidence considered on ability to pay

59. The Tribunal then considered the Claimant's ability to pay. She confirmed that she had secured a job at DHL earning £1300 net per month

and her outgoings were £700-£800 per month. She owned her own home, which was subject to a mortgage and had an Audi car on lease. She had no savings or ISA's and no pension. The Claimant has one child who is presently at University. She confirmed that her disposable income was about £300 per month.

Costs Order

60. Taking into account the Claimant's ability to pay it was considered that she should pay costs of £7,500. It was felt that this sum was reasonable taking into account the level of disposable income and the fact that she was the sole wage earner with the responsibility of putting a child through University. It was felt that the level of costs awarded struck a balance between the ability to pay and the amount of costs that were properly incurred by the Respondent as a result of the unreasonable conduct.

Employment Judge **Sage**

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Date 15 March 2017