EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs N Butts	**v**	Reuters Limited

Heard at: East London Employment Tribunal **On: 16-18 May 2017**

Before: Employment Judge Norris, sitting alone

Appearances
For the Claimant: Ms L Hatch, Counsel
For the Respondent: Ms L Gould, Counsel

JUDGMENT

1. The Claimant's claims of (constructive) unfair dismissal, breach of contract and breach of the Working Time Regulations are not well founded and fail.

2. The remedy hearing provisionally listed for 14-15 September 2017 is accordingly vacated.

REASONS

1. The Issues

It was agreed that the issues before the Tribunal were:

1.1 Constructive dismissal - did the Respondent conduct itself in such a way, without proper cause, that was calculated or likely to destroy or seriously damage its relationship with the Claimant, such that she was entitled to resign with or without notice, under section 95(1)(c) Employment Rights Act 1996 ("ERA")? The Claimant relies on a number of breaches of contract set out in the list of issues, produced by her Counsel and dealt with further below in my conclusions, under two main headings:

a) health and safety; and
b) mutual trust and confidence breaches.

1.2 Did the Respondent commit the breaches complained of? If so, did the Claimant resign promptly and in response to those breaches? The Claimant says the last straw was when, having submitted a grievance, she was told a

particular member of the HR team (Mr Chan) would be dealing with her, although he was "directly involved" with the grievance. Was that act capable of comprising a "last straw" (i.e. was it one which, while not necessarily unreasonable or blameworthy in itself, contributed towards a breach of the implied term of trust and confidence)?

1.3 The Claimant confirmed she is relying only on an allegation of constructive and not actual dismissal; the Respondent confirmed that it is no longer relying on a defence that any dismissal was potentially fair by reason of the Claimant's conduct. If the Claimant was constructively dismissed, was the dismissal fair or unfair?

1.4 Working time - did the Working Time Regulations 1998 ("WTR") apply to the Claimant, so far as they relate to rest periods and rest breaks? The Respondent says that the Claimant opted out of the WTR by signing a form pursuant to Regulation 4; alternatively, did Regulation 20 apply to the Claimant?

1.5 If the Claimant was entitled to the protection of the WTR and had not validly opted out, was the Respondent in breach by refusing to allow the Claimant to exercise her rights? If so, on what date was the last breach? Was the Claimant's claim brought within time? The Claimant relies on a breach on 2 June 2016.

2. The Hearing

2.1 I had before me a bundle divided across three Lever Arch files, running to around 900 pages altogether, with an additional ring binder containing witness statements. Ms Hatch for the Claimant had prepared a detailed chronology which had not been agreed, and also a list of the factual issues which fell to be determined, which was refined as set out above.

2.2 The case had originally been listed for two days, and had subsequently been extended from two to three days, but no Preliminary Hearing had taken place. At the beginning of the Hearing I discussed with both parties' representatives the difficulty I foresaw in concluding the matter even within the three days for which the case had been listed, given the amount of evidence and that there were seven witness statements from five witnesses. Further, none of the statements addressed remedy. Both Counsel agreed that even if we concluded liability, we would not be in a position to move on to remedy during the three days in any event. There would be complicated issues with remedy and it should be dealt with separately.

2.3 It was therefore agreed that we would make every effort to conclude the evidence within three days and hear submissions; then the case was provisionally listed for a further two days for remedy on 14-15 September 2017 if required.

2.4 I spent the first morning of the Hearing reading in to the statements and to the accompanying documents to which they referred. All the statements were then taken as read with supplemental questions where necessary before cross-examination.

2.5 We heard first from the Claimant, who gave evidence for the afternoon of day one, which concluded at 16.45 and then again from 09.30 to 11.30 on day two. Although the Claimant's cross examination was not complete, we then (by agreement) heard from Mr Thomas Frossell, Global Head of Content for the Respondent, who had to leave to catch a flight; he was released at 13.35 on day two. After lunch on day two, we completed the Claimant's oral evidence, and after a short break we heard evidence from Dr Robin McNeill Love, who was cross examined before being released at 16.30.

2.6 On day three we began at 10.00 and there was an email handed up as to which submissions were later made. We then heard evidence from Mr Steven Ashley, Head of CRM Capabilities and Processes for the Respondent. He was released at 13.45 and after the lunch break we heard evidence from Mr Kenny Chan, HR Manager for the Respondent. His cross examination concluded at 16.10 and there was no re-examination. Submissions in writing for both parties were handed up and supplemented orally. The hearing concluded at 17.50 and I reserved my decision.

3. The Law

Constructive dismissal/breach of contract

3.1 I had regard to section 95(1)(c) ERA and to caselaw, including the familiar case of *Western Excavating (ECC) Limited v Sharp*[1] and in particular Lord Denning's words:

> *"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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

3.2 So far as the "last straw" doctrine is concerned, I have considered the case of *Waltham Forest v Omilaju*[2], in which the following elements are said to be pertinent:

- The final straw must not be utterly trivial.
- The act does not have to be of the same character as earlier acts complained of.
- It is not necessary to characterise the final straw as "unreasonable" or "blameworthy" conduct in isolation, though in most cases it is likely to be so.
- An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

[1] [1978] ICR 221
[2] [2004] EWCA Civ 1493

Breach of the Working Time Regulations (WTR)

3.3 Under the Working Time Regulations (10-12), an employee is normally entitled to a rest break of 20 minutes when working more than six hours a day; 11 hours' uninterrupted rest per day; and 24 hours' uninterrupted rest per week (or 48 hours per fortnight).

3.4 In addition, an employee normally is entitled to limit their working week to 48 hours, calculated by considering a reference period. An employee may choose to opt out and disapply this limit, in which case there is no fixed ceiling of working hours per week, although since the WTR emanate from European health and safety law, it is nonetheless incumbent on the employer to ensure that health and safety considerations still play a part in the employee's working time.

3.5 An employee is not covered by some of the WTR (for these purposes relating to average weekly working time and to daily and weekly rest periods) if under Regulation 20(1) they are considered to be in control of the hours they work and are therefore "autonomous".

4. Findings of fact

I make the following findings of fact:

Background to the claims

4.1 The Claimant joined the Respondent in September 2013, having previously worked with British Airways for more than 22 years. Her employment contract was with Reuters Limited although her job description is of a role with Thomson Reuters, described as "the leading source of intelligent information for businesses and professionals". The Claimant was initially engaged as a consultant providing five months' maternity cover for a second-line Support Manager. Her daily rate at that time was £450.

4.2 On 7 April 2014, the Claimant was made a permanent employee in the role of Product Support Manager. Her permanent salary was £85,000. The Claimant agreed with her then line manager, Mr Allinson, that in light of this figure, which was lower than she had expected, she would work from home four days a week to minimise travel costs. The Claimant lived/lives in Kettering, a long commute from Canary Wharf where she was notionally based. The Claimant continued to work from home for the majority of the working week until her resignation in July 2016. While the Claimant says that the Respondent could not meet her expectations in terms of salary or job title, I note that she nonetheless chose to take the role that she was offered. The implication of what the Claimant says is that if the Respondent had given her a better salary and job title, she would not have objected to six hours' commute a day.

Working Time Regulations Opt-Out

4.3 When the Claimant's role was made permanent, she was provided with soft and hard copies of certain documentation to sign and return. In her witness statement, she says that she was required to attend the HR offices between meetings on 8 April 2014 to sign her contract and "expression of wish" form; she was instructed to sign a number of uncompleted forms without reading

them and indeed told that if she did not sign them, she would not be permitted to remain in the building.

4.4 Among the forms emailed to the Claimant was an agreement to opt out of the 48-hour limit to the working week. The Claimant said she had no intention of signing this form. Nonetheless, she did sign and date it and print her name on 8 April 2014, although it was never fully completed with the start date or her name at the top. It is strongly arguable that the Claimant and the Respondent both believed that she was not an "autonomous" decision maker, since she was asked to, and did, sign the opt-out. In the circumstances, I conclude that she was entitled to the protection of the WTR to the extent that she wished to avail herself of them. The Respondent did not give her a copy of the signed form, and the Claimant said she consequently believed (and indeed pleaded as part of her claim before the Tribunal) that she was entitled to the protection of the WTR.

4.5 Mr Chan by contrast says that the form, with other important documentation such as the Claimant's contract, was sent to her on 3 April. It was agreed between the Claimant and Ms Begum, an HR administrator, that the Claimant would bring in the signed copies on 8 April. Ms Begum was a new and very junior administrator, some six grades below the Claimant, who by contrast had over 20 years' experience in industry. Mr Chan accepted that no copy of the opt out form was given to the Claimant, as it is not the Respondent's normal practice to do so, but did not find it credible that Ms Begum would have given the Claimant an ultimatum in the terms described.

4.6 On balance of probabilities, I find that the Claimant did knowingly sign (in her maiden name) the opt out form and later forgot that she had done so. I note that it is a short document, clearly headed "UK Agreement to work more than 48 hours per week" in a large font size. The paragraph above the signature space allows for the consent to be withdrawn on three months' notice. I do not see how it could have been signed in error. All the documents signed that day (this form, the Claimant's employment contract and the expression of wish for death benefits) were important and I cannot see how the Claimant could have read them on receipt in advance but not realised the significance of what she was being asked to sign on the day.

4.7 I accept Mr Chan's evidence that it is not a requirement for all senior managers to opt out of the WTR and that not all of them do; further, I note there is a detailed four-page guide accompanying the form which explains the WTR and their application to different grades of staff.

4.8 If the Claimant had genuinely taken the decision, on receiving Ms Begum's email with the form attached and/or the hard copy by post, that she was not going to sign it, I cannot understand why, given her many years of experience in industry and the relatively senior position she held compared to Ms Begum, she would not simply refuse to do so if she was required, or alternatively opt back in to the limit again giving notice if required. I find that it would be highly unlikely for Ms Begum to give the ultimatum as stated by the Claimant and accordingly conclude that she did not do so. I find that the Claimant is bound by the opt out, which she had not rescinded at the date of her resignation.

4.9 Nonetheless, I have regard to the limitations on such a form, even when signed voluntarily by an employee. It is a form under which an employee voluntarily relinquishes their right to work a maximum of 48 hours a week over a reference period. It does not mean that there would be no limitations at all, or that the employee would not be entitled to the other rights (e.g. to rest breaks) under the WTR. I return to these issues below.

Claimant's workload, grade, title and salary issues

4.10 The Claimant says, and I do not doubt, that she gradually took on more and more responsibility and that Mr Allinson told her often that she was capable of doing his job. She took on the challenge of ensuring the support team was fully functional. The Claimant says in her statement that there were issues with the level of service being offered in some contracts, which she did not believe could be fulfilled. I note that she did not raise this internally at the time and it did not form part of her claim. It is not part of my function to determine whether the Claimant was correct in her assessment that the Respondent was potentially at risk of (or was in fact) entering contacts it could not legally fulfil, and therefore I make no finding on this point.

4.11 The month after the Claimant joined the Respondent (i.e. in May/June 2014), she married and went on her honeymoon. She says that Mr Allinson required her to buy a mobile phone and make herself available while she was away, reclaiming the cost on her expenses. Mr Allinson of course did not give evidence, and there is no written evidence in support of the allegation that he required her to work over her honeymoon, although there is evidence that the Claimant did purchase and spend time on a phone during the period that she was away. The Claimant says she was expected to work during subsequent holidays as well, but that she feels that she particularly missed out on her honeymoon and suffered "financial loss" as a result of having to work. I gather that this financial loss claim stems from the Claimant using up reduced-cost tickets that she received from British Airways following her considerable period of service with them.

4.12 I am unable to ascertain the extent to which the Claimant willingly agreed to work or to which her consent was reluctant. There is an email from her to Mr Allinson dated 9 May 2014 in which she states that she would work in the morning of 23 May, 26th was a bank holiday and then she would not be contactable from 27-30 May. She indicated that between 2 and 6 June, and 9 to 13 June, she would be online for at least eight hours each day to ensure she had "at least four hours in each timezone". There is no response from Mr Allinson, nor any direction from him as to the purchase or use of a phone. There is no written requirement from him for the Claimant to be available during her honeymoon.

4.13 On balance of probabilities, I find that the Claimant did work for periods during her honeymoon, but that this was not at the Respondent's instruction. Accordingly, I am unable to find that the Respondent is liable to reimburse the Claimant for the replacement value of the airline tickets or the other costs associated with her honeymoon.

4.14 The Claimant says that she was led to believe she would be given Mr Allinson's role if she proved herself and did the role that Mr Allinson did. She does not say where this belief stemmed from. She says that she was not remunerated or put on a higher grade for taking on more and more work. I return to this allegation below.

4.15 At the end of June 2014, the Claimant complains that a colleague, Ms Khuller, was given the role of Head of Content and Screening Support, which the Claimant considered should have been given to her. Mr Allinson explained to the Claimant that Ms Khuller was promoted because she was leaving the Respondent at the end of the year and the role would assist her future career. Nonetheless, the role would be the Claimant's in due course. The Claimant says she aired her concerns and disappointment with the Managing Directors in the Risk division, Mr Neblett and Mr Cotter, and says that she felt undermined by Ms Khuller's promotion; her trust and confidence suffered. Nonetheless, she continued to work for the Respondent and did not raise a formal grievance.

4.16 The Claimant contends that on Ms Khuller's departure in December 2014, she took over her role and workload but without being given any additional support. The Claimant says she went to HR and was told that she would be given a payrise and title/grade uplift once she was doing the same role as Mr Allinson. However, the emails to which she refers in support of this (without identifying the person in HR who she says gave her this assurance) date from August 2015 and are in fact a query around when her new title would be going live on the Respondent's internal system. In February 2015, the Claimant had an extremely positive appraisal with Mr Neblett, in which her own self-evaluation was broadly reflective of how Mr Neblett viewed her performance.

4.17 Another manager, Ms Von Meyer, left for another role within the Respondent in April 2015 and the Claimant says she took over that workload as well, when a replacement for Ms Von Meyer was not approved. The Claimant complains that this led to regular breaches of the WTR in relation to her rest breaks, both daily and weekly. She says that this was a further blow to her trust and confidence in the Respondent. However, she relies on an example dating back to November 2014 as evidence of this.

4.18 This example shows that at 21.16 on Saturday 29 November 2014 (i.e. Thanksgiving), Ms Khuller sent a message to the Claimant saying that "someone" was needed for a Webex call with a client immediately. Ms Khuller suggested "Paul", who I assume was one of the Claimant's team members. The Claimant replied asking what the issue was as Paul (and, it seems, others) were away for the holiday. Ms Khuller chased the Claimant to contact the client shortly afterwards, explaining that she was at a beach resort and did not have access to her laptop. The Claimant updated Ms Khuller just before midnight to say that she had got in touch with one of her team and "Phil is calling client". She also noted that if the system was down, 24/7 cover was being provided by another team.

4.19 This is another instance where the Claimant's assertion of evidence in support does not in fact support the point she is trying to make. Ms Khuller, who at the time was senior to the Claimant and performing a role that the Claimant wanted

to perform, has clearly felt able to go away on holiday to a beach resort where she cannot access a laptop. She is asking the Claimant to facilitate a response by someone else to the client, not to respond or to fix the problem herself. It is right to note that the Claimant was occupied (though for how long it is hard to establish, since I do not have a record of her discussions with other colleagues) for a significant part of a Saturday evening. However, the Respondent is a global business with 24/7 issues and the Claimant was part of the management team which supported its clients; it is not surprising that she might be contacted to organise someone to attend to an urgent issue over a weekend that is a public holiday in the USA. I can see that she may therefore have spent nearly three hours over one of her weekends dealing with this issue because of a combination of other people's holidays. It does not demonstrate a regular breach of the WTR as regards weekly rest periods or uninterrupted rest between working days. I do not have any evidence of when the Claimant stopped work on Friday 28th November 2014 (or any evidence to show that she continued to work on into Saturday 29th or worked on Sunday 30th).

4.20 The Claimant then relies on an email she sent Mr Neblett on 17 July 2015 as being around the imminent departure of the Head of Workflow Ms Moe and the Claimant's desire to be promoted from Product Support Manager 4 to Product Support Manager 5, reflecting a conversation they had had the previous day. This email, headed "My role" does not have a response. It makes no mention of Ms Moe and merely says that "with the extended work" the Claimant "would hope to move to a Product Support Manager 5". It goes on, "I have no issue on taking the extra responsibility as in the past have had teams that managed all of 2 major airlines systems".

4.21 The Claimant says that when Ms Moe did leave the following month, she took over Ms Moe's workload and that she approached HR about a pay rise, title and grade uplift, but was told if she took the higher grade and title, her position would be vulnerable because Risk (where the Claimant worked) would be integrating with Finance. The Claimant refers again to the email referenced above in August 2015 which queries when her new title would be live on the internal system. Mr Allinson forwarded this email to the Claimant and asked, "What is all this about?" The Claimant replied that her role as Product Support Manager had caused someone in sales to be hesitant about introducing her without a more senior title. The Claimant, referring to Ms Moe, said "to be honest, some time ago [Mr Neblett] put out the Org Chart for ERM [Ms Moe] was the Global Head of Support … if I am not the Global Head of Client Services, what am I??? I am not being petty but if I am doing a role I would be grateful for acknowledgment". There is no answer from Mr Allinson in the bundle.

4.22 I find it striking that the Claimant is now implying that she was forced to take on more and more work, causing her to work excessive hours, when the reality on the evidence before me is that she was actively seeking out additional challenges and leading the Respondent to believe she was entirely comfortable with them, in a bid to enhance her title and, with it, her salary. This is most certainly not a criticism of the Claimant; but when she emails Mr Allinson and Mr Neblett, she is not saying, "I cannot do all this work, the pressure is too much, I am having to work round the clock to meet the demands"; on the

contrary, she is saying, in terms, "I am happy to take this on, but I would like acknowledgment for it in the form of better pay and internal respect". While she now says that she felt "consistently undermined" and that her "trust and confidence continued to suffer", looked at objectively and, I emphasise again, on the evidence before me, the argument that the Respondent was failing the Claimant in some way during this period is not sustainable.

4.23 The following month (27 September 2015) there was a meeting between the Claimant and Mr Frossel, of which there is no contemporaneous note. However, the following day, the Claimant emailed Mr Neblett saying that Mr Frossel had explained why she would be reporting to Mr Ashley and that he, Mr Frossel, really cared about her career and would be making her part of the leadership team although this was to be kept confidential as he needed to advise Mr Ashley. In addition, Mr Frossel wanted to make her Head of Transformation and would look within a year to raise her grade and align her with the rest of his business. Mr Neblett replied the following day saying that it sounded like a "good resolution" and suggesting the Claimant let him know if she needed anything from him. He concluded, "You will be great at head of Transformation".

4.24 In October 2015, the Claimant was awarded a £5,000 per annum pay rise, which equates to nearly 5.9%. She contends that she was given no uplift in grade or title, but I note from the August emails that she was designating herself "Head of Client Services Governance Risk and Compliance" without apparent demur from her line managers.

4.25 In the same month, the Risk and Finance teams integrated. The Claimant says she was expected to work a 34-hour day between 14 and 15 October to meet every individual member of the team, in addition to her normal workload. She became ill, having managed "only" 30 hours. She notes that the diary pages for those days do not accurately reflect the workload, because when an employee leaves the Respondent, their "recurring" meetings may be removed from their diary, so that the Claimant's shows only the "one-off" meetings. She also notes that her PA, Ms MacLennan, later said she had not seen a schedule as busy as the Claimant's.

4.26 I have had particularly careful regard to the evidence on this point, because it is clearly one of the central planks of the Claimant's case. Firstly, the diary continues to show both bi-weekly and monthly "catch up" meetings so it is not the case that all the recurring entries have been deleted on the Claimant's leaving. I can accept however that not all entries are shown on the pages in the bundle. In any event, what is there shows a high concentration of sometimes back-to-back calls, throughout both days and overnight.

4.27 I find that the Claimant was neither required nor expected by the Respondent to work a 34-hour day. The schedule was not one imposed on her by management. There are several calls, but there are also several hours' worth of "writing up" those calls, for example, on 15 October between 01.30 and 02.30, and again between 05.00 and 06.00 and from 08.00 to 09.30. I have seen no suggestion that the Respondent was expecting the Claimant to complete any writing up work, let alone to do so during the night.

4.28 Further, I accept the Respondent's evidence that the Claimant was not required to have lengthy calls with every individual member of the team. That this was a large piece of work that needed careful handling, I have no doubt. I have the evidence of a schedule that shows the Claimant as the "owner" of individual conversations with "All Risk support team members" between 14 and 16 October, following a series of "Town Hall" meetings on 14 October. However, on 13 October, the Claimant was scheduled to have conversations with the Risk Support team managers. I accept the evidence of Mr Ashley that at the time, since he was not the Claimant's manager, he could only advise her; but he did advise her not to speak to every team member individually but instead to brief the managers who would in turn brief their teams.

4.29 The Claimant did not heed Mr Ashley's advice, and at 14.36 on 15 October, she emailed Ms MacLennan saying that she felt really sick from having had no sleep, apologised and asked Ms MacLennan to move the rest of the discussions to the following day. The fact that nobody took any issue with this re-timing of many of the discussions further supports my finding that this is an example of the Claimant being driven to "over achieve" when this was not the Respondent's requirement or even expectation of her.

4.30 I also accept Mr Ashley's evidence that the Claimant's concerns expressed during the planning phase of the integration of the teams centred around her role and responsibilities, and not the enormity of her workload or a lack of breaks as now pleaded by her. Mr Frossell agrees that the Claimant did not mention any workload or working hours concerns in the run up to the integration. Again, I do not criticise the Claimant. She is clearly driven to progress and succeed, and undoubtedly wanted to impress the new senior managers with her commitment and achievements. She has explained that she was/is the only breadwinner in the household and therefore may well have been anxious to ensure that her role was cemented.

4.31 This is similarly the case with the Claimant's arrangements to have weekly 1-2-1 meetings with Mr Ashley at 07.15. I accept Mr Ashley's evidence that the initial scheduling was the Claimant's, and that he continued it thereafter, believing that to be the Claimant's preference. In any case, I also accept that such was the relationship between them, the Claimant could have suggested a different time for the meeting and Mr Ashley would have accommodated her. There is evidence that on one occasion when there was to be a meeting that would not end until 01.00, the Claimant told Mr Ashley she would need to stay in a hotel overnight. There is no response from Mr Ashley, which suggests that he was content for the Claimant to do as she proposed. I can also see that on 16 October 2015, the Claimant emailed Mr Ashley asking for their forthcoming meeting to be moved to a Wednesday when she would be in the office and extended, as she wanted "a proper chat" with him. This does not suggest any reluctance on the Claimant's part to discuss the timing or duration of her 1-2-1s with Mr Ashley.

4.32 Given the Claimant's level and the fact that she worked from home four-fifths of the working week, it is not surprising, and is completely credible, that Mr Ashley would not have sought to manage her diary but left that to her, in conjunction with her PA. To have a telephone meeting at 07.15 when someone works from

home is not necessarily either unusual or inappropriate; if the Claimant had had to be in work for a meeting at 09.00, she would have had to leave home much earlier than 07.15 as she points out in one email that her journey was three hours each way. Again, it was the Claimant's choice to live in Kettering and work in Central London; this was something she knew when she took the job. She says she raised the issue of early morning meetings "repeatedly" with HR and with Mr Allinson (though this was during a period when Mr Ashley was her manager). I cannot find any evidence that this was so.

4.33 The Claimant says that post-integration she continued to feel undermined by a failure to amend her title to Head of Client Services, despite Mr Neblett having made an announcement internally and having given her another very good appraisal. She said that her trust and confidence continued to suffer; it caused her embarrassment to be introduced to clients as Product Support Manager when they were expecting someone of director level. I accept Mr Ashley's evidence that job titles and bands across the board were to be aligned from May 2016, and that at that point the Claimant became Director, Risk Services; Head of Client Services, was, as I have indicated above, the title she already used anyway in email communications both internally and externally.

4.34 The Claimant says that on 25 January 2016, a colleague, Mike Peterson, was announced as Head of Transformation. She referred back to the "promise" made to her by Mr Frossell the previous September and the encouragement from Mr Neblett. She believed she was being managed out of the business, and this feeling was enhanced when Mr Ashley queried the fact that she worked from home four days a week.

4.35 A number of points arise from these contentions. The announcement to which the Claimant refers was in the form of an email, which is the document produced at the beginning of day three. It says that Mr Peterson, who had been Head of Frontline English Support in Manila, would be repatriating to the US in June 2016 "to continue his support of our critical customer service transformational initiatives". His replacement would be recruited shortly. Colleagues were encouraged to speak to Mr Frossell with any questions.

4.36 This email does not expressly say that Mr Peterson is to be the Head of Transformation and he is not shown as such in any organisation chart or by email signature (for instance). It does suggest that Mr Peterson is to continue what appears to have been a highly successful spell in Manila "along the transformation journey". I am unable to say on balance of probabilities that he was indeed made the new Head of Transformation. I accept Mr Frossell's evidence that Mr Peterson returned to New York in his role as Head of Frontline English Support.

4.37 I also accept Mr Frossell's evidence that he had not, in any event, "promised" the Claimant the role of Head of Transformation in their conversation the previous year. I would have found it very surprising that he would have promised her a role of any description when he barely knew her, and certainly not a role that did not exist at the time, when the Respondent was about to undergo substantial reorganisation in the risk/finance groups and without waiting to see how that panned out and what the subsequent requirements

were. The Claimant did not say that he had given her a definite promise – as I have previously noted, she told Mr Neblett that Mr Frossell had said he "wanted" to make her Head of Transformation and would look within a year to raise her grade. That had been in September 2015, just under four months earlier.

4.38 As to the query raised by Mr Ashley around the Claimant's working hours, it is important to see this against the email correspondence between him and Mr Frossell, to which the Claimant was not privy prior to her resignation. On 20 January 2016, Mr Frossell emailed Mr Ashley to say that while on a trip to Asia, he had had "some significant feedback" about the Claimant and her "style". He reported that "overall management confidence in her is low" and gave a single example suggesting that a number of Risk leaders had been in London the previous week and had asked to meet the Claimant but she had replied that she was working from home. They had been surprised, given that "major stakeholders" were in town, that she had not come in.

4.39 Mr Ashley replied that he could understand the disappointment, but asked whether there was anything else particularly given as a reason why their confidence in her was low. Mr Frossell responded "Working from home mentality. Poor skill sets and lack of confidence in service measurement were a few". For the record, the Claimant asserts that she was in the office on both 12 and 13 January 2016 and had attended a social event with the Risk leaders on the evening of 12th.

4.40 Less than a week later, the Claimant was to be booked on to a five-day workshop in London. Ms MacLennan asked whether the Claimant was required for the whole period or whether she could attend remotely, but was told she needed to attend the first week in person. When Ms MacLennan told the Claimant, the Claimant asked Mr Ashley if she could book a hotel. Mr Ashley pointed out that where colleagues lived outside London but were paid at London rates, it was expected they would pay their own travel and accommodation costs if they were then needed to come in. He said an exception was made if travel would be outside social hours, such as the recent meeting to which I have referred above, and he gave an example of a colleague in the same situation.

4.41 The Claimant explained that this had not been the arrangement imposed when she joined the Respondent, and indicated that she started work at 05.00 and continued "until 23.00 most nights" but her PA made sure she had 10-15 minutes breaks throughout the day. She acknowledged her contract did not have her based at home but from London but noted that she had always worked from home, with Mr Allinson's approval. Mr Ashley replied that he had agreed with Mr Frossell to cover the accommodation costs for the workshop but the issue would need to be addressed for the future.

4.42 Mr Ashley's evidence, which I accept, is that in their next meeting on 28 January, he and the Claimant had a frank discussion in which the Claimant described long days with heavy workload, and he emphasised to her the importance of delegating to her managers to allow them in turn to manage their reports. In light of the lack of evidence suggesting that the Claimant raised any

health concerns until mid-February, I accept that the Claimant did not indicate to Mr Ashley that she was struggling with the pressures that she was experiencing. I find, as Mr Ashley indeed concedes, that Mr Ashley called the Claimant a "control freak". This was clearly not a pleasant or indeed constructive thing to say; but it indicates that Mr Ashley saw the Claimant as having an unhealthy level of involvement in issues that could and should have been dealt with by those in management roles beneath her.

4.43 On 15 February 2016, matters came to a head when the Claimant worked from 05.00 until 04.30 the following morning (according to her witness statement, which I accept). She was due to recommence at 06.00 but, as she says, she "broke down and could not go on". She visited her GP and was signed off for a month. The condition for which she was signed off was simply given by her GP as "unwell". The Claimant forwarded her fit note to Mr Ashley without elaborating on the reason for her absence.

4.44 Mr Ashley says, and again I accept, that initially he did not know what was wrong with the Claimant; he knew she had had a minor operation the previous month and thought the two things might be related. I note the Claimant does not suggest that she raised the issue of overwork with her doctors when she had that operation.

4.45 During her absence, Mr Ashley did speak to the Claimant, who told him she needed to limit her working day; he recommended an Occupational Health report should be obtained. Mr Ashley also very promptly emailed the Claimant's direct reports to say that she would be off for three weeks and that he would be supporting them in her absence; he received a response from one person, Ms Osborne giving her contact details and saying that she would await the Claimant's return to deal with any necessary changes to her team's goals. It would appear that there was very little concern among the Claimant's reports at her prospective absence, nor was there (on the papers before me) a heavy requirement on Mr Ashley while he was covering for the Claimant.

4.46 However, when the Claimant returned in mid-March it would appear she reverted immediately to working excessively long hours, without alerting Mr Ashely to this fact at first. On 21 March, she did email Ms Wallis, an HR Adviser, to say that she had been working 18-22 hours a day for the last two years and had become very ill the previous month due to exhaustion. She said that her GP wanted her phased back to work but she already had a 14-hour day, and although she could manage her week (although the sentence is a little unclear) she needed some help dealing with the stress and needed an occupational health (OH) appointment.

4.47 Ms Wallis replied within four hours saying that she had referred the Claimant to OH but that it was very important for the Claimant to make Mr Ashley aware of the situation as it was ultimately up to the Respondent and particularly him to ensure the Claimant's workload was manageable. Ms Wallis also indicated that the Claimant should feel free to visit her in person or to call her. The Claimant emailed back to say that it was Mr Ashley and her GP who wanted a phased approach for her return to work and that she had not wanted to be referred to

OH. She ended, “Just following orders from doctor for once” with a smiley face emoji.

4.48 The Claimant and Mr Ashley shared an email exchange later on 21 March in which she said she would see her GP to establish the parameters of a phased return and then see OH; that she was managing her workload in the meantime and trying not to do as long a day. She said, “I am fine but I understand that my doctor just wants to make sure that my body recovers fully”. Mr Ashley offered any help she needed and emphasised “Really important that you do not work long days, we can shift our 121 a little bit on Weds if that helps. I would also suggest that you do not attend the HD LT on that day as there is a lot that is only applicable to the F business, it will free up 2 hours and I can update you on anything of relevance/importance. Want to make sure that we take every opportunity in these first few weeks to limit the possibility of excessive hours until we get a good understanding of work and priorities”. The Claimant replied assuring him twice that she was being “sensible”.

4.49 The following day, the Claimant forwarded her OH appointment to Mr Ashley at 18.15, to which he replied quickly saying “Am hoping your finished for the night” [sic]. The Claimant replied “Nearly… promise”.

4.50 On 1 April, while he was abroad on holiday, Ms Wallis emailed Mr Ashley with the points arising out of the OH report. Mr Ashley had already spoken to the Claimant to arrange a call in which he wanted to explore her apparent need to work such long hours. The Claimant did then email her team saying she would be working two days a week for six weeks, between 08.00 to 16.00 on Tuesdays and 06.00 to 14.00 on Thursdays. However, the Claimant was very quickly working far longer than that, emailing Mr Ashley on 1 April saying among other things that her diary for the following Tuesday was already full from 07.30 to 18.30 with no breaks. Clearly this was outside the boundaries of what they had agreed. Mr Ashley wrote back just over an hour later informing her that until they had agreed her priorities and a way to limit her workload, it was not appropriate for her to return to work. He followed this up with a similar injunction to Ms MacLennan, who was told to hold back on the Claimant’s return to work.

4.51 On 5 April, Mr Ashley, Mr Chan and the Claimant had a telephone conversation to complete a risk assessment tabled by OH, although despite it being a very long call, only the first four points out of 21 could be discussed. The Claimant covertly recorded the call. Mr Chan suggested that the Claimant complete the remainder from her perspective and she was also asked to produce a pain point and priority document and activities list. Dr McNeill Love, who had provided the advice, acknowledged that he did not doubt Mr Ashley’s good intentions in asking for those, but noted (on 17 May) that it had meant the individual stress risk assessment had not been completed.

4.52 The Claimant had said how much stress it was causing her to be off but equally now reported that her doctor had said there were implications from a number of perspectives if she continued to go against his recommendations. Mr Ashley was, I find, attempting to ensure that the Claimant did not return to work until there was a plan in place that all (by which I mean Mr Ashley, the Claimant, HR

and OH) had agreed with, and was seeking to give her as much comfort as he could about her future within the organisation.

4.53 Dr McNeill Love also welcomed on 17 May as a "very positive move" the introduction of an Operations Manager to work alongside the Claimant and ease her workload, although he cautioned that the Claimant should not be attending training as well as completing her normal work. He recommended very strongly that the Claimant's existing working pattern (by then Monday to Thursday, 09.00 to 17.00) should continue for a further six weeks.

4.54 The Claimant appears to have interpreted the appointment of Mr Claxton, Operational Manager, in a different light, saying she felt "undermined and upset" that it had happened without her knowledge. Indeed, she felt his appointment was not helpful to her as she continued to have responsibility put on her and Mr Claxton in fact needed her support. She perceived that she was being micromanaged, no longer had any leadership and as though she was being managed out. Without being specific, she says that on 2 June she worked so many hours that the WTR were breached once more and she was signed off work once again.

4.55 On 3 July the Claimant submitted a grievance dated 1 July. On 4 July she commenced psychological counselling. The Claimant takes exception to an email (to which she was not copied in) between Mr Ashley and Mr Moyse, Global HR Business Partner, on 14 April following the call which she had covertly recorded. In that Mr Ashley remarks that Mr Chan had raised a concern offline whether the Claimant's "mind is in the right place". I do not find this to be either flippant or disdainful. It suggests to me that Mr Chan had rightly been worried that the Claimant was having mental health difficulties, as indeed was the case.

4.56 On 8 July, Mr Moyse emailed the Claimant to say that she would be hearing from Mr Chan shortly as to how the Respondent would be taking her grievance forward. The Claimant sent a letter of resignation with immediate effect on 15 July, citing Mr Chan's involvement in the grievance process as the "final straw", the other factors having been set out in her grievance letter. The Respondent did conduct an investigation into the Claimant's grievance in her absence as she said she did not wish to attend a meeting; it was rejected by letter of 26 August 2016.

4.57 Finally, I deal with the question of the Claimant's place in Mr Frossell's leadership team and a team meeting planned for Manila later in 2016, which the Claimant had been told she would not be attending. I was not impressed with Mr Frossell's explanation of the Claimant's involvement in what at times was described as the leadership team and at other times the "core" or "extended" leadership teams, and consider that this issue could have been made far clearer. However, in another conversation which was covertly recorded by the Claimant, Mr Frossell clarified that the Claimant would be welcome to visit Manila on another occasion and that there was a limit to the number of his team who could attend the planned meeting. I find that this was a decision that he was entitled to make by virtue of his seniority and that this was unrelated to the Claimant's health.

5. Submissions

I had the benefit of submissions from both representatives on which they each expanded orally. I considered both the written and additional comments carefully in my deliberations but I do not rehearse them here.

6. Conclusions

Constructive dismissal

6.1 Health and safety breaches: I conclude that the Claimant was not regularly required to work excessive hours with inadequate breaks and/or rest periods which put her health and safety at risk. Nor was she required to work in a pattern which put her health and safety at risk.

6.2 I have found that the Claimant signed the opt-out of the WTR voluntarily. That does not mean that she opted out of the right to have breaks during a working day, or between working days, or weekly; but it was not at the Respondent's behest that she did not have them, when she did not. It was the Claimant's choice – indeed, her express wish – to work from home. This meant the Respondent had little or no awareness of her work diary commitments, particularly since Ms MacLennan was, I gather, based in the USA. This is a 24/7 global business. Unless and until the Claimant raised the issue of her working hours, it is hard to see how anyone could have known what they were.

6.3 There is in any case such a lack of specificity in terms of the last occasion when the Claimant says the WTR were breached that I conclude her claim is out of time. If she was indeed working excessive hours up to and including 2 June, that would be directly against the Respondent's express instructions as articulated repeatedly by Mr Ashley to the Claimant and Ms MacLennan. The Claimant had been told by everyone, including her own GP and OH, that her workload (as reported by her) was unsustainable, even life-threatening. I am delighted that she has been attending counselling to deal with this apparent inability to "say no" to additional work, and that it did not come at a point where it was too late. I do not consider that the responsibility for this situation can be laid at the Respondent's door however. I do not consider that the workload that the Claimant assumed would have been given to her if she had revealed the nature and extent of her struggles at a much earlier stage.

6.4 I do not consider that the evidence supports either of the assertions that the Claimant was expected, much less required, to work a 34-hour day in October 2015 during the integration, or to work from 05.00 to 04.30 on an unspecified date in February 2016. When the Claimant did raise her concerns, it is my finding that Mr Ashley promptly and repeatedly tried very hard to enforce limits on the working hours the Claimant was undertaking. To the extent that he was unsuccessful, again I do not consider this was his fault or that of the Respondent. For the avoidance of doubt, nor do I say it was the Claimant's "fault"; it is clear to me that she was suffering from a mental health condition for which, as I have noted above, it is heartening to learn she has received treatment.

6.5 For the reasons set out above, I conclude that the Respondent did seek to provide adequate support for the Claimant's phased return and to implement the OH recommendations.

6.6 Mutual trust and confidence – I do not repeat my findings and conclusions where matters alleged under this head have already been addressed under alleged health and safety breaches above. I have already concluded, and again set out my reasons for that conclusion above, that there is insufficient evidence to support the contention that the Respondent "required" the Claimant to work while on her honeymoon in 2014. There is similarly little or no evidence that the Claimant was "expected" to work over other holidays. I accept indeed the evidence of Mr Ashley and others that this is not an expectation of all the Respondent's managers. I note that Mr Ashley acknowledges he did work on the Claimant's issues while he was away in March/April 2016, but that was because of the extreme nature of her condition. I also conclude that it is not indicative of a culture that Mr Ashley attended to work issues while off sick with suspected Deep Vein Thrombosis. That might confine him to his home, but would not necessarily prevent him from participating in conference calls and other work-related projects if he otherwise felt well enough.

6.7 I have concluded that the Claimant had the appetite to take on the workload of Ms Khuller, Ms von Meyer and Ms Moe and indicated to her own managers that she was coping with the challenge, emphasising her desire to have her role underpinned by making herself immensely valuable. To the extent that this was unsuccessful – and indeed counterproductive - because it led others to feedback to Mr Frossell that they were unhappy with her style or availability, that is of course very unfortunate. It is also unfortunate that Mr Ashley suggested that the Claimant was a "control freak". Other than that however, I conclude that he was, so far as the Claimant knew, most supportive of her and tried many times to ensure that she restricted her hours to those agreed with OH.

6.8 I have also set out above that I do not accept the Claimant's assertion that it was Mr Ashley who required their meetings to take place at 07.15; that the Claimant had not been promised a role as Head of Transformation and in any event, that was not the role given to Mr Peterson in January 2016; and that it was in order for Mr Ashley to ask the Claimant about her agreement to work from home four days a week. There was no sinister reason behind the decision in April 2016 not to take the Claimant to Manila. It was not the Respondent who arranged the long hours on the Claimant's return to work in March; and Mr Caxton's appointment was intended to provide much-needed support for the Claimant in May. It was inevitable that there would be a short handover during which he would need to ask the Claimant about work in progress and the manner in which she would prefer things to be done, but in the medium/long term, his appointment was aimed to assist, not undermine her.

6.9 Last straw – I conclude that the Respondent's conduct was not such as to entitle the Claimant to resign with or without notice. It was not conduct that was either likely or calculated to destroy or seriously damage the relationship. In any event however, I could not have concluded that the suggestion Mr Chan would be in touch with the Claimant to say how her grievance would be

progressed could have constituted a last straw. I am mindful that the last straw need not be a breach in itself, but this was not an act, reasonably considered, that would cause anyone to conclude that there had been a breach of mutual trust and confidence. Mr Chan was not going to be hearing the grievance, just contacting the Claimant to tell her who would. This was an entirely innocuous act.

6.10 The Respondent did not in any event delay in hearing the grievance prior to the Claimant's resignation. She submitted her grievance by email on the afternoon of 3 July – a Sunday – and Mr Moyse emailed her back on the fifth working day after receipt – the following Friday. On any analysis of normal business practice, that is not an unreasonable delay.

6.11 It was the Claimant's argument that she suffered a loss of trust and confidence in the Respondent almost from the moment she was appointed to the permanent role. It strikes me that the Claimant had a certain perception of her value to the business which was not always shared by those managing her, though that certainly seems to have been more the case towards the end of the relationship than at the start, and that she perceived slights in a number of areas which I have found were not reasonably based. In any case, if it would have been reasonable for the Claimant to interpret the Respondent's conduct as breaching the mutual trust and confidence in the relationship, I would have found that the Claimant did not respond promptly to those breaches and resign. Rather, she continued to try to cement herself within the organisation, thereby waiving any breaches that might reasonably be said to have occurred.

6.12 In the circumstances, I conclude that the Claimant was not constructively dismissed and the Respondent did not breach her rights under the WTR.

7. Accordingly, the Claimant's claims are not well-founded and fail.

Employment Judge Norris

7 July 2017