EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
Mrs L Merajdi	**AND**	**Ringback Limited**

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON: 16 & 17 November 2017**

EMPLOYMENT JUDGE Mason

Representation
For the Claimant: Ms. Farah
For the Respondent: Mr. B Watson

JUDGMENT

The judgment of the Tribunal is that:

The Claimant's claims of constructive unfair dismissal and wrongful dismissal fail and are dismissed.

The Remedy Hearing provisionally listed to be heard on 18 January 2018 is vacated.

REASONS

Background and procedure at the Hearing

1. In this case Mrs. Meradji ("the Claimant") claims that she has been constructively dismissed and claims compensation for unfair dismissal and damages for wrongful dismissal. The Respondent denies that she was dismissed and says she resigned.

2. Having agreed with the parties the issues (para. 7 below), I retired to read the witness statements and the agreed joint bundle.

3. It was identified prior to the start of the oral evidence that the Tribunal copy of the bundle was incomplete. During a brief adjournment, Mr. Watson obtained copies of the missing pages (98-122). Some other pages (e.g. page 38) are feint but neither side could produce better copies.

4. I heard from the Claimant and also her witness, Mrs. Heidi Burgess. On behalf of the Respondent I heard from Mr. Miro Oundjian, Mrs. Christine Oundjian, Mr. Nabil Maatouk, and Mr. Askel Buyukgiray. The copy of Mrs. Burgess' statement provided to the Tribunal was not identical to that provided on exchange to Mr. Watson; after a brief discussion, it was agreed that the Tribunal copy was the correct version.

5. At the start of the second day of the Hearing, Mr. Watson sought leave to (i) produce an additional document being an invoice addressed to the Respondent dated 1 December 2015 for accountancy services and (ii) to call an additional witness, Mr. Garo Garabedian who took notes on behalf of the Respondent at the grievance hearing on 5 October 2016. Ms. Farah did not object to the invoice being admitted and it was added to the bundle as page 123. Ms. Farah objected to Mr. Garabedian being allowed to give evidence and to his witness statement being admitted. Having considered both sides' point of view, I declined to allow Mr. Garabedian to be called taking into account the overriding objective in rule 2 of the Employment Tribunal Rules of Procedure 2013. This request was made only after conclusion of the Claimant's evidence; directions for exchange of witness statements and documents were given back on 7 February 2017 and statements were exchanged back in June 2017 and the documents exchanged before that; the Respondent had therefore had ample time and opportunity to obtain a statement from Mr Garabedian; the relevance (or otherwise) of his evidence has been apparent from the outset.

6. At the end of the second day of the Hearing, the evidence was concluded. Mr. Watson provided a Skeleton Argument and I heard submissions from both representatives. I reserved my decision which I now give with reasons.

Issues

7. The issues as agreed with the parties at the outset are as follows:

8. Did the Claimant resign because of an act or omission (or series of acts or omissions) by the Respondent? The Claimant does not have a written contract of employment and relies on the following breaches:

8.1 10 August 2016: she says she was asked to work full-time;

8.2 24 August 2016: an altercation with Mr. Oundjian; and
8.3 Mr. Oundjian's conduct of the grievance process and the grievance outcome.

9. If so:
9.1 did the Respondent's conduct amount to a fundamental breach of contract? and
9.2 did the Claimant affirm the contract following the breach or breaches?

10. If the Claimant was constructively unfairly dismissed, was the dismissal fair?
10.1 was dismissal for a potentially fair reason (S98 Employment Rights Act 1996)? (Mr. Watson confirmed that the only potentially fair reason the Respondent relies upon is conduct); and
10.2 if so, did the Respondent act reasonably in treating it as a sufficient reason for dismissing the Claimant?
10.3 If the reason was the Claimant's conduct:
(i) did the Respondent believe the Claimant was guilty of misconduct?
(ii) did the Respondent have in its mind reasonable grounds upon which to sustain that belief?
(iii) at the stage at which that belief was formed, had it carried out as much investigation as was reasonable? and
(iv) did the decision to dismiss and the procedure followed fall within the range of reasonable responses of a reasonable employer?

11. If the Claimant was unfairly constructively dismissed, should any compensation awarded be adjusted to:
11.1 reflect any failure on the part of the Claimant to take reasonable steps to mitigate her loss and/or in accordance with the ACAS code and/or to reflect any contribution by the Claimant to her own dismissal?
11.2 reflect any failure on the part of the Respondent to adhere to the ACAS code?

12. If the Claimant was dismissed, was she wrongfully dismissed? (i.e. without being given due notice or monies in lieu?). The parties confirmed that the Claimant's notice period was 12 weeks.

Findings of fact

13. The Respondent is a small company and describes itself [ET3 para 1] as *"stockists and distributors of spare parts, servicing a wide and diverse cross section of vehicle applications from agricultural tractors, heavy constructions and all-terrain vehicles, to lorry fleets and passenger cars*". It operates from one site and at the time the Claimant's employment terminated, the employees consisted only of the Claimant (part-time bookkeeper), Mr. Oundjian (Managing Director since March 1982) and Mr.

Askel Buyukgiray ("Frank") (Warehouse Manager since 2007); Mrs. Oundjian is also a director (since 1991) but only rarely in attendance. Mr. Nabil Maatouk joined the business in May 2015; he describes himself as being employed by the Respondent and *"non-resident Managing Director*"; he lives in Lebanon and visits once a month. In addition, "Leon" provides accountancy services on a self-employed independent basis

14. The Claimant commenced employment with the Respondent in 1994; there is a minor dispute about her exact start date but it is agreed that she had 22 years continuous employment at the date of termination. She was earning £1,126.60 per month gross (£846.74 net). She did not have a written contract of employment and none of the Respondent's employment practices and procedures (e.g. disciplinary and grievance) are in writing,

15. The Claimant alleges that she resigned on 18 November 2016 because of the Respondent's conduct and I will look at each of the alleged breaches the Claimant relies on in chronological order.

Request to work on a full-time basis

16. The Claimant worked 3 hours a day, 5 days a week. She claims that on or about 10 August 2016, Mr. Oundjian told her she needed to increase her hours to full-time. She says she was surprised and asked him why she would want to change her hours; he did not reply. She then approached Mr. Maatouk (at the Hearing she said this was about a month or a few weeks later) who had recently joined the Respondent company and was on the premises; she told him there was not enough for her to do full-time. She says Mr. Oundjian then became cold, withdrawn and unresponsive. Both Mr. Oundjian and Mr. Maatouk say this conversation in fact took place back in July 2015 and say she was asked whether, if the opportunity arose, she would be interest in a full-time role and the matter was not raised again.

17. Having considered all the evidence on this point, whether or not this conversation took place in 2015 or 2016, it is not in dispute that the Claimant was asked if she was prepared to increase her hours to full-time and she refused. I find that there was no insistence on the part of the Respondent or attempt to unilaterally impose on her an obligation to increase her hours; it was a simple request which she declined and no action was taken. Significantly, she makes no mention of this in her grievance letter or in any communications or at the meetings with Mr. Oundjian. In her final email of resignation dated 18 November 2016 [page 71] she refers to *"fundamental breaches of both my contract and of policies regarding the grievance procedure"* but then goes on to specify only Mr. Oundjian's behaviour on the 24 August 2016 and the way he conducted the grievance procedure.

18. With regard to the timing of this conversation, I place no weight on Mr. Maatouk's flight itinerary in July 2015 [pages 92- 94] as Mr. Maatouk was a regular visitor to the Respondent's premises in both 2015 and 2016. I have considered that on 25 August 2016, the Claimant mentioned to her GP the request to increase her hours and described this request as "*recent*". However, on balance I prefer the Respondent's account as the Claimant's timeline is inconsistent. She says the conversation with Mr. Oundjian took place two weeks before 24 August 2016 (ET1 para. 2) and in evidence said that her subsequent conversation with Mr. Maatouk was "*about a month or a few weeks*" later; however, this takes her beyond the date she last attended the Respondent's premises on 24 August 2016. Furthermore, I accept the Respondent's evidence that on 1 December 2016 she was replaced with a part-time employee (Mrs. Taghrid) which is an indication that there was no requirement for her to increase her hours as at July/August 2016 [page 95].

Altercation on 24 August 2016

19. Prior to 24 August 2016, the Claimant and Mr. Oundjian generally had a good working relationship. The Claimant says Mr. Oundjian only shouted at her on one other occasion and she did not complain.

20. It is not in dispute that the Claimant mistakenly entered into the ledger of a customer, KM Products ("KMP"), two entries being two invoices dated 12 August 2016 numbers 20666 and 20667 which totalled £15,952.75. A statement sent to KMP reflected these incorrect entries [page 97]. Conversely, the Claimant also reduced the liability of the correct customers by the same amount.
    The Claimant says "*the mistake was minor as the figures were all on the computer and no money had been exchanged*". She says it was on a monthly statement and no losses were incurred. She acknowledges that the amount involved is £16,000 but says the Respondent has some very big clients and that she would have spotted it at the end of the month, a few days later.

21. Mr. Oundjian emailed KMP on 23 August 2016:
    "*I am sorry accounts have posted these invoices to incorrect accounts. These 2 invoices are NOT for you"* [page 96].
    Laura of KMP responded at 08.29 on 24 August 2016 thanking Mr. Oundjian and asking for an updated statement of account [page 96].
    I do not accept Mr. Oundjian's evidence that KMP complained. He has not been able to provide any supporting evidence of any such complaint and this assertion is very vague. I do however accept that KMP queried the statement and brought the error to his attention and hence the exchange of emails [page 96].

22. Mr. Oundjian says he left a copy of the ledger on the Claimant's desk with a post-it note:
"*Pls be careful!! Where is your brain!! 20666 & 20667 is incorrect !! Pls adjust. Miro*." [page 32 and 91]. He says he also left on her desk a copy of his exchange of emails with KMP with a post-it note "*Litsa, Pls send revised statement to KMP*" [page 96]; the Claimant denies having seen the latter.

23. On 24 August 2016, it is not in dispute that the Claimant arrived for work as usual at around 9.30 am; she went to her desk (downstairs) and saw the copy ledger with Mr. Oundjian's post-it note on her desk; she then went upstairs to Mr Oundjian's office and took him (as per usual) a cup of tea.

24. The Claimant and Mr. Oundjian disagree as to what was then said:

24.1 The Claimant says that he verbally abused her and that he was like a volcano and said "*use your brain*", "*all you think about is holidays*" "*I want to sack you*" "*we only use Leon [accountant] because of you*" and "*you're here physically but your mind is on holiday*". She says she was speechless and that it was totally out of character for Mr. Oundjian to behave like this; he had never mentioned holidays or Leon before and he was threatening to sack her for what was in her eyes a minor mistake being just a paper error on a monthly statement. She says Frank was at work and heard everything as Mr. Oundjian was shouting at the top of his voice with the windows open. She says she felt humiliated and tearful.

24.2 Mr. Oundjian denies that he said he wanted to sack her. He was annoyed and upset with the Claimant. He told her that such mistakes were not acceptable and if she repeated such mistakes she may not be employed by the Respondent [ET3 para. 7]. He acknowledges that he raised his voice but denies shouting and says he only raised his voice so that the Claimant could hear him as she had left his office and was on her way back down the stairs to her own office.

25. In determining which account to accept, I have looked at all the extraneous evidence including the subsequent texts, emails and notes of the meeting on 5 October 2016.

26. Events after the altercation on 24 August 2017 and prior to the grievance hearing on 5 October 2016

26.1 After the altercation in Mr. Oundjian's office, the Claimant says she returned downstairs to her desk and worked the full 3 hours of her shift and left at 12.30. Mr. Oundjian did not come down to see her but she acknowledges that he had a visitor and I place no weight on this point either way.

26.2 Before she left, the Claimant made a contemporaneous note of what Mr. Oundjian had said [page 90]:
"*We are using Leon just because of you"*
"Use your brain"
"You're here physically but your mind is on holiday"

"That you want to sack me"

26.3 On 25 August 2016, the Claimant consulted her GP. The GP's notes of that meeting record that she was "*feeling quite emotional*", her boss had threatened to sack her, she had made a mistake yesterday and he had shouted at her and she was upset and frightened; she was asked to work full time instead of part time but recently declined [page 101].
Her GP signed her off sick and I accept her evidence that at least initially she was on sick leave due to "*work stress*" as this is supported by the Statement of Fitness for Work dated 25 August 2016 [page 33]. This is a clear indication that she was genuinely distressed by the altercation and that her absence was due to this and not because her mother was seriously ill.

26.4 On 26 August 2016, Mr. Oundjian sent the Claimant a text [pages 102-105]. He asked her what her intentions are and comments:
"*The professional mistake you made has serious implications and I was rightfully angry, I cautioned you on this as it could have been a motive for dismissal. But I took into consideration the fact that you have been with Ringback for many years and only regarded this as a serious mistake not to be repeated*".

26.5 On 27 August 2017, the Claimant emailed Mr. Oundjian to advise she had been signed off sick due to work related stress. She states that he told her he would like to sack her and concludes:
"I would appreciate meeting with you to discuss how we proceed from your outburst and to understand yours and mine concerns, as like I said, this has caused me undue stress and anxiety ..." [page 34]
Text messages were exchanged the same day [pages 98-99] and the Claimant reiterated that she was very upset and asked for a meeting with him.

26.6 On 28 August 2016, Mr. Oundjian emailed the Claimant:
"I am very sorry to have read the contents of your email and regret you are feeling this way.
May I first stress that I did not sack you and no time during our conversation I said you were sacked.
I was upset for the errors that you had made and my reaction purely reflected my disappointment of your work for these transactions.
I would of course very much like to meet you and discuss this matter further. I suggest that as your doctor advised we meet after you had a rest for a week". [page 35].

26.7 Sadly on 28 August 2016 the Claimant's mother died.

26.8 On 30 August 2016, the Claimant emailed Mr. Oundjian clarifying that she had not said that he had sacked her but that he had said he would like to sack her; she said that she felt his "*reaction was totally unjustified for the minor error*" she had made. She informs Mr. Oundjian that her mother had passed away and that she needed "*extra time out*" and further assistance from her doctor [page 37].

26.9 On 1 September 2016, her doctor gave a further Statement of Fitness for Work for "*Family bereavement*" [page 38].

26.10 On 6 September 2016, the Claimant emailed Mr. Oundjian suggesting they meet on either 19 or 20 September 2016 [page 39]. On 7 September 2016, Mr. Oundjian replied suggesting either the 23 or 24 September due to work commitments [page 40].

26.11 On 12 September 2016, the Claimant's mother's funeral took place.

26.12 On 21 September 2016, her doctor gave a further Statement of Fitness for Work for "*stress, low mood*" until 5 October 2016 [page 41].

26.13 On 23 September 2016, the Claimant attended the Respondent's premises with a view to meeting with Mr. Oundjian. She was accompanied by her friend Mrs. Heidi Burgess to act as her witness. She had not advised Mr. Oundjian that Mrs. Burgess would be in attendance and as Mrs. Burgess was not an employee of the Respondent and Mr. Oundjian did not have a witness present, he declined to proceed with the meeting. He wrote to the Claimant the same day to confirm this [page 42].

26.14 On 26 September 2016, the Claimant replied advising that Mrs Burgess would be in attendance at a rescheduled meeting as an observer and note taker [page 43]

26.15 On 28 September 2016, Mr. Oundjian wrote to the Claimant making arrangements for a meeting on 5 October 2016. He states;
"It seems clear to me that you had been suffering considerable duress due to the ill health of your mother and you have my deepest sympathy following her recent death. I fully appreciate your current reasons for absence and do hope that you will feel well enough to return to the workplace soon" [page 44].

26.16 On 30 September 2016, the Claimant replied clarifying that her absence from work had nothing to do with her mother and asked him to "*refrain from using this as an excuse*" for his "*unacceptable behaviour*". She also states:
"... *I have not mentioned the word grievance meeting, but as you have opened up this topic, you obviously understand what this entails, so kindly email me your grievance procedure, before our meeting so I can understand the process and format of the meeting*".[page 45]

26.17 On 5 October 2016, Mr. Oundjian emailed the Claimant advising that the Respondent's grievance procedure would follow the ACAS code and sent her a copy [page 46 plus 47-60]. The Claimant replied the same day asking for a copy of the Respondent's (as opposed to ACAS') grievance policy [page 61]. Mr. Oundjian replied the same day [page 119] advising that the Respondent does not have a separate grievance policy.

27. <u>5 October 2016, grievance hearing</u>

27.1 This was conducted by Mr. Oundjian. The Claimant attended accompanied by her friend Mrs. Heidi Burgess and Mr. Garabedian also attended on the Respondent's behalf. Neither Mrs. Burgess nor Mr. Garabedian took any part in the proceedings other than as note takers.

27.2 Mrs. Burgess' notes are set out in an email from Mrs Burgess to the Claimant dated 6 October 2016 (pages 88-89). Mr. Garabedian's manuscript notes are at pages 120-12 and his typed notes are set out in an email dated 5 October 2016 [pages 117-118] .

27.3 The notes vary in the following key respects:

(i) Mrs Burgess records that Mr. Oundjian said he had not shouted that loudly and he "*had asked Frank and Frank had said no it was not so loud*". Mr. Garabedian does not mention this.

(ii) Mrs. Burgess records the following verbatim dialogue:

Mr. Oundjian: "When do you start work?"
Claimant: "I can't come back"
Mr. Oundjian: "*I can't' run the business on my own – it is killing me". "I can say sorry – you can say sorry".*
Claimant: "*You have never said sorry".*
Mr. Oundjian: "*I am saying it now".*
Claimant: "*You should think about what I have said".*
Mr. Oundjian: "*You do not want to come back"*
Claimant: "*The situation is untenable".*
Mr. Oundjian: "*What is your answer again*"
Claimant: "*We cannot work together – you think about it and let me know"*

Mr. Garabedian only partly records this exchange and does not mention the part relating to an apology.

(iii) Mr. Garabedian records at the end of his notes that the Claimant said she did not want to come back to work and was looking for an offer from the Respondent. This is not in Mrs Burgess' notes and at the Hearing she adamant that this was not said.

27.4 On balance I prefer the notes taken by Mrs. Burgess as Mr. Oundjian in oral evidence accepted that the dialogue recorded in her notes (above) took place specifically the part about an apology. This is a significant omission and leads me to conclude that Mrs. Burgess' notes are more accurate.

28. <u>Events post the grievance hearing</u>

28.1 On 10 October 2016, the Claimant's doctor gave her a further Statement of Fitness for Work for "*stress and depression*" [page 64].

28.2 On 12 October 2016, Mr. Oundjian emailed the Claimant advising her that her grievance was dismissed in full [page 65]. He did not mention a right of appeal. The Claimant says in her statement (para. 26): "*As far as I was concerned I had not continued to work for the company as I had not returned to the office. I did not know that I was expected to resign as a result of his behaviour immediately otherwise I would have done so. I could never have returned to work after being shouted at in this way and it was only after I received legal advice that I knew this.*" However, it is not in dispute that the Claimant remained in the Respondent's employment until 18 November 2016.

28.3 On 14 October 2016, the Claimant emailed Mr. Oundjian querying why he had chaired the grievance hearing contrary to the ACAS policy and pointing

out that he had failed to provide her with details of her right to appeal [page 66].

28.4 On 21 October 2017, Mr. Oundjian emailed the Claimant stating that, given the size of the Respondent, it was reasonable that he had dealt with the matter himself and that this was not contrary to the ACAS policy; he states he would be *"happy to discuss the matter*" with her again but would only be willing to do so if she provided "*substantive grounds for such an appeal*". He asked her to undertake an occupational health assessment with a view to agreeing a Return to Work Plan and enclosed a consent form [page 67].

28.5 On 25 October 2016, the Claimant emailed Mr. Oundjian notifying him of her intention to appeal and consenting to being seen by occupational health [page 68].

28.6 On 14 November 2016, the Claimant emailed Mr. Oundjian pointing out that he was incorrect to state that she only had a right of appeal if she provided "*substantive grounds*" and states as follows:

"*The grounds for my appeal are as follows:*

The way the meeting was handled did not feel as if I was getting a fair grievance hearing, when the person I had complained about i.e. yourself, was chairing the hearing. How can you make a fair and impartial decision regarding your own unacceptable and unprofessional behaviour towards me?

It is my view, you should have instructed an independent person to hear this.

The email you sent providing me an outcome did not provide any information on how the decision was reached or constructive way forward.

Finally, your communication to me did not offer my right of appeal.

I would request that an independent and impartial person is commissioned to review all the paperwork in relation to this grievance, the background and my appeal." [page 69]

28.7 On 17 November 2016, the Respondent advised her that an independent and impartial person had been appointed to hear her grievance appeal [page 70].

28.8 On 18 November 2016, the Claimant resigned by email [page 71] stating:

"... *I have been left with no choice but to leave the company effective immediately. I am leaving without notice from my role due to your fundamental breaches of both my contract and of policies regarding the grievance procedure.*

The trust and confidence I have in you as an employer has irrevocably broken down due to both your behaviour on the 24th August 2016 and the way you have conducted the grievance procedure since".

The Claimant says by this time she had reached the end of her tether having lost all trust and confidence in Mr. Oundjian as her employer.

28.9 On 21 November 2016, Mr. Oundjian emailed the Claimant strongly urging her to reconsider her resignation and invited her to attend an appeal hearing on 29 November 2016 to be conducted by an independent and impartial person (Consultant from Peninsula's HRFace2Face service). He

summarised her grounds of appeal. She was invited to put forward written submissions and it was explained that if she elected not to attend, the grievance appeal would still proceed [pages 72 and 73].

28.10 On 23 November 2016, Mr. Oundjian emailed the Claimant again advising her that the appeal hearing would proceed in her absence if she failed/elected not to attend and reminded her that she had until 25 November 2016 to notify him if she wished to reconsider her resignation [page 74].

28.11 On 28 November 2016 Mr. Oundjian emailed the Claimant reminding her that the grievance hearing was due to take place the next day and urging her to attend. [page 75]. The Claimant responded the same day confirming that, having resigned, she would not be attending the grievance meeting [page 76].

28.12 On 29 November 2016, the grievance appeal hearing took place in the Claimant's absence conducted by Mark Silvey, HR Consultant. On the same day, Mr. Silvey sent the Claimant an email inviting her to put forward submissions within the next two days. He also set out in the body of his email copies of the minutes taken of the grievance hearing on 5 October 216 by Mr. Garo Garabedian and asking her to tell him if she agreed with them or alternatively if she felt that they were incorrect and to forward any corrections. [pages 77-78]. The Claimant did not respond.

28.13 On 2 December 2016, Mr. Silvey prepared a report [pages 80-85]. His key findings were as follows:

(i) The Clamant was offered the right of appeal but incorrectly advised with regard to her right of appeal having been advised that she could only appeal if she provided substantive grounds. Such a limitation on her right of appeal is not in line with the ACAS code.

(ii) With regard to conduct of the grievance hearing on 5 October 2016 he observed that Mr. Oundjian's account of the altercation on 24 August 2016 (as rehearsed in the minutes of the grievance hearing on 5 October 2016 taken by Mr. Garabedian) was unchallenged apart from in the Claimant's grievance and appeal letter; she had refused to attend the appeal hearing and had not responded to a request for written submissions and had not challenged Mr. Garabedian's minutes. He concluded as follows:

a. It was accepted that Mr. Oundjian had shouted her and that this was inappropriate and the Claimant's appeal to this extent should have been upheld (paras 16 and 17).

b. *"In general, good HR practice allows for such informal meetings to discuss possible matters of misconduct before any proceedings are started. The Employee appeared to have resigned before this could take place and, ordinarily, a formal disciplinary investigation and process would have to be postponed to allow for the grievance proves to be completed. The process followed so far therefore does not appear to constitute bullying*".(para. 19).

c. There was little evidence of bullying or harassment apart from this incident. There were no aggravating factors such as swearing or discriminatory language "*which would suggest that this incident went beyond an Employer*

of 22 years expressing his frustration at what was allegedly a simple error which had serious consequences" (para 20). Her complaint of bullying and harassment was therefore not upheld.

d. With regard to the fact that Mr. Oundjian conducted the grievance hearing, he observed that the Respondent is a small business with only three employees including Mr. Oundjian and the Claimant and one other employee who does not appear to be a manager. There was therefore no one else in the business to appropriately deal with complaints. In any event, the employer had sought an impartial report to deal with the appeal and this "alleged flaw" was therefore rectified.

e. It was correct that the email of 12 October 2016 did not give an indication of how the relationship would proceed or a "*high degree of detail with regard to the Employer's reasoning*". However, the email refers to a belief that the incident should not prevent the employee from returning to work after expiry of her sick note on 10 December 2016 and other than offering a welfare meeting, there was little the Respondent could do. The appeal rectifies the lack of detail issue.

(iii) Mr. Silvey concluded in his report as follows:

"RECOMMENDATIONS

26. Having given full and thorough consideration to the information presented I recommend that the appeal should be upheld to the extent that the Employee was shouted at by Mr. Oundjian; that the right of appeal initially offered was insufficiently complaint with the ACAS Code of Practice. The remaining grounds of appeal are however dismissed."

28.14 On 9 December 2016, Mr. Oundjian emailed the Claimant enclosing a copy of Mr. Silveys' report [page 79].

29. Having gone through the exercise of examining all the above events and communications and viewing the evidence in the round, I make the following additional findings of fact with regard to the altercation on 24 August 2016:

29.1 The Claimant's error identified on 23 August 2016 was serious. The potential cost of the error was just under £16,000 and it is irrelevant that the Respondent routinely carries out transactions of a greater value. It is also of limited significance that the Claimant would have spotted the error herself at the end of the month a few days later. The fact remains that a statement was sent to a customer (KMP) listing erroneously two invoices and whilst I have found that KMP did not complain, this does not alter the fact that the mistake was made and it was justifiably a cause for genuine concern. I also find that the Claimant's attitude regarding the mistake was inappropriate; she regarded (and still regards) it as minor and just a "paper error" and I have seen no evidence of any remorse on her part at any time.

29.2 At the altercation on 24 August 2016, I find that Mr. Oundjian did shout at the Claimant. He says he only "raised his voice" but I fail to see the distinction. He acknowledges that he was annoyed, angry and upset and raising one's voice when angry is generally tantamount to shouting.

Furthermore, Mr. Silvey accepted in his report following the grievance appeal hearing that Mr. Oundjian had shouted at her and that this was inappropriate and the Claimant's appeal to this extent should have been upheld.

29.3 With regard to what was said at the altercation, I find that Mr. Oundjian did say words to the effect "*all you think about is holidays*" and "*we only have Leon [accountant] for your mistakes*". The latter comment was repeated at the grievance hearing on 5 October 2016 [page 89].
I do not accept that he specifically said "*I want to sack you*". However, I find that he did threaten the Claimant with possible dismissal if she repeated such mistakes:

(i) this is acknowledged in the ET3 [para. 7];
(ii) in his text to the Claimant on 26 August 2016, he says he "*cautioned*" her "*as it could have been a motive for dismissal";*
(iii) in verbal evidence he said he told her "*if you do such mistakes again you may not be employed by Ringback*".

29.4 I find that Mr. Oundjian's behaviour, whilst inappropriate and regrettable, was out of character as the Claimant herself acknowledges.

29.5 With regard to whether or not this occurred within earshot of other staff, the only possible member of staff who may have overheard was Frank. I accept on balance that Frank was on the premises as Mr. Oundjian checked with him if he had heard (as reflected in Mrs. Burgess' notes). However, I accept Frank's evidence that he did not in fact hear the altercation. Whilst it is reasonable that he would now be unable to accurately recall exactly where he was at that time on 24 August 2016, it is also reasonable to assume that he would be able to recall if he had overheard the heated discussion given its significance (the Claimant thereafter having not returned to work).

30. With regard to the procedure that followed, none of the events are in dispute other than what was said at the grievance hearing on 5 October 2016 and I have preferred Mrs Burgess' notes for the reasons explained above (para 27.4). For the avoidance of doubt I find that the hearing on 5 October 2016 was a formal grievance hearing; Mr. Silvey refers to that meeting as an informal meeting but this was clearly not the case otherwise Mr. Silvey would not have been tasked to hold a Grievance Appeal hearing.

The Law

31. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he or she terminates the contract under which he or she is employed (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer's conduct.

32. I have considered the cases of **London Borough of Waltham Forest v Omilaju** [2005] IRLR 35; **Western Excavating (ECC) Limited v Sharp** [1978] IRLR 27 CA; **Woods v W M Car Services (Peterborough) Limited** [1981] ICR 666; **Lewis v Motorworld Garages Ltd** [1985] IRLR 465; **Malik v BCCI SA** [1997] IRLR 462 HL; **RDF Media Group v Clements** [2008] IRLR 207; **Buckland v Bournemouth University Higher Education Corporation** [2010] IRLR 445 CA; **Eminence Property Developments Ltd V Heaney** [2010] EWCA Civ 1168; **Chindove v William Morrisons PLC [2014] UKEAT/0201/13** and **Cockram v Air Products PLC [2014] IRLR 672, EAT**.

I take these cases as guidance, and not in substitution for the provisions of the relevant statutes. From these cases, the following principles can be derived:

32.1 The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment and the task of the Tribunal is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably, sensibly and objectively, is such that the employee cannot be expected to put up with it.

32.2. There is implied in a contract of employment a term that employers will not, without reasonable and proper course, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

32.3. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents, if the conduct cumulatively amounts to a repudiatory breach. There is no difference in principle between a unitary repudiatory breach of contract and a repudiatory breach of contract comprising a series of acts, which taken together, amount to a breach of the implied term as to mutual trust and confidence and the last of which amounts to a "last straw". Although the final straw may be relatively insignificant, it must not be utterly trivial and furthermore all previous incidents (or "straws") must not be utterly trivial.

32.4 The test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.

32.5 In the case of **RDF Media Group** it was held that:

"The implied obligation as formulated is apt to cover a great diversity of situations in which a balance has to be struck between an employer's interests in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited"

"In assessing whether there has been a breach, it seems clear that what is significant is the impact of the employer's behaviour on the employee rather than what the employer intended moreover the impact will be assessed objectively"

"*The test whether there is a breach or not is said to be a "severe" one. In this regard it should be remembered that for an employee to become entitled to claim that he has been constructively dismissed on this ground, it is not enough to prove that the employer has done something which was in breach of contract or "out of order" or that it has caused some damage to the relationship; there is a need to prove that the conduct of the employer is sufficiently serious and calculated or likely to cause such damage that it can fairly be regarded as repudiatory of the contract of employment, that is to say, so serious that the employee is entitled to regard himself as entitled to leave immediately without notice".*

32.6 In **Western Excavating** Lord Denning commented that the employee *'must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged*.' In these circumstances the employee is often said to have 'waived the breach' or affirmed the breach. Affirmation has more recently been considered by the EAT in **Chindove** and **Cockram**.

33. In accordance with **s86 ERA**, employees are entitled to one week's notice for each complete year of service unless dismissed fairly for gross misconduct. If an employee proves that they have been dismissed (constructively or otherwise) without due notice, this will give rise to a claim for damages for wrongful dismissal.

Submissions

Respondent:

34. Mr. Watson provided a written Skeleton Argument and made supplementary verbal submissions which can be summarised as follows:

34.1 There was no breach of contract

(i) The Respondent denies asking the Claimant to increase her hours in 2016 but even if she was asked, it does not amount to a breach; she was not threatened in any way and suffered no detriment having declined to increase her hours.

(ii) With regard to the altercation on 24 August 2016, Mr. Oundjian accepts he was angry and raised his voice but only so that the Claimant could hear him; he denies that he erupted like a volcano. What was said was in the "*heat of the moment*" and Mr. Oundjian denies the "sacking" comment. There was no repudiatory breach.

(iii) With regard to the grievance procedure, the ACAS code expects that an informal meeting will take place first and this is what the Respondent tried to do on 23 September 2016. But the Claimant wanted a more formal route. The meeting on 5 October 2016 was conducted by Mr. Oundjian but the Respondent is a "micro business" and its other director [Mr. Maatouk] is based in Lebanon.

34.2 If there were any breaches, then they were not sufficiently serious to justify the Claimant resigning, whether separately or on a "last straw" basis. The Tribunal must consider whether there was a repudiatory breach by

considering the impact on the contractual relationship of the parties (**Millbrook Furnishing Industries Ltd v McIntosh [1981] IRLR 309**).

34.3 If there were any breaches, the Claimant must have resigned in response to the breach and not for some other unconnected reason. The Claimant resigned "*freely*" some weeks later and there are "*other potential reasons in the evidence*". Post resignation conduct is irrelevant (**Gaelic Oil Co Ltd v Hamilton [1977] IRLR 27**).

34.4 If there were any breaches, the Claimant affirmed the breaches by delaying her resignation. She needs to show a good reason for the delay and her sickness has not been advanced as a reason for her delay. Giving longer than due contractual notice constitutes continued performance which can amount to affirmation (**Cockram)** but it may then be necessary to consider why the extra notice was given (**Buckland v Bournemouth University)**. In this case, the Claimant delayed her resignation, remained in receipt of sick pay and commenced a grievance process but clearly had no intention of returning to work.

If she had been as hurt by Mr. Oundjian's comments on 24 August 2016 as she claims, she would have resigned on 25 August. Instead she initiated the grievance process.

The final straw must be a final trigger and Mr. Oundjian's letter of 17 November 2016 was not a breach or final trigger. When a contract has been affirmed, a previous breach cannot be "revived"; a further innocuous action on the part of the employer does not entitled the employee to revert to the pre-affirmation breach.

Claimant:

35. Ms Farah made verbal submissions as follows:

35.1 The Respondent breached the Claimant's contact by asking her to work full-time, Mr. Oundjian's behaviour on 24 August 2016 and the grievance process and outcome. These were fundamental breaches both separately and amounted to a course of conduct.

35.2 With regard to the request to work full-time, the Claimant was clear and consistent that this request was in 2016.

35.3 With regard to the altercation on 24 August 2016, the Claimant says Frank was on the premises. If he had left the premises the Claimant would have heard the shutters. He would have heard the shouting and is protecting his position by now denying it. The Appellant felt "kicked to the stomach" by Mr. Oundjian's comments; this was a fundamental breach and the contract between them broke down at this point.

35.4 The grievance procedure was flawed in that there was no investigation and Frank could have chaired the meeting; the Claimant was not advised of her right to appeal.

35.5 The Claimant did not affirm the breach or breaches. She did not return to work after 24 August 2016 due to stress at work. Ms Farah relies on **Chindove** in which the EAT held that a resignation must be considered in all the circumstances, it is not just a question of timing.

Conclusions

36. Mr. Oundjian's behaviour at the meeting on 24 August was inappropriate and I do not doubt that it caused the Claimant real distress and the impact of Mr. Oundjian's behaviour on the Claimant, rather than what he intended, is significant in assessing whether there has been a breach of contract. However, the impact must be assessed objectively and viewed from the perspective of a reasonable person in the Claimant's position. Mr. Oundjian's behaviour must be seen in the context of the Claimant's failure to acknowledge the seriousness of her error and a generally harmonious working relationship of 22 years; the Claimant herself acknowledges that his behaviour that day was out of character. I therefore conclude that in this context, Mr. Oundjian's conduct on 24 August 0216 was not tantamount to a repudiatory or fundamental breach of the Claimant's employment.

37. Turning to the grievance process which followed, initially the Claimant made it clear in several communications that she wanted to meet with Mr. Oundjian and therefore Mr. Oundjian duly arranged the meeting on 23 September 2016. It was entirely reasonable for Mr. Oundjian to refuse to proceed with that meeting because the Claimant chose to be accompanied by Mrs. Burgess, without pre-warning him. A meeting was then arranged for 5 October 2016 and it is clear from the parties communications that the nature of the meeting had stepped up a gear; the meeting was to be a formal grievance hearing as opposed to an informal meeting and the Respondent said it would follow the ACAS Code of Practice; it thereby became an express term and condition of the Claimant's employment that the Respondent would do so.

38. The Respondent then failed to follow the ACAS Code of Practice in the following respects:

38.1 Mr. Oundjian chaired the grievance hearing on 5 October 2016. I accept that the Respondent is a small business and the ACAS code acknowledges in the Introduction:
"3. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometime not be practicable for all employers to take all of the steps set out in this Code"
However, whilst I accept it was not practicable for Mrs. Oundjian (as Mr. Oundjian's wife) or Frank (who reports to Mr. Oundjian) to conduct the Grievance Hearing, it has not been explained why Mr. Maatouk could not have conducted it; he is based in Lebanon but visits every month and as a director he would have the necessary standing to make a decision.

38.2 On 12 October 2016, Mr. Oundjian advised the Claimant her grievance was dismissed but did not inform her that she had the right to appeal and when he did so.

39. Taking Mr. Oundjian's conduct on 24 August 2016 together with the failings in the grievance process that followed, I conclude that there was by 12 October 2016 a repudiatory breach of the Claimant's contract; I agree with Ms. Farah that there was a "course of conduct". I also conclude that the "last straw" was on 12 October 2016 (the failure to advise the Claimant of her right to appeal). On 21 October 2016 Mr. Oundjian advised her that she must provide "*substantive grounds for such an appeal*" but this is not significantly at odds with the ACAS code which provides that "*an employee should let their employer know the grounds for their appeal*" (para 41). The Respondent's email the day before she resigned simply advised her that the grievance appeal hearing would be conducted by an independent and impartial person (in accordance with her request). I cannot therefore identify any subsequent breach or trigger after 12 October 2016;

40. I must then determine whether the Claimant affirmed these breaches. I have reminded myself of the principles in **Buckland** and **Chivers** and that the passage of time in itself is sometimes insufficient for an employee to lose the right to resign and "*the matter is not one of time in isolation"* and must be seen in the context of the particular employee's circumstances. I have taken into account the Claimant's long service; her verbal evidence that she did not need to work for financial reasons and therefore it is reasonable to assume her income was not required for mortgage or other regular expenses; the fact that she was off sick but on the other hand chose to engage with the grievance process and there is no medical evidence before me that her ability to make decisions (such as whether to resign) was impaired by her sickness (whether work related or due to grief); she is educated, intelligent and articulate.

41. The Claimant says that from the outset she had resolved not to return to work "after *being shouted at in this way"* back on 24 August 2016 but her subsequent conduct is at odds with this resolve. Taking the factors in para. 40 above into account, on balance, I find that she affirmed the contract by taking the following steps which are inconsistent with the actions of someone who regards themselves as no longer bound by a contract of employment:

41.1 She continued to receive and accept sick pay and submit "sick notes";

41.2 On 25 October 2016 she agreed to undertake an occupational health assessment with a view to agreeing a Return to Work Plan and returned a completed consent form [page 67].

41.3 Also on 25 October 2016, she advised of her intention to appeal and made a specific request that "*an independent and impartial person is commissioned to review all the paperwork in relation to this grievance, the background and my appeal."*

41.4 She did not resign until 18 November 2017, more than 7 weeks after the grievance hearing.

42. My conclusion is therefore that her claim for constructive unfair dismiaal must fail. It must follow from my conclusion that the Claimant was not dismissed that her wrongful dismissal claim must also fail. In view of this, it is not necessary for me to consider compensation and the Remedy Hearing provisionally listed for 18 January 2018 will be cancelled.

43. I appreciate the Claimant has invested a significant amount of time in these proceedings and will be disappointed by this decision. She undoubtedly had genuine grievances with regard to Mr. Oundjian's conduct and his handling of the grievance procedure but for the reasons explained above I cannot conclude that she was constructively dismissed.

44. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which I have identified as being relevant to the claim are at paragraphs 7 to12; all of these issues which it was necessary for me to determine have been determined; the findings of fact relevant to these issues are at paragraphs 13 to 30; a statement of the applicable law is at paragraphs 31 to 33; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 36 to 42.

Employment Judge Mason on 23 November 2017