EMPLOYMENT TRIBUNALS

Claimant: Mrs S Murphy

Respondent: Hutchinson 3G Limited

HELD AT: Manchester **ON:** 11 September 2017

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: Mr D Murphy, Husband
Respondent: Ms C McCann, Counsel

RESERVED JUDGMENT

The claimant was not constructively dismissed and her complaint of unfair constructive dismissal therefore fails.

REASONS

Issues

1. By a claim form presented on 17 February 2017, the claimant raised a single complaint of unfair constructive dismissal. The claimant's case was that the respondent had fundamentally breached the implied term of trust and confidence causing her to resign.
2. The claim form was accompanied by four pages of narrative setting out the ways in which trust and confidence had been undermined. I summarise the narrative as follows:
   2.1. Mr Nick Edwards, the claimant's then Area Manager, failing to carry out a return to work interview on 18 April 2016;

2.2. following the departure of the claimant's husband who is also employed by the respondent, Mr Nick Edwards repeatedly asking the claimant about her husband;

2.3. following a management meeting on 29 September 2016, attempting to trap the claimant in the corridor and warning her about her use of Facebook;

2.4. Lead Store Manager, Ruksana Hatia, lying to the claimant about the purpose of a visit on 11 October 2016;

2.5. at the same visit, Miss Hatia harassing the claimant over her use of Facebook;

2.6. Miss Hatia unprofessionally carrying out a documented conversation in the claimant's car following the same visit;

2.7. unreasonably delaying an investigation into an altercation between the claimant and a customer on Friday 14 October 2016;

2.8. withholding from the claimant's disciplinary pack a statement made by a witness to the altercation with the customer;

2.9. Mr Roy Clarke, Lead Store Manager, being inappropriately assigned to conduct the claimant's disciplinary hearing when he was unsuitable in the light of Mr Clarke's previous dealings with the claimant's husband;

2.10. delay in providing the written outcome of the disciplinary hearing;

2.11. imposing a disciplinary sanction against the claimant;

2.12. unfairly and inconsistently withholding the claimant's bonus in the light of the disciplinary sanction;

2.13. during the claimant's sickness absence in late 2016, failing to ensure that the claimant received a prompt appointment with Occupational Health and failing to chase Occupational Health on the respondent's own initiative;

2.14. lying to the claimant on 22 December 2016 about action taken against other employees of the respondent following altercations with customers and in particular their actions in respect of the claimant's husband; and

2.15. failure to give timely answers to a series of four questions posed by the claimant on 5 January 2017.

3. The issues for the Tribunal to determine were as follows:-

3.1. whether the conduct described above was calculated or likely to destroy or seriously damage the relationship of trust and confidence;

3.2. whether the respondent had reasonable and proper cause for such conduct;

3.3. whether the claimant resigned in response to the alleged breach of trust and confidence; and

3.4. whether in the meantime the claimant affirmed the contract.

4. In her witness statement the claimant made some criticisms of the respondent that do not appear in the list set out above. So far as these were allegations of conduct undermining trust and confidence, I was unable to attach any significant weight to them. I considered them as being potentially relevant to the allegations that did appear in the claim form but I did not treat them as allegations of conduct which contributed to the breakdown in trust and confidence. This was for two

reasons. The first was procedural. The claimant's husband confirmed at the start of the hearing that the conduct on which the claimant relied was that set out in the claim form. It was on this basis that the respondent conducted the hearing. The other reason was evidential. It appears to me that, had a particular episode of conduct materially influenced the claimant's decision to resign, she would have referred to it in her very full narrative that at the time of presenting her claim.

Evidence

5. I considered documents in an agreed bundle which, by the end of the hearing run to 462 pages. I concentrated chiefly on those documents to which the parties had drawn my attention, either by referring to them in their witness statements or mentioning them orally during the course of the hearing.

6. The claimant gave oral evidence on her own behalf. Witnesses giving oral evidence for the respondent were Mr Edwards, Miss Hatia, Mr Clarke, Mr Johnston, Ms Marsh and Mrs Graham.

7. In his written closing submissions, Mr Murphy invited the tribunal to follow a link to a YouTube page. According to Mr Murphy, the YouTube page would show CCTV footage of an incident in February 2015. That incident is described in more detail below.

8. I decided not to look at the footage. My reasons were essentially twofold:

   8.1. The footage was not sufficiently relevant. The only issue to which I thought the footage could be relevant would be the allegation that the claimant's oral warning in December 2016 had been inconsistent with the lack of action taken against her husband in February 2015. Mr Murphy wanted to make the point that he had twice punched a customer and yet nothing had been done except to ask if Mr Murphy was alright. But, on Mr Murphy's own description of the footage, it did not actually show punches being thrown and landed, merely Mr Murphy drawing back his arm in readiness to punch. As set out below, Mr Murphy's own incident report form made no mention of punches being thrown. What is more, on Mr Murphy's description of the footage, he was using force in self-defence to restrain a violent customer. That is different from what the claimant did in December 2016. As will be seen below, the claimant, when faced with an obnoxious and aggressive customer, potentially inflamed the situation by calling him a rude name. Judicial consideration of the CCTV evidence would not overcome the claimant's essential difficulty, which is that she is not comparing like cases with like.

   8.2. Mr Murphy was asking me to look at previously unseen evidence after the oral evidence of the witnesses had been completed. The oral warning was given by Mr Clarke and upheld by Mr Johnston on appeal. If there was going to be an allegation that the claimant's oral warning was unfairly harsh in the light of the CCTV footage of Mr Murphy's behaviour, that allegation should have been put to Mr Clarke and Mr Johnston so they could comment on it. In my view it would be completely disproportionate to reconvene the tribunal hearing to enable that exercise to be carried out.

Facts

9. The respondent is a large mobile phone network provider trading as "Three".

10. The claimant was employed by the respondent from 31 January 2011 until she resigned on 7 February 2017. From 1 January 2014 she worked as a Store Manager. At the time with which this claim is concerned, the claimant's store was in Ashton-under-Lyne.

11. The claimant's husband Mr David Murphy, is also a former employee of the respondent. His employment ended at some point during the summer of 2016.

12. From November 2013 until October 2016, the claimant reported to the Area Manager, Mr Nick Edwards. For most of that time, they had a good working relationship. In December 2015, for example, Mr Edwards recognised the claimant's work by nominating her "Store Manager of the Month". The award was deserved. The claimant was a good Store Manager and, in her own words, "never had a bad store visit".

13. The claimant's husband and Mr Edwards were not only work colleagues, but good personal friends. All three of them were "friends" on Facebook, as were many more junior work colleagues. From time to time the three of them, including Mr Edwards, would post statuses using swear words.

14. The claimant's employment with the respondent was governed by a number of policies and procedures. These included an Occupational Health Policy dated 3 March 2016. The policy prescribed a list of trigger points for an automatic referral to occupational health, one of these was one day's absence with stress, depression or anxiety. The respondent's occupational health provider, Duradiamond, was required to make contact with the employee within two working days of the referral to arrange a telephone consultation appointment. The employee's line manager was responsible for tracking and managing occupational health reports using the OH Portal. This was required to be done with support from Employee Relations (Human Resources).

15. Another written procedure of the respondent related to reports of abuse from members of the public. A prescribed Abuse Report Form was required to be used by all employees to report all incidents where staff had been abused either verbally or physically or had been threatened by members of the public within the respondent's stores. The Abuse Report Form was required to be submitted within 24 hours of the incident.

16. The respondent had a written Disciplinary Policy. Where a disciplinary hearing was convened, the policy required that the affected employee should receive a copy of all documentation to be referred to at the disciplinary hearing in advance. The outcome of the disciplinary hearing would, according to the policy, be issued "usually within seven calendar days of the disciplinary hearing".

17. In November 2015, the respondent issued written Social Media Guidelines. The Guidelines included a list of "Do's and Don'ts". Under the list of "Don'ts", was having "visible abusive/offensive language, imagery or video content on any of your social media pages".

18. On 9 May 2016, the respondent introduced a new Retail Bonus Plan. The plan was stated to be effective from October 2016. Amongst other things the plan indicated how disciplinary sanctions should affect an employee's bonus. Where an employee was suspended, the rubric stated that the respondent "may" withhold bonus during the period of suspension. It continued, "If the disciplinary matter results in a formal warning the following sanctions will apply:…verbal warning - 50% of bonus withheld …."

19. The word "will" in the above sentence contrasted with the word "may" in the preceding sentence dealing with suspension. The clear meaning of the plan was that there would be no room for discretion if an employee was given an oral warning; their bonus would automatically be cut in half.

20. Between October 2016 and 23 March 2017, 33 employees of the respondent had their bonuses withheld or reduced under the terms of the Retail Bonus Plan.

21. On 13 February 2015 an incident took place between the claimant's husband and an irate customer. According to Mr Murphy's Abuse Report Form, the customer had been rude and aggressive and had failed to heed requests to leave. Mr Murphy placed his hands on the customer and attempted to push him back to the door with light force. At this point the customer threw his arms at Mr Murphy who grabbed the customer in order to defend himself. Eventually, with the assistance of a colleague, the customer was manhandled to the floor. There was no suggestion that Mr Murphy or anybody else had hit the customer.

22. In January 2016 Mr Murphy was suspended as part of a disciplinary investigation. His suspension had nothing to do with the 2015 incident with the customer. Rather, it was part of an investigation codenamed Operation Bellamy. In March 2016 Mr Murphy received a final written warning. I do not have to decide whether the action taken against Mr Murphy was justified or not.

23. As a result of Bellamy, a number of employees besides Mr Murphy were also given disciplinary warnings. Some of these warnings were given after the introduction of the Retail Bonus Plan. Despite the apparently mandatory wording of the plan concerning the impact of disciplinary sanctions, a decision was made that the relevant employees' bonuses should not be affected. This was because the Operation Bellamy investigation had begun before the Retail Bonus Plan was introduced. It was thought that employees might consider it unfair to be penalised financially for their conduct under a scheme that was not in place at the time when that conduct occurred.

24. The claimant was absent from work on sick leave from 20 February 2016 until 18 April 2016. Mr Edwards made a prompt referral to Occupational Health and, in due course, received a report. Alarmingly, the report referred to the claimant having engaged in self-harming behaviour. She was, however, subsequently signed fit for work.

25. Two telephone calls took place between Mr Edwards and the claimant on the day of the claimant's return to work. Each lasted in excess of twenty minutes. There is a dispute as to whether, on that day, Mr Edwards conducted a return-to-work (RTW) interview with the claimant. I am satisfied that he did. Mr Edwards entered relevant information onto a template RTW discussion form and saved the completed document as a Microsoft Word file. A recent screen shot from Mr Edwards' computer shows that a Microsoft Word document was last modified shortly after 5pm on 18 April 2016. At the time of taking the screenshot, the filename of that document corresponded to the RTW discussion document in the bundle. The claimant alleges that the Word document is a recent fabrication. It is her case that Mr Edwards manipulated Microsoft Word to give the appearance that the RTW form was the same document as the file that had been modified on 18 April 2016. I reject that contention. Assuming in the claimant's favour that such a subterfuge were technically possible, it does not get around the fact that the claimant and Mr Edwards had two lengthy conversations on that day. The most likely topic would have been arrangements for the claimant's return to work.

I also find that Mr Edwards' actions during the spring of 2016, for example arranging an occupational health referral, were generally supportive and consistent with him having discharged his responsibilities conscientiously on 18 April 2016.

26. Following Mr Murphy's suspension, the personal friendship between himself and Mr Edwards began to deteriorate. As 2016 wore on, the ripples from that breakdown began to be felt by Mr Edwards and the claimant in their working relationship.

27. In July 2016 Mr Edwards conducted a half year review with the claimant. Amongst other things they agreed that Mr Edwards would concentrate on his line management relationship with the claimant and put aside any issues with the claimant's husband. This was easier said than done, because the claimant's husband was using social media to express his support not just for his own cause but for colleagues caught up in Operation Bellamy.

28. In about August 2016, Mr Edwards saw a Facebook post from Mr Murphy which he regarded as unpleasant. It stated "someone shat on three people, I've got enough to bury them twice over". From the context of the post, Mr Edwards believed that the post referred to him. He telephoned the claimant and asked her what Mr Murphy was up to. The claimant replied that she did not want to get involved. Shortly afterwards, Mr Edwards removed a number of friends from his Facebook account. These included the claimant. He included others who were connected to Mr Murphy. Some colleagues at the Ashton store remained Mr Edward's Facebook friends. Mr Edwards informed the claimant of what he had done in a text message. He added "FYI not personal".

29. On 23 September 2016, Mr Edwards attended the Ashton store to carry out a store visit. The claimant was not present. Mr Edwards carried out the visit in her absence. Although his findings were generally positive, he was unable to complete his inspection, as he could not find all the required written reviews and Personal Development Plans. In his report, Mr Edwards highlighted the need to discuss these documents and recommended a follow-up visit in October.

30. The reason why the claimant was absent for the store visit was because she had gone to see her doctor. She had been upset by the "FYI not personal" message from Mr Edwards. As she saw it, Mr Edwards had singled her out for removal as a Facebook friend.

31. At 11.25 that morning, the claimant emailed Nicola Marsh, Head of Region, to complain about Mr Edwards. Her email was copied to Human Resources. Within about ten minutes of receiving the email, Ms Marsh telephoned the claimant, seeking to reassure her that Mr Edwards was trying to be supportive. She offered to mediate between the claimant and Mr Edwards. Ms Kate Smith of Human Resources also emailed the claimant offering to assist. The claimant replied to both. Her email stated that she was happy to resolve things with Ms Marsh. She wanted to be "in the right place" before she could speak directly to Mr Edwards. Ms Marsh followed up this exchange on 26 September 2016 outlining the claimant's options and renewing her offer of mediation.

32. On 26 September 2016, in the Manchester Arndale Shopping Centre, Mr Murphy and Mr Edwards had a long conversation in an attempt to clear the air. Following that conversation, Mr Murphy sent Mr Edwards an email raising various points of concern arising out of their conversation. The email concluded that Mr

Murphy thought he had grounds to take formal action but that he would not do so because "I do not want to cause you further issues". Rightly or wrongly, Mr Edwards took this statement to be an implied threat.

33. On 29 September 2016, just before Mr Murphy sent his email to Mr Edwards, the claimant attended a Store Managers' meeting with Mr Edwards and approximately 14 other Store Managers. At the end of the meeting, Mr Edwards took the opportunity to take the claimant to one side. He spoke to her in the corridor as other managers were leaving the room. He reiterated that he did not want issues with Mr Murphy to interfere with his management relationship with the claimant. The conversation turned to the removal of the claimant from Mr Edwards' Facebook friends, which in turn led to a discussion of previous posts that the claimant had placed on Facebook. Mr Edwards warned the claimant that she needed to think about the impression that she was giving, especially to people working in her store. The claimant started crying and left.

34. There is a dispute as to whether, during this conversation, Mr Edwards attempted to trap the claimant in the corridor or not. I am satisfied that that was not Mr Edwards' intention. Having said that, it was not appropriate for Mr Edwards to attempt such a sensitive conversation in a public place such as the corridor.

35. Following receipt of Mr Murphy's email, Mr Edwards informed Ms Marsh that he was struggling to manage the claimant's sales area. It was agreed that Mr Edward should be transferred to a different area. Line management of the claimant would temporarily be carried out by Miss Hatia, Lead Store Manager.

36. At the beginning of October 2016 Ms Murphy was informed that the claimant had made a number of posts on Facebook that gave cause for concern. Amongst the posts were:

    36.1. "This is going too far now annoyed isn't the word why the fuck is everyone so fucking interested what goes on with the Murphy's, get a fucking life!!!!! No one and I mean no one decides who your friends are. Put it this way if people don't come for fear of being told off. Then grow a pair of fucking balls WE ARE YOUR FRIENDS not the people preaching".

    36.2. Two sentences which might have been originally posted by someone other than the claimant, but which had been adopted in the claimant's Facebook status: "This fucking blue line will be the death of me today. Stupid slow fucking systems" Underneath these words was a partial screenshot of a retail computer system. Ms Murphy had apparently added to the post, "just thought I'd jump on this wagon today as today is another day of giving no fucks".

37. At the time the comments were posted, the claimant's Facebook friends included more junior colleagues at the Ashton store.

38. Ms Murphy was not friends with the claimant on Facebook and had not seen any of the claimant's contributions until the above posts were shown to her. She decided that she could not ignore them. She had never before challenged a colleague on their use of social media, so this was new territory for her. In her opinion, the best way to tackle the issue would be for Miss Hatia to hold a documented conversation, called a Record of Discussion ("ROD"), with the claimant. RODs sat outside the formal disciplinary procedure, but served to create a record of the respondent's expectations having been communicated to the employee concerned. Accordingly, on 10 October 2016, Ms Marsh emailed

Miss Hatia asking her to have an informal chat with an ROD. The tone of the email was one of drawing "a line in the sand" at the same time encouraging the claimant to achieve her "personal best moving forward".

39. Meanwhile, arrangements had been made for the October follow-up store visit recommended in Mr Edwards' report. The scheduled date was 11 October 2016, the day after Ms Murphy's e-mail. Miss Hatia decided to kill two birds with one stone. She would start with the ROD and move on to discuss the business of the follow-up store visit.

40. Neither Miss Hatia nor Ms Marsh informed the claimant of the proposed ROD before Miss Hatia's arrival. When Miss Hatia arrived in store on 11 October 2016, the claimant was expecting to discuss Personal Development Plans. Instead, Miss Hatia started politely challenging her about her use of Facebook. The claimant reacted angrily. She told Miss Hatia that she felt the ROD was a personal attack on her and the examples Miss Hatia had given were somebody's way of getting back to her and wanting to hurt her. When shown the actual posts, the claimant became emotional and left the store, saying she was going home due to the stress and anxiety it was causing. By this time she was actually crying. After a short while, Miss Hatia telephoned the claimant who, by that time, was sitting in her car. Eventually the claimant agreed to resume the discussion face to face. She did not want to return to the store. Miss Hatia decided, without objection from the claimant, to resume the ROD inside the claimant's car. Miss Hatia pointed out the social media guidelines of which the claimant said she was unaware. She was adamant that she had done nothing wrong. In particular it was her standpoint that the posts had nothing to do with work. She agreed to make her account private but stressed that she would "continue to be me".

41. On 14 October 2016, the claimant was present in the Ashton store with Sales Associate, Kelsey Wilkinson. Shortly after the store opened, a young man in his twenties entered the store. The purpose of his visit is not entirely clear, but on any view the customer was not satisfied. He began talking to the claimant, who was sitting at a desk. In broad terms I accept the claimant's account of what happened. The claimant attempted to explain to the customer that the problem had been resolved and that she did not know what else the customer wanted her to do. The customer shouted, "Get off your lazy fat arse you lazy bitch and do your job", adding something along the lines of, "Watch your back". In retaliation, the claimant called the customer a "dickhead". The heated conversation lasted several minutes. Owing to the layout of the store, the claimant did not have an easy route to get away from the customer. The claimant was conscious of this fact and felt intimidated. Eventually the customer left. According to the version later given by Ms Wilkinson, he called the claimant a "fat slag" on his way out.

42. There is one aspect to the claimant's version of the incident that I do not accept. For reasons that will become clear later in this judgment, I do not believe that the customer made a threat to kill the claimant, or that the claimant understood the customer's words as a threat to kill at the time.

43. The claimant was, understandably, quite shaken by the incident. She remained at work the rest of the day and then went on holiday. She did not return to work until 24 October 2016. At no point before going on holiday did the claimant submit an Abuse Report Form. Nor did she report what had happened to Miss Hatia. I accept the claimant's explanation for not speaking to Miss Hatia: she had

been upset by her encounter with Miss Hatia on 11 October and was wary of embarking on another potentially difficult discussion with her. Nevertheless the claimant's silence made it impossible for the respondent to launch a prompt investigation into the customer's behaviour.

44. Unknown to the claimant, the customer made a complaint about the claimant at 1.40pm on 14 October 2016. The complaint was received by the respondent's Customer Relations Team in Glasgow, who forwarded the complaint to Mr Edwards. By this time, of course, Mr Edwards had moved to a different area. The most likely explanation for Mr Edwards being the recipient of the email is a delay in updating the records to reflect the change of Area Manager. Mr Edwards passed the email to Miss Hatia. A decision was taken (I am not sure by whom) to commence a formal investigation. Mr Alexander Holmes, Lead Store Manager, was appointed as Investigator. The claimant was invited to an investigation meeting which took place on 3 November 2016. This was ten days after the claimant's return from holiday.

45. At the investigation meeting, the claimant confirmed essentially the version of events set out above. The claimant recognised that she had used "cross words" and that her behaviour was not professional. She made a number of comments suggesting that there were two reasons why she had reacted as she had. One was that she felt threatened by the fact that the claimant was a young man and that she had no easy escape route. The other reason was that the customer had made a personal attack on her about her appearance.

46. Ms Wilkinson was interviewed the same date. She described the customer as having been rude and shouting. She was not able to relate the entire conversation, but recalled the customer's "fat slag" insult.

47. By letter dated 15 November 2016, the claimant was invited to a disciplinary meeting to take place on 18 November 2016. The purpose of the meeting was to consider an allegation that the claimant had displayed inappropriate behaviour on the shop floor towards a customer, specifically, by using inappropriate language. A subsidiary allegation was that the claimant had failed to follow the incident reporting procedure regarding the incident. The letter warned the claimant that she could face any disciplinary sanction up to and including dismissal. Enclosed with the letter were a copy of the disciplinary policy and the notes of the claimant's meeting with Mr Holmes. The notes of Ms Wilkinson's interview were not included.

48. Appointed to chair the disciplinary meeting was Mr Roy Clarke, Lead Store Manager. It was Mr Clark's decision to leave out Ms Wilkinson's interview record. He did not think that Ms Wilkinson's interview was relevant, because, in his view, it added nothing to the claimant's own version of events. The claimant had vividly described the customer's behaviour and had admitted that she had called the customer a "dickhead".

49. The claimant replied to the invitation letter by email on 15 November 2016. The email took issue with the notes of the investigation meeting. In particular she challenged the assertion that she had stated that she did not fear that the customer was going to hit her. Her email claimed that she had said the opposite. She also requested copies of the enclosures because she had been unable to open the attachments. She also requested notes of Ms Wilkinson's interview. On receipt of the claimant's reply, Mr Clarke agreed to reschedule the interview and sent the attachments in different format, this time including the notes of Ms

Wilkinson's interview. The meeting then had to be further rescheduled to accommodate the claimant's chosen companion. It finally took place on 30 November 2016.

50. At the rescheduled disciplinary meeting, the claimant was accompanied by Ms Saf Benabbas, Store Manager at Stockport. Notes were taken by Mr Banforth. The claimant gave an account of the incident consistent with her previous version. Again, the claimant recognised that she should not have reacted to the customer's insults by calling him a "dickhead". She stressed repeatedly that she had been scared, but also made clear her indignation at having been insulted about her weight. She explained that she did not submit an incident report form because incidents of customers' bad language were so common place she would not have time to record every incident.

51. At no point during the disciplinary meeting did the claimant ask Mr Clarke to step aside or suggest that his involvement with her husband would prevent him hearing the case fairly. Nor did the claimant draw Mr Clarke's attention to any incidents between other customers other employees who had gone unpunished.

52. Mr Clarke adjourned the meeting for just over one hour. During that time he shared his thoughts with Mr Banforth, the note taker, but the decision was Mr Clarke's alone. Mr Clarke accepted the claimant's version of events. Acting on advice from human resources, Mr Clarke was aware that other cases of inappropriate language from staff towards customers had been visited with a written warning. In this case, however, Mr Clarke believed that a lesser sanction was appropriate. This was because of the customer's aggressive nature and the insults and threats he had aimed at the claimant. He also took account of the claimant's general mitigating circumstances, in particular the difficulties she had experienced with Mr Edwards. His overall decision was that the claimant should receive an oral warning. This sanction was communicated to the claimant when the meeting re-convened. At the close of the meeting, Mr Clarke informed the claimant that she had the right of appeal within seven calendar days of receipt of the letter confirming the meeting outcome.

53. On 2 December 2016, Mr Clarke emailed the minutes of the disciplinary meeting to the claimant. The claimant replied on 7 December 2016. Her email was copied into People Assist, a branch of Human Resources. Her email announced an intention to appeal. The main ground of appeal at that stage appeared to be that she was legally entitled to defend herself verbally when in fear of violence. She asked for confirmation that she would be paid her full bonus. She also chased Mr Clarke's letter confirming the outcome of the disciplinary meeting.

54. Mr Clarke replied the following day. He apologised for the delay in sending out the confirmation letter and emailed a copy. As for the bonus, Mr Clarke indicated that the bonus would be withheld owing to the disciplinary sanction. In answer to a further query, Mr Clarke provided the claimant with a link to the policy which explained the rationale for reducing the bonus.

55. On 9 December 2016 the claimant began a period of sickness absence. It is not clear what reason the claimant initially gave, but her subsequent GP Fit Notes cited stress at work.

56. At 12.28 pm on 9 December 2016, Mr Adam Johnston, Area Manager (Northern Ireland), made an online referral to Duradiamond, the respondent's occupational health provider. Mr Johnston was temporarily covering of Area Manager for the

claimant's area. The same day, Mr Johnston and the claimant exchanged instant messages on their phones. The claimant stated that, if it was not for financial commitments, she would just resign. Uppermost in the claimant's mind at this time was her oral warning and its impact on her bonus. Mr Johnston replied expressing his sympathy and asking if there was anything he could do to support her. He made clear that his priority was the claimant's health. He followed up the exchange on 12 December 2016, the following Monday. He asked how the claimant was feeling. The claimant expressed her appreciation for Mr Johnston's enquiry.

57. In the meantime, the claimant prepared a lengthy written appeal against the disciplinary sanction. Her appeal was dated 11 December 2016. In her letter she made a number of points including the following:-

    57.1. the customer "stood over me threatening me with my life, literally and also calling me names that nobody should be subjected to";
    57.2. she had "every right to call the customer a dickhead";
    57.3. "in the event that this sanction is not removed and I am not paid my full bonus I will be resigning from my role and immediately filing for constructive dismissal";
    57.4. "also, in the event that this sanction is not removed, I will also be lodging the incident with the Police …".

58. This phrase suggested to the respondent that the claimant was using the prospect of involving the police as a lever to persuade the respondent to overturn her oral warning. Whether this was actually the claimant's motive or not we did not find it necessary to determine. It does, however, help to explain why, at this stage, the respondent did not think it appropriate to report the issue to the police themselves.

59. The claimant highlighted what she saw as an unfair inconsistency between the reduction of her bonus and the treatment afforded to her husband earlier in the year. Mr Murphy had received a final written warning and yet his bonus had been unaffected. She attached a screen shot of Mr Murphy's invitation to a disciplinary hearing dated 4 March 2016. The date of the invitation helps to explain the difference in treatment. The Retail Bonus Plan was not in force at that time.

60. The claimant was invited to an appeal meeting which took place on 22 December 2016. In advance of the meeting, the claimant was provided with the full text of the email from the Customer Relations Team outlining the customer's complaint.

61. Mr Johnston flew to Manchester from Northern Ireland to hear the claimant's appeal. Notes were taken by Mr Wilkinson. The claimant was accompanied by Ms Benabas. The meeting lasted 98 minutes.

62. During the meeting the claimant drew Mr Johnston's attention to the February 2015 incident in which Mr Murphy had physically manhandled a customer. She told Mr Johnston that her husband had punched the customer in the face and nothing had been done. Later in the meeting, she said that Mr Murphy had struck the customer twice and had never been spoken to by anyone from the

company. She posed the rhetorical question "which one is worse?". By this question, the claimant was clearly implying that it was unfair that she should receive a warning when a colleague (who happens to be her husband) had got away scot free with “worse” conduct. Mr Johnston was not prepared to be drawn. He said that he was not "here to discuss any other confidential case", adding later in the meeting, "I can't comment on [Mr Murphy's] case as I have no knowledge of it". Part way through the meeting Mr Murphy emailed Mr Johnston to confirm that on 13 February 2015 he had punched the customer twice during a “severe altercation” in which he had had to use physical force.

63. This brings me to a factual dispute. Did Mr Johnston say that there had been an investigation into Mr Murphy’s February 2015 encounter? I accept that, following the meeting, the claimant believed that that was what she had heard. Within hours of the meeting, Mr Murphy sent an e-mail alleging that Mr Johnston had said that he (Mr Murphy) had been investigated and action had been taken. His e-mail sought confirmation that no investigation had in fact taken place and that Mr Johnston had been lying. Nevertheless, I prefer Mr Johnston’s evidence that he did not say that there had been an investigation into Mr Murphy’s conduct. It does not fit with the rest of the minuted meeting. Mr Johnston was saying that he did not know the circumstances of what happened to Mr Murphy. Those parts of the meeting minutes were not challenged. The claimant later made suggested alterations to other parts of the minutes, but did not dispute that Mr Johnston had said that he did not know about Mr Murphy’s case.

64. During the course of the meeting, Mr Johnston made clear to the claimant that he was not disputing her version of the customer's behaviour. He indicated that such behaviour was not acceptable. As he explained, however, he was more concerned about whether the claimant's own behaviour had been reasonable and appropriate.

65. Mr Johnston asked the claimant a number of questions about her failure to report the incident once it had occurred. The claimant replied that she had previously filled in an abuse report form but she had received no support. When asked why she had not informed her then Line Manager Miss Hatia, the claimant replied that there had been "no love lost" between them.

66. Towards the end of the appeal, the claimant said, "regardless of what this outcome is …. It’s time for me to go as I've had enough".

67. During the appeal meeting the claimant did not mention any other specific incident involving an employee escaping disciplinary sanction for rudeness or other behaviour towards a customer. Nor did the claimant mention the lack of contact from Duradiamond, despite the fact that Mr Johnston was acting as the claimant’s line manager. She did not suggest that Mr Clarke should not have chaired the disciplinary hearing.

68. Later that day Mr Wilkinson emailed the draft minutes of the appeal meeting to the claimant. The claimant made various amendments which Mr Johnston accepted. The minutes were agreed on 23 December 2016.

69. By 28 December 2016, Mr Johnston had drafted his outcome letter. His decision was to uphold the oral warning given to the claimant. He took into account that the claimant had been provoked. He did not, however believe that the claimant had felt physically threatened. He noted the contradiction between various statements made by the claimant that her behaviour had been reasonable and other statements acknowledging that her remark had been “unprofessional” and “not acceptable”. Those latter two admissions coincided with Mr Johnston's own view. The claimant was a leader in the business who should be setting an example. The extent of the customer's provocation was a matter that had already been taken into account when reducing the sanction from written warning to oral warning. In Mr Johnston's view, the fact of the claimant's case and those of her husband were totally different. Mr Murphy had not sworn at the customer. On the claimant's version, he had used physical violence which Mr Murphy claimed was reasonable force during a "severe altercation". As for the bonus, Mr Johnston accepted that the reason why Mr Murphy's bonus had not been reduced was because he had been given his final written warning before the new retail bonus plan had been introduced. The outcome and Mr Johnston's reasons for it were communicated to the claimant by letter dated 29 December 2016.

70. This is a convenient opportunity to address two criticisms made of Mr Johnston in connection with the appeal decision. The first is that, in his witness statement, Mr Johnston stated that the claimant had not mentioned in her appeal letter that the customer had threatened to kill her. This was plainly incorrect. To my mind it betrays an error in Mr Johnston's reasoning. He mistakenly thought at the time of deciding his appeal that the claimant was telling him that she did not feel physically threatened. In my view, this error did not affect the fairness of the appeal outcome. Had Mr Johnston spotted the reference in the appeal letter to a threat to kill her, he would have been quite entitled to wonder why the claimant had never mentioned it before. According to the claimant's earlier accounts, the customer had made a veiled threat ("watch your back"), but had never "literally" threatened to kill her. Second, if the claimant was fearful of her own safety, it is unlikely that she would have wanted to antagonise the customer further by insulting him. The second criticism of Mr Johnston is that he failed to see the inconsistency between management response to Mr Murphy punching a customer and warning given to the claimant for bad language. On the basis of the information given by the claimant and Mr Murphy, that criticism would have some force. Knowing, however, what Mr Murphy himself reported at the time of the February 2015 incident, it is clear that there is no similarity at all. Mr Murphy did not say he had punched the customer. Had he done so he would have made that clear in his report at the time. Mr Murphy's customer was far more physically aggressive than the claimant's customer. Mr Murphy's response was to push the customer gently towards the door. There is no evidence of any customer complaint. There was no misconduct to investigate.

71. By 30 December 2016, the claimant had still not been offered an appointment with Occupational Health. Despite being in regular contact with Mr Johnston, she had not drawn this fact to his attention. For his part, Mr Johnston had not proactively monitored the Occupational Health Portal to check that an appointment had been offered. Both Mr Johnston and the claimant had allowed

the matter to drift. Mr Johnston at this time did not know about the claimant's history of self-harming.

72. The claimant was extremely disappointed with the outcome of her appeal. On 29 December 2016, the claimant emailed Mr Johnston, copied to Ms Marsh and the Chief Executive, David Dyson, to express her dissatisfaction. According to her email, "the one and only part that you should have based your decision on … was the fact that it was "reasonable" within UK law for me to say what I did irrespective [of] any Three expectations". She stated that she was not in a financial position to resign, but had no confidence in the respondent at all, and was ashamed to be employed by them. The letter announced her intention to raise a grievance and expressed the hope that she would not have to return to work for the respondent.

73. The next morning, 30 December 2016, Ms Marsh had a meeting with Mr Johnston. At this meeting Mr Johnston mentioned that the claimant did not appear to have had her Occupational Health assessment yet. Ms Marsh therefore emailed the claimant to check whether occupational health had made contact. The claimant replied the same day with a number of criticisms of what she perceived to be a lack of support from Ms Marsh. She confirmed that occupational health had not made contact and complained of the delay. Worryingly, the claimant's email referred to her history of "self-harming", adding that Mr Edwards and Occupational Health had previously been informed of this tendency.

74. On Bank Holiday Monday, 3 January 2017, Mr Johnston emailed Duradiamond requesting an update on the progress of the claimant's case. On 4 January 2017 he received an apology from Duradiamond together with an explanation that their booking team had not been informed of the referral. A telephone call was immediately made to the claimant from occupational health. Unfortunately the claimant was unable to take the telephone call, they did, subsequently however, make contact and an occupational health assessment was arranged to take place on 10 January 2017.

75. On 5 January 2017, the claimant reported the incident with the customer to the Police. She informed Mr Johnston of the crime reference number and posed four questions to Mr Johnston to which she required an answer. The questions were:-

    (1) Have you or has anyone barred the customer from the store or Three premises?

    (2) Have you or has anyone informed the Police of the incident?

    (3) Has the customer been aware of what me and Kelsey have stated and has he been given the chance to apologise?

    (4) Has anything at all been done by yourself or anyone at Three to ensure that the customer knows that his behaviour was unacceptable and will not be tolerated?

76. On 3 January 2017, Mr Johnston emailed the claimant to inform her of his efforts to chase occupational health. He asked the claimant if she needed any further information from the respondent to help her pursue her enquiry with the Police. He also informed the claimant that he had contacted the Health and Safety Team who would be in touch in relation to conducting a stress risk assessment with the claimant. The claimant replied the same day. Her email stated that she was not willing to return to the Ashton store irrespective of what the Health and Safety Team said. Mr Johnston's reply on 4 January 2017 attempted to leave open a potential discussion about adjustments that could be made to enable the claimant to return to the Ashton store.

77. Mr Johnston telephoned the claimant on 6 January 2017 to discuss her list of questions. The claimant told Mr Johnston that she was "never going to be in a good place" with the respondent, and that she did not think that it was a place for her to be. Mr Johnston promised the claimant that he would look into the claimant's four questions and revert to the claimant as and when he received a response. He warned that this process might take some time, measurable in days or possibly a week. They agreed that they would have a further conversation in one week's time. By this time, unknown to the claimant, Mr Johnston had already emailed the Retail Crime Team, copied into Human Resources and Ms Marsh, repeating the claimant's four questions and asking for support. Following his telephone conversation with the claimant, Mr Johnston completed a retrospective Abuse Report Form. His covering email stated "my request is that the customer is banned from the Ashton store and is made aware that his behaviour is not acceptable and will not be tolerated in any of our retail stores". Mr Johnston also spoke to a police officer that day. Mr Johnston's e-mail was not copied to the claimant. She did not discover its existence until after she resigned. Knowing that Mr Johnston had specifically asked for the customer to be banned would have given her some reassurance.

78. On 9 January 2017, the claimant emailed Mr Johnston to chase replies to her four questions. The same evening, Mr Johnston emailed Ms Marsh with his thoughts.

79. In the meantime, on 6 January 2017, Ms Marsh emailed the claimant to enquire after her health and to wish her a happy new year. The claimant replied the same day. She engaged with the claimant's criticisms of Ms Marsh's support for the claimant. She offered to discuss the claimant's concerns about the individuals mentioned in the claimant's email. If the claimant felt unable to resolve those concerns on an informal basis, Ms Marsh invited the claimant to follow the grievance resolution process. The claimant replied the same evening. Her email stated that she had been "completely failed" by the respondent and that she did not feel that she could return to her role, adding that she felt that she would "never be able to trust in Three again". Later in the email the claimant indicated that she was trying to make financial arrangements to allow her to resign and would be resigning very soon.

80. On 12 January 2017, the claimant repeated the contents of her 6 January 2017 email to Ms Murphy, this time pasted in to an email to Mr Dyson. This email stated, "I feel that I now have no choice but to resign as I have been completely failed by Three throughout this whole literal nightmare".

81. On 13 January 2017, during their weekly telephone call, Mr Johnston gave the claimant a response to her four questions based on the information so far available. Mr Johnston did not spell out to the claimant that he had asked for the customer to be banned from the Ashton store. He told the claimant that he had spoken to a police officer on 6 January 2017.

82. The claimant's e-mail to Mr Dyson was forwarded to Ms Murphy. She had already responded to the claimant's 6 January 2017 e-mail which made up the bulk of the e-mail to Mr Dyson. Ms Murphy was, however, concerned about the "no choice but to resign" comment. On 13 January 2017, Ms Murphy e-mailed the claimant, asking her, "Please confirm if you want us to accept this as your formal resignation?" Although not one of the allegations set out in the claim form, the claimant contended in her witness statement that Ms Murphy's reply was "Literally unbelievable and totally and utterly not the right approach." I disagree. The claimant's e-mail to Mr Dyson was easily capable of being interpreted as her resignation. It was important for Ms Murphy to clarify whether the claimant truly intended to take such an important step. Ms Murphy's question, taken out of context of the rest of her e-mail, might be seen to be unsympathetic. But the full e-mail shows that Ms Murphy was in fact trying to support the claimant.

83. At 1.35am on 16 January 2017, Mr Murphy e-mailed Mr Dyson and Ms Marsh and others with alarming news about the claimant. He had found her self-harming. His e-mail repeated many of the complaints that the claimant had made up to that point and pressed for an answer to her 4 questions by 26 January 2017.

84. On 18 January 2017, the claimant submitted a further GP fit note stating that she was unfit to work for a further 2 weeks because of stress.

85. On 13 and 19 January 2017, various managers, including Mr Jastrzebski, Mr Wilson, Ms Kidd and Ms Lynsey Graham, Employee Relations Manager, exchanged e-mails on the subject of action to be taken against the customer who had insulted the claimant on 14 October 2016. The prevailing view was that it would be inappropriate to ban the customer from the Ashton store because of the delay in reporting the incident.

86. On 20 January 2017, Ms Graham e-mailed the claimant with answers to her four questions. Her e-mail explained:

    86.1. That the claimant's incident report had been passed to "legal" from the Retail Crime Team, but it was unlikely that the customer would be banned because of the delay in reporting it.

    86.2. That Ms Graham was aware of the claimant having reported the customer to the police and that Retail Crime had made contact with the police directly and that Mr Johnston was "helping with their enquiries".

    86.3. That, in answer to the claimant's enquiry about seeking an apology from the customer, the incident report was currently with "legal", but because of the delay it was unlikely that any further action would be taken.

    86.4. That the same answer applied to the claimant's question about ensuring that the customer knew that his behaviour was unacceptable.

    The e-mail went on to express concern for the claimant's health and to offer confidential support from the Retail Trust.

87. The same day, the claimant's husband attempted to enter into e-mail correspondence with Ms Graham, chasing acknowledgement that there had never been any investigation into his own February 2015 customer incident. Ms Graham would not be drawn.

88. On 22 January 2017, the claimant's husband e-mailed Ms Graham once more. The varying font size and wording of the e-mail gave the impression of a man in some distress. He gave details of a self-harm attempt made by the claimant in 2015 and made clear how difficult the claimant's illness was for him to witness.

89. On 25 January 2017 the claimant and Ms Graham exchanged several e-mails. During the course of the e-mail conversation the claimant made clear that she had lost all trust in the respondent and was thinking of resigning that day. She referred alarmingly to an incident the evening before where she had had further thoughts of self-harm. Ms Graham strongly recommended that the claimant should visit her doctor.

90. Later that afternoon, the claimant e-mailed a lengthy grievance document to Ms Graham. In her grievance she raised the following complaints (in the order in which they appeared in the document):

    90.1. Targeting and punishing her for defending herself within the law;

    90.2. Lack of support and care since 14 October 2016;

    90.3. Harassment by Mr Edwards, including the conversation in the corridor;

    90.4. Ms Hatia's store visit on 11 October 2016;

    90.5. Inconsistent treatment in disciplining her and withholding her bonus following the 14 October 2016 incident;

    90.6. Failure to provide Ms Wilkinson's statement as part of her initial disciplinary pack;

    90.7. Delay in sending the written confirmation of the disciplinary meeting;

    90.8. Delay in providing her with the outcome of her appeal;

    90.9. Delay in arranging the Occupational Health assessment;

    90.10. Failure on appeal to take into account the threat made on the claimant's life;

    90.11. Failure to provide timely answers to her 4 questions;

    90.12. Delay in commencing the investigation following the customer's complaint;

    90.13. Inconsistency in treatment over withholding bonus between herself on the one hand and Mr Murphy and Mr Daniel Murphy (her nephew) on the other; and

    90.14. Failure to overturn her oral warning on appeal on the ground of inconsistent treatment, in contrast to the treatment of a further colleague (Mr M) who had been reinstated on the ground that his dismissal had been inconsistent with the treatment of colleagues.

91. The claimant's grievance document did not mention any lack of independence on the part of Mr Clarke or suggest that he had been unfit to deal with the disciplinary hearing on account of Mr Clarke's involvement with her husband.

92. The claimant's grievance was acknowledged and a grievance meeting was arranged to take place on 9 February 2017. Ms Graham attempted to telephone the claimant on 27 January 2017 to discuss her welfare. When she could not get through, she initiated an e-mail conversation. Eventually they spoke by telephone on 30 January 2017. Their conversation covered the practical arrangements for the grievance meeting, sources of support for the claimant and her husband, and the claimant's expectations from the grievance process. The claimant stated that she would not return to work following the grievance process, but wanted an admission from the respondent that what it had done to her was wrong. They also discussed arrangements for a face-to-face Occupational Health assessment.

93. On 1 February 2017 the claimant e-mailed Ms Graham, stating that, if she did not receive an outcome to her grievance by 23 February 2016, she would resign "as the warning was issued on 30 November 2016 and this is the Significant event that has created a breakdown in my relationship with my employer…this is the most significant event, whilst what has happened since the warning has worsened things significantly…"

94. On 7 February 2017, the claimant e-mailed various managers of the respondent to announce her immediate resignation. This e-mail cited the "significant incident" triggering her resignation as being the decision to issue her with the oral warning, its impact on her bonus and its unfairness when contrasted with the treatment of her husband following his customer incident. According to her e-mail, her "biggest concern" was the "total failure from everyone around my mental state", mentioning in particular the delay in arranging the Occupational Health assessment. She also mentioned the withholding of Ms Graham's witness statement and the alleged lie during the course of the appeal about Mr Murphy having been investigated.

Relevant law

95. Section 95 of the Employment Rights Act 1996 ("ERA") relevantly provides:

> 95 Circumstances in which an employee is dismissed
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and… only if)—
>
> … (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. …

96. An employee seeking to establish that he has been constructively dismissed must prove:

96.1. that the employer fundamentally breached the contract of employment; and

96.2. that he resigned in response to the breach.

(*Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27).

97. An employee may lose the right to treat himself as constructively dismissed if he affirms the contract before resigning.

98. It is an implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or

likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: *Malik v. BCCI plc* [1997] IRLR 462, as clarified in *Baldwin v Brighton & Hove CC* [2007] IRLR 232*.*

99. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT (Langstaff J) in *Pearce-v-Receptek* [2013] ALL ER (D) 364.

> 12. ...It has always to be borne in mind that such a breach [of the implied term] is necessarily repudiatory, and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious. The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal, not in an employment context, in the case of *Eminence Property Developments Limited v Heaney* [2010] EWCA Civ 1168:
>
> > "So far as concerns of repudiatory conduct, the legal test is simply stated ... It is whether, looking at all the circumstances objectively, that is, from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
>
> 13. That has been followed since in Cooper v Oates [2010] EWCA Civ 1346, but is not just a test of commercial application. In the employment case of *Tullet Prebon Plc v BGC Brokers LP* [2011] EWCA Civ 131, Aikens LJ took the same approach and adopted the expression, "Abandon and altogether refuse to perform the contract". In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that, since it is repudiatory, it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract.

100. A fundamental breach of contract cannot be “cured”, but if an employer takes corrective action the employer may prevent conduct from developing into a breach of the implied term of trust and confidence: *Assamoi-v-Spirit Pub Co Ltd* [2012] ALL ER (D) 17.

101. Where a fundamental breach of contract has played a part in the decision to resign, the claim of constructive dismissal will not be defeated merely because the employee also had other reasons for resigning: *Wright-v-North Ayrshire Council* [2014] IRLR 4 at paragraph 16. See also *Abbey Cars (West Horndon) Ltd v Ford* UKEAT 0472/07 at paragraph 34 and 35.

102. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract. All depends on the circumstances of the particular case: *W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443,

103. In *Mari (Colmar) v Reuters Ltd* UKEAT/0539/13*,* HHJ Richardson reviewed the authorities relating to affirmation by employees who are on sick leave. The following principles were derived:

103.1. It is open to the tribunal to find that an employee has affirmed the contract simply by remaining in employment for a period of time, even if the employee was absent on sick leave for the whole of that period.

103.2. It is relevant to consider whether, during the period of sick leave, there was any affirmatory behaviour beside the receipt of sick pay.

103.3. It is also relevant to consider whether, during the period of sick leave, the employee continued to protest about the breach.

103.4. Each case depends on its own facts.

104. It is not uncommon for an employee to resign in response to a "final straw". In *Omilaju v. Waltham Forest London Borough Council* [2005] EWCA Civ 1493*,* [2005] IRLR 35*,* CA the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if relatively insignificant. As a result, if the final act was totally innocuous, in the sense that it did not contribute or add anything to the earlier series of acts, it was not necessary to examine the earlier history.

105. *Vairea v Reed Business Information UK Ltd* UKEAT/0177/15 is authority for three further points in relation to the "final straw" and affirmation:

105.1. There cannot be a series of "last straws".

105.2. Once the contract is affirmed, earlier repudiatory breaches cannot be revived by a subsequent "last straw".

105.3. Following affirmation it takes a subsequent repudiatory breach to entitle the employee to resign.

Conclusions

106. I start by examining each allegation of bad conduct. In the light of my factual findings, I assess the impact on the relationship of trust and confidence, whether there was reasonable and proper cause for the conduct, and its effect, if any, on the claimant's decision to resign:

106.1. *Failure to carry out return to work interview.* Mr Edwards carried out a return to work interview over the telephone on 18 April 2016 and did nothing on that occasion to damage the relationship of trust and confidence. The claimant's resignation was not in any event influenced by any belief on the claimant's part that the return to work interview had not occurred.

106.2. *Repeatedly asking about Mr Murphy.* Mr Edwards should not have asked the claimant about the activities of Mr Murphy in August 2016, especially since he had previously agreed with the claimant not to do so. Trust and confidence was affected, but not to the extent suggested by the claimant. There was no repeat after August 2016. I would, however, have expected the claimant to have renewed faith in the respondent once Mr Edwards ceased to be the claimant's line manager and in the absence of any further intrusive enquires about Mr Murphy.

106.3. *Attempting to trap the claimant in the corridor.* My finding was that Mr Edwards did not attempt to trap the claimant. He had reasonable and proper cause to speak to the claimant and to challenge her use of Facebook, but he should not have tried to hold the conversation in the corridor. His decision to hold the meeting in that particular place had some effect on the relationship

of trust and confidence. It never happened again, however, and its impact would be likely to fade once Mr Edwards moved area.

106.4. *Lying about Miss Hatia's visit.* Miss Hatia did not lie about the purpose of her visit. She had reasonable and proper cause to begin a scheduled store visit with a ROD about use of social media. Advance warning was not essential when the conversation was intended to be relatively informal, with no disciplinary sanction involved.

106.5. *Harassment over the use of Facebook.* Miss Hatia did not harass the claimant. She had reasonable and proper cause to remind the claimant of the respondent's expectations concerning the use of social media. At least one of the claimant's posts (the "giving no fucks" comment) was clearly inappropriate, especially when it was likely to be read by the claimant's more junior colleagues at Ashton. Though she may not have known it, the claimant was in breach of the respondent's Social Media Guidelines. Whatever Mr Edwards might have tolerated in the past, Ms Murphy and Miss Hatia could not be expected to ignore the issue.

106.6. *Conversation in the claimant's car.* It was not best practice for Miss Hatia to conduct a difficult ROD in the claimant's car. Her motives were well-intentioned: the claimant did not want to return to the office or have the conversation in a public place. The claimant did not object to the conversation happening in her car at the time. A more experienced manager would nevertheless have appreciated that the close physical proximity of sitting side-by-side in a car, and holding the conversation in a place to which the claimant had chosen to retreat, might be seen by the claimant as intrusive. Rearranging the meeting would have helped to keep a physical and professional distance. This was, however, an isolated occurrence whose effect on the relationship of trust and confidence was relatively slight. It did not feature very prominently in the claimant's decision to resign.

106.7. *Unreasonably delaying the investigation into the 14 October 2016 incident.* In my view, the respondent's investigation was not unreasonably delayed. It was reasonable to approach the investigation by first speaking to the claimant and Ms Wilkinson. That could not happen until the claimant had returned from holiday. Ideally, the interview with the claimant should have taken place during the first week following her return. It actually happened during the second week. I cannot say that the extra few days' delay was unreasonable.

106.8. *Withholding Ms Wilkinson's statement.* I have no doubt that, at the time of first inviting the claimant to a disciplinary meeting, Mr Clarke genuinely thought that disclosure of Ms Wilkinson's account was unnecessary. With hindsight, I hope he has come to realise that his view was mistaken. Ms Wilkinson's version supported the explanation given by the claimant. Going into the disciplinary meeting, the claimant was not to know that Mr Clarke would take the claimant's version of events at face value. The claimant was entitled to have her own say about the relevance or otherwise of Ms Wilkinson's account. The initial withholding of the statement was likely to arouse suspicion and therefore to have some effect on the relationship of trust. I would, however, have expected the relationship to be quickly repaired by the disclosing of Ms Wilkinson's statement immediately on request, and by Mr Clarke explaining that he accepted the claimant's account.

106.9. *Mr Clarke being assigned to chair the disciplinary meeting.* The respondent's choice of Mr Clarke as the manager to conduct the disciplinary meeting had little or no effect on the relationship of trust and confidence. It played no part in the claimant's decision to resign. The claimant made no mention of it at the time of the meeting or of her resignation. She did not ask for Mr Clarke to step down. The respondent had reasonable and proper cause to appoint a Lead Store Manager apparently unconnected with the events on 14 October 2016.

106.10. *Delay in providing written outcome.* The respondent did not do what was usually expected under the terms of the Disciplinary Policy: the outcome was not "issued", in the sense of being issued in writing, within seven calendar days of the meeting. Nevertheless there was little to damage trust and confidence here. The claimant was informed at the meeting itself that she was receiving an oral warning and the reasons for that decision. There was no effect on the claimant's ability to appeal.

106.11. *Imposing a disciplinary sanction.* The imposition of the oral warning was a highly significant factor in the claimant's decision to resign. In spite of all the claimant's arguments, my view is that the respondent had reasonable and proper cause to give the claimant that warning. She should not have called the customer a "dickhead", no matter how insulting he was being to her and how vulnerable the claimant felt. Calling an angry and aggressive customer an abusive name was unprofessional and risked provoking the customer into further aggressive behaviour or, worse, violence.

106.12. *Withholding the bonus.* The effect of the disciplinary sanction on the claimant's bonus also weighed heavily on the claimant's mind at the time she resigned. It was not unfair to reduce the claimant's bonus. The wording of the policy left no room for manoeuvre: reduction of bonus was an automatic consequence of the imposition of an oral warning. The claimant was treated differently to those individuals caught up in Operation Bellamy. The difference, however, is explained entirely by the fact that the Retail Bonus Plan was introduced after the disciplinary warnings (in some cases) and the investigation which led to them (in the remaining cases). The respondent had reasonable and proper cause to give the Retail Bonus Plan its full effect in relation to the claimant.

106.13. *Delay in Occupational Health appointment and failure to chase.* The claimant should not have had to wait 6 weeks for an Occupational Health assessment. The blame for the delay mostly sat with Duradiamond. In my view that fact would not of itself absolve the respondent. If an employer delegates provision of Occupational Health services to an outsourced provider, and the provider takes an unacceptably long time, the employer has to take the consequences. It can guard against those consequences by putting the right checks in place to ensure that the provider is not allowed to fall behind. The respondent's Occupational Health policy went some way to serving that purpose, but did not clearly spell out to the line manager that they should proactively check on Duradiamond's progress. Close monitoring of the claimant's "Occupational Health journey" (as Mr Murphy put it) was particularly important given her known history of self-harming behaviour. Mr Johnston ought to have been briefed about the claimant's history and, had he known, might well have been more pro-active in chasing the Occupational Health assessment.

By this time of the claimant's resignation, this issue had grown in importance in the claimant's mind. In my view, however, the claimant is overstating the effect of the delay on the relationship of trust and confidence at the time it actually occurred. She did not mention the lack of an appointment until Ms Marsh raised the issue with her on 30 December 2016. Mr Johnston had shown concern for the claimant's health by making an immediate referral. When the claimant pointed out the problem, it was very quickly rectified.

106.14. *Lying to the claimant during the course of the appeal meeting.* Mr Johnston did not lie to the claimant.

106.15. *Failure to give timely answers to the four questions.* The respondent had reasonable and proper cause for not answering the claimant's questions straight away. It was appropriate for potential action against the customer and the involvement of the police to be checked with Retail Crime and the Legal Department. A delay of a few days would be natural. On the other hand the respondent ought to have known about the claimant's self-harming history and tried to give her peace of mind by answering her questions as quickly as they could. In that context, two and a half weeks was too long, but the delay was not grossly excessive. Mr Johnston did try to keep the claimant updated on 6, 9 and 13 January 2017 before her questions were answered by Ms Graham on 20 January 2017. Mr Johnston did not tell the claimant in terms that he had made a request for the customer to be banned from the Ashton store. The claimant's four questions did not directly ask whether Mr Johnston had made a *request,* but whether the customer had in fact been banned. Nevertheless, Mr Johnston ought to have appreciated that the claimant wanted to see her manager taking a stand against the customer. Telling the claimant about Mr Johnston's request would have helped. There was some harm to the relationship of trust and confidence here, but in my view it would relatively slight.

107. Having examined the trees in some detail I have tried to step back and look at the wood. I have considered the respondent's conduct overall, leaving aside that conduct which played no part in the decision to resign and the conduct for which the respondent had reasonable and proper cause. Can it be said that the cumulative impact of that conduct was such as to destroy or seriously damage the relationship of trust and confidence? In my view it cannot. It comes nowhere near demonstrating an intention to abandon and altogether refuse to perform the contract.

108. The claimant was not entitled to resign and her complaint of constructive unfair dismissal therefore fails.

109. I have considered whether it would be helpful for me to express my view in relation to the remaining issues in case my main conclusion – no fundamental breach of contract – is found to be wrong. Such an exercise is necessarily speculative as it would depend on what breach of contract I ought to have found. The following conclusions may, nevertheless, be of assistance:

109.1. In my view, the claimant did not affirm the contract by raising her grievance and remaining in employment on sick leave for a short time thereafter. She was attempting to give the respondent the opportunity to remedy the breach of contract as she saw it. The fact that she changed her mind before the respondent had a chance to investigate her grievance does not mean that the grievance was not genuine.

109.2. I would go further: the claimant did nothing to affirm the contract in 2017. She remained on sick leave for a period of just over 5 weeks and kept expressing her intention to resign, sometimes conditionally, sometimes unconditionally. There was nothing about the claimant's actions that demonstrated any intention to let bygones be bygones.

109.3. The delay in answering her four questions was not totally innocuous and was capable of adding to a cumulative breach of trust and confidence. It was capable of being the "final straw".

110. In the light of my main conclusion, however, these views do not affect the outcome of the claim, which must be dismissed.

_____

Employment Judge Horne

22 September 2017

SENT TO THE PARTIES ON
26 September 2017

FOR THE TRIBUNAL OFFICE