EMPLOYMENT TRIBUNALS

Claimant: Mrs Jill Harrison

Respondent: Cognito Software Limited

FINAL HEARING

Heard at: Birmingham **On:** 16 to 19 October 2017

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: Mr J Neville, counsel
For the respondent: Mr J Meichen, counsel

RESERVED REASONS

1. These are the reserved reasons for the Judgment of 19 October 2017.

2. The claimant, Mrs Jill Harrison, who had continuity of employment going back to 1994, resigned from her position as the respondent's Office Manager on 17 March 2017. On the face of it, her resignation was the culmination of a dispute dating back to September 2016 relating to her holiday entitlement and to a pay rise awarded to her in July 2015, which was unilaterally reversed by the respondent from 1 February 2017.

3. The claimant alleges she was constructively dismissed, based principally on an allegation that reversing her pay rise was a fundamental breach of her contract of employment. Her complaints are of unauthorised deductions from wages, unfair dismissal and wrongful dismissal.

4. Part of her unauthorised deductions claim is about two days of sickness in March 2017 for which she was not given contractual sick pay.

5. The gist of the respondent's defence of the claimant's main complaints is that the claimant misled the respondent into awarding her the pay rise, that the respondent was therefore entitled to reverse it, that therefore there was no unauthorised deduction from wages or fundamental breach of contract, and that therefore there was no constructive dismissal.

6. The respondent's main fall-back position in relation to unfair dismissal is an assertion that any compensation should be reduced to, or close to, nil because the claimant was guilty of serious misconduct for which she could reasonably have been, and

would have been, dismissed in any event. The main thing relied upon by the respondent as the serious misconduct in question is the claimant allegedly falsely claiming to be ill on 3 February 2017 in order to get the day off and causing or permitting the respondent to pay her contractual sick pay on that day as if she had genuinely been off sick.

Issues

7. A list of issues had been prepared by claimant's counsel. Although I have some quibbles about some of its details, and although it contains a number of potential issues that appear not, in practice, to be in dispute, it was a helpful starting point.

8. The principal issue I had to decide was: was the claimant entitled from 1 February 2017 onwards to be paid at the rate of £15,000 p.a.? Deciding that issue involved deciding whether the respondent was entitled to reduce her wages from £15,000 p.a. (£1,250 per calendar month) to £11,820 p.a. (£985 pcm), because of mistake and/or misrepresentation made when she was awarded the pay rise in July 2015. Another way of putting this issue is: did misrepresentation and/or mistake in connection with the awarding of the pay rise give the respondent a defence to the claimant's claim that it was a breach of contract not to pay her at the rate of £15,000 p.a.? My decision on that issue, in summary, is that the claimant was entitled to be paid at the rate of £15,000 p.a. and that the respondent was not entitled to reduce her wages from that figure, there having been no relevant mistake or misrepresentation.

9. It did not seem to be in dispute (and in any event, I find it was indisputable) that, in practice, the answer to the first issue was, subject to one matter I shall come on to in a moment, determinative of liability in relation to the main unauthorised deductions complaint, the complaint of unfair dismissal and the complaint of wrongful dismissal. There is no valid basis for any arguments to the effect, for example, that improperly reducing wages from £15,000 p.a. to £11,820 p.a. would not be a fundamental breach of contract, nor that, if the claimant was constructively dismissed, that dismissal was fair under section 98 of the Employment Rights Act 1996 ("ERA"). Further, the respondent was not arguing that there was affirmation of the contract of employment between any fundamental breach and the claimant's resignation.

10. The issue I just stated I would come on to in a moment relates to the respondent's contention that, even if there was a fundamental breach of contract, the claimant was not dismissed because (so the respondent alleges) the claimant did not resign in response to any such breach. The second issue for determination was, accordingly: if there was a fundamental breach of contract, did it play a part in the dismissal, i.e. was it a factor in the claimant's resignation? My decision on that issue is that the respondent's fundamental breach of contract in reducing the claimant's wages from 1 February 2017 *did* play a more than minimal part in the claimant's dismissal, i.e. *was* a significant factor in the claimant's resignation. The claimant was, then, unfairly and wrongfully dismissed.

11. Both parties, through counsel, agreed with me at the start of the hearing that some remedy issues relating to unfair dismissal should be dealt with alongside liability, in

the first part of the hearing. Those issues were: if the unfair dismissal complaint succeeded and the claimant was awarded compensation -

11.1 would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before dismissal, pursuant to ERA section 122(2), and if so, to what extent?

11.2 what adjustment, if any, should be made to any compensatory award to take into account the possibility that the claimant might, in time, have been dismissed in any event, pursuant to Polkey v AE Dayton Services Limited [1987] UKHL 8, paragraph 54 of the EAT's decision in Software 2000 Limited v Andrews [2007] ICR 825, W Devis & Sons Limited v Atkins [1977] 3 All ER 40, and Crédit Agricole Corporate & Investment Bank v Wardle [2011] IRLR 604? (I shall refer to this as the "Polkey / Devis issue");

11.3 did the claimant, by blameworthy or culpable actions, cause or contribute to her dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce, or further reduce, the amount of any compensatory award pursuant to ERA section 123(6)?

12. In short, my decision on those remedy issues is:

12.1 had the claimant not been constructively dismissed with effect on 17 March 2017, she would in all probability have been dismissed by the respondent for misconduct within six weeks of that date; and the maximum amount of any compensatory award should be a sum equivalent to six weeks' net pay;

12.2 it would be just and equitable to reduce the amount of the claimant's basic award by 50 percent because of blameworthy or culpable conduct pursuant to ERA section 122(2);

12.3 the claimant did not cause or contribute to her dismissal, by blameworthy or culpable actions or otherwise, and no further reduction to any compensatory award pursuant to ERA section 123(6) is appropriate.

13. In relation to the claim for non-payment of two days' worth of contractual sick pay, the issue in technical terms is: did the respondent make unauthorised deductions from the claimant's wages in accordance with section 13 of the ERA when it failed to pay her contractual sick pay in relation to two days in March 2017? My answer to that question is: yes, the respondent did.

The law

14. The applicable law substantially appears in the "Issues" section of these Reasons, immediately above, and in the relevant provisions of the ERA. Except in relation to the misrepresentation / mistake subsidiary issue (dealt with separately, later in these Reasons) nothing about the law seems to be in dispute.

15. Dismissal includes an employee terminating, "*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*": ERA section 95(1)(c). What this means was definitively decided by the Court of Appeal in Western Excavations v

Sharp [1977] EWCA Civ 165, in the well-known passage beginning , "*If the employer is guilty of conduct which is a significant breach…*" and ending, "*He will be regarded as having elected to affirm the contract.*"

16. The claimant relies on two things, individually or cumulatively, as the "*significant* [a.k.a. fundamental or repudiatory] *breach*":

    16.1 alleged significant underpayment of wages – something that, absent special circumstances, will usually be a fundamental breach of contract. See Cantor Fitzgerald International v Callaghan [1999] ICR 639;

    16.2 a breach of the 'trust and confidence term'; that is to say, the claimant alleges that the respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between employer and employee. Any breach of that term is repudiatory. This serves to highlight that it is a high-threshold test: "*destroy or seriously damage*" is the wording used. It is not enough, for example, that – without more – the employer acted unreasonably or unfairly.

17. To further emphasise how grave things must be for there to be a fundamental breach of the contract of employment, a fundamental breach is one going to the root of the contract; one that, adopting the wording used in some of the cases, 'evinces an intention not to be bound' by the contract.

18. This doesn't seem really to be a 'last straw' case, but if and to the extent it is, I note that an essential ingredient of the final act or last straw in a constructive dismissal claim based on a breach of the trust and confidence term is that it is the last act in a series the cumulative effect of which is to amount to such a breach. The final act need not necessarily be blameworthy or unreasonable, but it has to contribute something to the breach, even if relatively insignificant. See Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493.

19. In a constructive dismissal case, the repudiatory breach of contract in question need not be the only or even the main reason for the employee's resignation. It is sufficient that it "*played a part in the dismissal*"; that the resignation was, at least in part, "*in response to the repudiation*"; that "*the repudiatory breach is one of the factors relied upon*" by the employee in resigning. See Wright v North Ayrshire Council [2014] IRLR 4. This is the one and only part of the test for whether someone is constructively dismissed in relation to which it is appropriate to look at matters subjectively, from the employee's point of view.

20. If the claimant was constructively dismissed, it will necessarily follow that she was wrongfully dismissed because she resigned without notice.

21. In relation to remedy, in addition to cases already mentioned: in relation to ERA sections 122(2) and 123(6), I have sought to apply the law as set out in paragraphs 8 to 12 of the decision of the EAT (HH Judge Eady QC) in Jinadu v Docklands Buses Ltd [2016] UKEAT 0166_16_3110.

22. Some further particular legal points will be discussed during the course of these Reasons.

Factual Background

23. I shall now summarise the relevant facts, as I find them to be. Further findings of fact are made later in these Reasons, where I explain my decision on particular issues in the case.

24. On my analysis of this case, in terms of what happened, almost the only thing of importance substantially in dispute is whether the claimant was genuinely off sick on 3 February 2017. I should perhaps qualify this slightly: lots of things that might at first blush seem important were theoretically in dispute, but in most instances, when one examined them, they proved to be of little, if any, significance and/or there was no real basis in the evidence for any dispute about them.

25. The claimant seems to have had about twenty reasonably happy and successful years with the respondent and its predecessor, JCS Computing Solutions Limited ("JCS"). She TUPE-transferred from JCS to the respondent in 2008, but her boss stayed the same until 2014: Mr Roger Jackson. Mr Jackson had been one of the owners of the business until it was sold to the respondent (or to the respondent's parent company) and was and remained its Managing Director until he left in 2014.

26. In 2005, it was agreed between the claimant and Mr Jackson and his then fellow Director of JCS, Mr K Frater, that the claimant would work an additional 2½ hours each week from 1 January 2006 and would forego any salary increase that year in return for an increase in her holiday entitlement to 40 days each year plus public holidays. JCS failed formally to record this agreement at the time and did not send the claimant the statement of change of employment particulars required by ERA section 4.

27. When the claimant TUPE-transferred from JCS to the respondent in 2008, JCS's corporate knowledge of the claimant's agreement of 2005/6 about holiday passed to the respondent in at least two ways.

28. First, Mr Jackson and Mr Frater continued to work for the respondent as they had done for JCS. Mr Frater was employed as Chief Technical Officer and was also a Director of the respondent. His employment with the respondent ended around March 2013, but he continued to do work for the respondent in a consultancy capacity for a further year or so. As just mentioned, Mr Jackson was the respondent's Managing Director until 2014.

29. The second way in with JCS's knowledge of the claimant's holiday arrangements passed to the respondent in 2008 was that, on or about 28 August 2008, during the discussions that culminated in the purchase of JCS by the respondent or its parent company, Mr Jackson and Mr Frater provided to a Mr David Nuttall, at the time a senior figure within the respondent and/or its parent company, details of the holiday entitlement of all members of staff, including the claimant. Although the details provided at a meeting on that date may have been slightly inaccurate, I accept Mr Jackson's evidence that in all likelihood he provided Mr Nuttall with accurate figures

at some stage prior to the purchase of JCS's business and the TUPE transfer to the respondent.

30. I also accept Mr Jackson's evidence that he provided to Professor Humayun Mughal, who became Managing/Executive Director of the respondent and also holds a senior role within the respondent's parent company, details of the claimant's holiday arrangements in a conversation in late 2008 or early 2009. Mr Jackson had a clear recollection of that conversation because he was consistently reminded of the claimant's unusual holiday arrangements by being telephoned every year to query them by someone from the part of the respondent that dealt with such things.

31. In 2009, following on from the TUPE transfer, a new set of standard terms and conditions for all employees was issued. What was sent to them, including to the claimant, was a document headed "*Statement of your Terms and Conditions of Employment*". It was a generic document. Amongst other things, it specified that employees' holiday entitlement was 25 days plus public holidays. Mr Jackson sent it to a number of members of staff, including to the claimant, on 9 March 2009. At the same time, he sent a document headed "*Agreement of your Terms and Conditions of Employment*". This was a document that made reference to the Statement of Terms and Conditions document and was specific to each individual employee. It specified, amongst other things, the individual's commencement date, job title and description, and salary. It did not specify anything about holiday entitlement; holiday entitlement was set out, and only set out, in the generic, Statement of Terms and Conditions document, in the manner explained above.

32. The Agreement of Terms and Conditions document that was sent to staff on 9 March 2009 did not have any of the details filled in. In his covering email of 9 March 2009, Mr Jackson stated, "*Needless to say, the "blanks" will be completed in accordance with your current terms!*" He also stated, "If there are any objections, please let me know without delay. Unless a written objection is received, the contract will be assumed to have been accepted in 14 days."

33. Around the first week of April 2009, Mr Jackson visited staff, including the claimant, with completed versions of the Agreement of Terms and Conditions document and got them to sign them. The claimant signed hers without demur. She did not raise any written objections either.

34. I am a little confused as to what the respondent's point is in relation to the 2009 agreement. Repeatedly during the hearing, I asked whether it was the respondent's case that the claimant had, by signing the Agreement of Terms and Conditions document, consented to a change in her terms and conditions such that her holiday entitlement was reduced to 25 days plus public holidays. Repeatedly, it was confirmed on the respondent's behalf that this was not the respondent's case. (It would have been surprising had it been the respondent's case, given that its defence in these proceedings was based on the claimant having a contractual entitlement to 40 days holiday which she had not told Mr Mughal about when asking for a pay rise in 2015). However, in closing submissions, respondent's counsel suggested that any compensation for unfair dismissal should be reduced because, amongst other things, the claimant had continued to take 40 days holiday despite her [supposed] agreement

to the standardisation of terms in 2009, "*which limited her holiday entitlement to 33 days*".

35. The 2009 agreement is a red herring. It is nonsense to suggest there was a variation of the claimant's contract of employment because:

    35.1 neither the claimant nor, through Mr Jackson, the respondent thought the claimant's holiday entitlement was anything other than 40 days [plus statutory holidays] at any relevant time;

    35.2 at all relevant times, the claimant took 40 days holiday a year, the respondent [as a corporate entity] knew she was taking 40 days a year, and the respondent paid her for 40 days holiday a year;

    35.3 there was never any intention to change the claimant's terms and conditions of employment;

    35.4 all that happened in 2009 was that, due to an oversight, Mr Jackson presented to the claimant – and she signed – a set of documents that did not accurately reflect the true agreement between the parties;

    35.5 the situation is no different from what it would have been had the documents presented to the claimant in 2009 wrongly stated that her salary was £100,000 p.a., or that her holiday entitlement was 60 days;

    35.6 the true agreement between the parties was and remained that the claimant was entitled to take 40 days holiday (plus statutory holidays).

36. In or around May 2015, the claimant asked for a pay rise to £15,000 p.a. She made that request through Mr Davis and he forwarded it to Professor Mughal. There does not seem to have been any direct contact between the claimant and Professor Mughal about the pay rise prior to it being awarded. The request for a pay rise was accompanied by a document headed "*Jill Harrison – Job Description – Role & Responsibilities*". I shall refer to this as the "Job Description document". As its heading suggested, it was a document in which was set out what things the claimant was responsible for as part of her job. Immediately under the heading at the top of the document was a sub-heading, "*Salary: Presently on £11,820 looking for £15,000*". That document was passed on by Mr Davis to Professor Mughal. There was no substantial discussion between Professor Mughal and Mr Davis about it, nor about the claimant's request for a pay rise more generally. Professor Mughal granted the request.

37. Around late September 2016, for reasons that are obscure, Professor Mughal seems to have taken against the claimant and the claimant seems to have become dissatisfied in her employment. A particular source of friction in the employment relationship was that, around 27 September 2016, the claimant's holiday entitlement came to the attention of Professor Mughal. I accept that Professor Mughal genuinely was unaware of it before then, most likely because he had forgotten.

38. To cut a long story short, the holiday entitlement issue culminated in Professor Mughal sending the claimant a letter on 17 January 2017, the relevant parts of which are as follows: "*You are aware we have been carrying out a review regarding the*

issue of your current salary and your annual holiday entitlement. …We have now completed this review and I write to confirm we will be reverting your salary back to your original salary prior to your most recent pay review (1st July 2015) with the continuation of your 40 days annual holiday entitlement. This change will take effect from 1 February 2017."

39. The claimant responded to that letter through her solicitors, by a letter from them of 24 January 2017. That letter included the following: "*As you will no doubt be aware, the pay rise issued and expressly agreed to in July 2015 now forms part of our client's contract of employment. To make any change to this without her express agreement would result in a breach of contract. What you are proposing to do would also entitle our client to resign and make a claim for constructive dismissal as such a fundamental breach of contract goes to the heart of the employment contract.*"

40. The respondent's solicitors replied to that letter by a letter of their own, of 24 February 2017. Between the two letters, on 30 January 2017, Mr Davis sent Professor Mughal an email, the relevant parts of which are as follows: "*I would like to bring to your attention a conversation I have overheard from Jill* [the claimant] *… I heard that Jill is having Friday off sick with a migraine so bad she cannot see, following this, she will state that this has been brought on by stress. Also, during this, that she will be attending Butlins on the Friday or Saturday….. I would suggest we do nothing until it happens.*"

41. 30 January 2017 was a Monday. On Friday, 3 February 2017, the claimant did call in sick with a migraine. She also went away to Butlins that weekend.

42. Mr Davis gave oral evidence to the effect that on 30 January 2017, he had indeed heard something along the lines of that which is recorded in his email of that date. The conversation he had overheard was between the claimant and a colleague called Megan Timms. Shortly after overhearing the conversation, Mr Davis spoke to Miss Timms and she apparently told him something to the effect that he had not misheard what the claimant had said.

43. The gist of the claimant's evidence was that no such conversation between her and Miss Timms took place and that she was genuinely ill on 3 February 2017.

44. The claimant had not suggested – at least not prior to this final hearing – that Mr Davis's email to Professor Mughal of 30 January 2017 was fabricated. I can see no good reason to treat it as inauthentic. If I accept its authenticity, which on the balance of probabilities I do, then, in order to reject Mr Davis's evidence, I would have to find that there was a remarkable coincidence; that, by chance, Mr Davis somehow managed accurately to predict on 30 January 2017 what the claimant would do on 3 February 2017. Although I can see no other good reason in the evidence to doubt the claimant's honesty, unfortunately for her, the evidence against her here is very strong indeed. Although coincidences do happen, the standard of proof in the employment tribunals is the balance of probabilities. And it is more likely than not that Mr Davis did indeed overhear the conversation recorded in his email of the 30 January 2017 and that the claimant did indeed go off sick on Friday, 3 February 2017 not because she was genuinely ill, but because she wanted to.

45. Returning to the respondent's solicitors' letter of the 24 February 2017, it included the following:

> *In September 2016, our client became aware that in breach of her contract, your client had been taking 40 days of annual leave per year, when her contractual entitlement was for a maximum of 25 days only…*
>
> *Our client's position is that … she signed a contract with our client on 1 April 2009, which contained clear, unequivocal terms as to her salary, hours of work and holiday entitlement…*
>
> *Our client's position is therefore that at all material times, your client was not entitled to any more holiday entitlement or salary than was provided for in her written contract or by agreed expressed variation...*
>
> *… In an email to your client dated 10 November 2016, Professor Mughal offered your client the option of a "*salary sacrifice with extra holidays … or normal salary with normal holidays*"…*
>
> *Our client's understanding was that your client's preference was to retain her 40 days of annual leave, but revert to her pre-1 July 2015 salary. If, alternatively, your client would prefer to keep the higher salary of £15,000 per annum but to take only 25 days of annual leave per annum, then our client is happy to accommodate this.*
>
> *For the avoidance of doubt, and provided that this dispute resolves in accordance with the offer set out below, our client is willing to waive its rights to require your client to refund it for the additional days of annual leave mistakenly given to your client in breach of her contract of employment. That offer is as follows:*
>
> a. *Your client to confirm in writing within 14 days of the date of this letter which salary / holiday entitlement to keep …*
> b. *Upon receipt of the above written confirmation, our client will make any necessary adjustments to your client's paid salary for February 2017;*
> c. *Upon our client making the above adjustment, or if no adjustments are necessary, then upon your client providing a written confirmation set out at a. above, your client will withdraw her written grievance of today.*
>
> *Obviously, if the above is not acceptable to your client, then our client will carry out a full investigation into your client's grievance … In that circumstance, our client will also consider making a claim against your client in respect of the additional holiday days taken by your client in breach of her contract and in that regard, our client's rights are fully reserved.*
>
> ***Potential Disciplinary Action***
>
> *We understand that your client's performance at work has dropped to below an acceptable standard over the past few months. Examples include:*
>
> i. *On 30 January 2017 your client was overheard by a senior member of staff predicting that she would take Friday 3 February 2017 off with a*

migraine…. Your client subsequently took Friday 3 February 2017 off work and in her sick note she stated "migraine" as the cause of illness. She was paid for that day on the basis of her alleged ill-health.

ii. In October 2016 a complaint was received regarding your client's tone and attitude during a telephone call with Mr Bassi.

iii. A number of your client's colleagues have made complaints about her rude, abrupt and aggressive behaviour.

iv. It has become apparent that your client is passing most of her own work to other members of staff … It is unacceptable for your client to refuse to carry out her own duties and to expect other members of staff to do her work.

At the present time, our client is carrying out an investigation into the above allegations, and our client will write to your client in due course should it become necessary to invite your client to an investigatory meeting and/or to suspend your client temporarily pending a full investigation.

46. The reference to "*your client's grievance*" in that letter was to a grievance from the claimant to Professor Mughal, also of 24 February 2017, about unlawful deductions from wages. In a letter of 13 March 2017, the respondent's solicitors confirmed that they had been instructed to write to the claimant raising potential disciplinary matters prior to receipt of the claimant's grievance. The claimant's grievance of 24 February 2017 was subsequently supplemented in a undated letter sent in late February / early March 2017.

47. A grievance meeting was arranged for 6 March 2017. It had originally been arranged for 14 March 2017, but was brought forward at the claimant's request. The grievance meeting was conducted by Mr Davis. There isn't any particular complaint about the way in which the grievance meeting itself was conducted, albeit the claimant has subsequently complained that it was Mr Davis who heard it rather than someone more neutral.

48. Mr Davis gave his decision on the grievance in a letter of 6 March 2017. In that letter, he addressed each of the points raised by the claimant in her undated letter. His decision was to reject the grievance.

49. The claimant resigned by a letter of 17 March 2017. The relevant parts of the letter are as follows: "*I am writing to inform you that I am resigning … with immediate effect. / Having received by grievance appeal outcome, without being asked to clarify the minutes first, I can see that there will only ever be one outcome in this matter. I have lost all trust and confidence in the company and its officers and can no longer work for the company. / Please accept this as my formal letter of resignation and a termination of our contract. I feel that I am left with no choice but to resign in light of my recent experiences regarding your attempt to change my terms of contract and the unlawful reduction of my salary.*"

Decision on the issues – liability

50. I shall now explain why I have made the decisions on the issues that I summarised towards the start of these Reasons.

51. In practice, the respondent's entire defence to the main unauthorised deductions complaint is the allegation of mistake or misrepresentation. I start with misrepresentation.

52. I am far from sure the respondent is right in its analysis of the issues of legal principle that arise in relation to the misrepresentation defence. But, for present purposes, I am prepared to accept that if an employee persuades her employer to award her a pay rise by making a misrepresentation, the employer might (depending on the particular circumstances) be entitled to take that pay rise away. On the facts here, however, any defence based on misrepresentation does not get off the ground because there was no relevant misrepresentation.

53. For the defence based on misrepresentation to get off the ground, the respondent has to show that, by providing it with her job description document in June 2015, the claimant was making a misrepresentation of fact that was not true at the time it was made. But the only misrepresentation she was making when she provided that document was as to what her responsibilities were as at June 2015. She was not, in my view, making a representation to the effect that she did everything in the job description herself, without assistance and/or delegation, still less one about what would or might happen in the future.

54. Professor Mughal freely admitted, when giving oral evidence, that he had no real idea what work Mrs Harrison was doing around June 2015. Mr Davis admitted that he didn't know what she did around that date in any detail either. The only person who gave evidence who was in a position to tell me with any precision what the claimant's responsibilities were at that time was the claimant herself.

55. The whole of the misrepresentation part of the respondent's case was based on annotations Mr Davis made to the claimant's job description document in or around October 2016. The gist of the annotations was that the claimant was not doing all of the things set out in the job description document all by herself at that time. They were not concerned with what she had or hadn't been doing in June 2015.

56. During cross-examination, Mr Davis was challenged to identify anything in the job description document that was substantially inaccurate in June 2015. He was unable to do so. The high point (from the respondent's perspective) of this part of his evidence was a criticism of the claimant's suggestion in that document that one of her responsibilities was to, "*liaise with clients if they should have any problems or complaints, discuss with Operations Manager what action is to be taken to resolve these problems*". His criticism, such as it was, was to the effect that the claimant did not herself deal with formal customer complaints. Unprompted, he himself used the word "*pernickety*" to describe that criticism; and I think he was right to do so.

57. The claimant did not suggest (and the respondent, in the form of Professor Mughal, cannot possibly have thought she was suggesting) that she dealt with all or most

formal customer complaints herself. Based on the claimant's evidence on this point, which I accept (having no good reason to do otherwise), her statement in the job description document about one of her responsibilities that I just quoted was a fair and reasonably accurate one at the time it was made – June 2015.

58. The respondent has entirely failed to satisfy me that the claimant made any misrepresentations of fact in or in relation to her job description document in 2015. Its defence based on misrepresentation therefore fails.

59. Moreover, even if there were one or two minor exaggerations in that document amounting to misrepresentations – and I don't think there were – I would not have been satisfied that the respondent awarded the claimant the pay rise in reliance on them. Professor Mughal's evidence on this point was rather lacking. It began and ended with the statement in paragraph 12 of his witness statement that he agreed to the pay rise, "*on the mistaken belief that the claimant was carrying out the duties as per*" the job description document. Although this part of his statement was not challenged in cross-examination, it does not follow from the fact that Professor Mughal may have relied, generally, on the accuracy of the job description document in awarding the pay rise that he relied to any material extent on the complete and total accuracy of the every last word of it.

60. I turn to the supposed defence of mistake and/or (possibly; to some extent) misrepresentation by silence based on the claimant's failure to tell Professor Mughal, when seeking a pay rise, that she had forgone a pay rise in 2005/06 in return for extra holidays.

61. This part of the respondent's case is hopeless.

62. The respondent, corporately, was aware at all relevant times of the agreement of 2005-2006 and of the claimant's 40 day holiday entitlement. It knew through Mr Jackson, its Managing Director, up to 2014. It knew through payroll, who paid the claimant for 40 days holiday each year. It knew through Mr Davis, who authorised the claimant to take 40 days holiday each year. The only relevant person who didn't know in 2016 (most likely because, as I have found, he had forgotten) was Professor Mughal. What the respondent is effectively seeking to do is to blame the claimant for its own inefficiency in: failing to provide Professor Mughal with appropriate personnel records and/or for Professor Mughal's own failure of memory and/or failure to ensure, when JCS was taken over, that adequate due diligence was done; and/or, in 2006 and again in 2009, failing to provide the claimant with a statement of employment particulars that accurately reflected her terms and conditions of employment, in breach of ERA section 4. At no point from 2006 to 2014, including in 2009, did she or the respondent (through its Managing Director Mr Jackson) believe that her holiday entitlement was only 25 days. Of course, in an ideal world the claimant would have noticed the discrepancy herself and brought it to Mr Jackson's attention. But the primary responsibility for ensuring that employees' statements of employment particulars are accurate is the employer's.

63. Further, the claimant plainly did not know and could not reasonably have been expected to know that Professor Mughal was unaware of the 2005/06 agreement and

of her holiday entitlement when she asked for a rise. To decide this 'knowledge point' otherwise would require me to find that the claimant knew or ought to have known:

63.1 either that inadequate due diligence was done in 2008, or that Professor Mughal had forgotten what he had been told in 2008 and that the respondent's record-keeping relating to the sale of JCS in 2008 was inadequate;

63.2 that Professor Mughal would never have noticed it and that no one would have mentioned it to him (or that if he had known about it at some stage, that he would have forgotten about it) – and this despite everyone else in the company, including her line manager Mr Davis, knowing of her 40 day holiday entitlement, and despite her request for a pay rise being channelled through Mr Davis, and despite her having been taking 40 days holiday every year for 9 years;

63.3 that despite knowledge of the 40 day entitlement (according to the respondent) being so fundamental to a decision as to whether or not to award a pay rise, Mr Davis would not have mentioned it to Professor Mughal in an email or in other discussions between the two of them about the pay rise.

64. I think the truth is the precise opposite of how the respondent would have it. In all the circumstances, it is inherently likely that, if she considered it at all (and why would she?), the claimant would have thought that Professor Mughal almost certainly knew all about her holiday entitlement, or, at the very least, would know about it by the time he came to decide whether or not to give her a pay rise.

65. The respondent's case has not been particularly clearly articulated in this respect, but part of it seems to be to the effect that the claimant must have known Professor Mughal didn't know of (or had forgotten about) her holiday entitlement because otherwise there is no way he would have awarded her the significant pay rise he did award her. I don't accept this. I do accept she was not expecting to get a pay rise to £15,000 and that being given this relatively generous pay rise might have dented to some extent her previous certainty that he did know about her holiday entitlement. But even if I did accept this – even had I decided, for example, that she didn't know before she was given the rise but did know afterwards – in my view this would take the respondent's case no further. She was not in a fiduciary relationship to the respondent. She was under no obligation to approach Professor Mughal and say something like, "did you really mean to give me such a large pay rise? You have remembered that I forwent a pay rise in 2005/06 in return for extra holiday, haven't you?"

66. A further point in the claimant's favour on this issue is that I don't think there would be a sound basis in law for the respondent's case, even if the facts had fallen the respondent's way.

67. The respondent relies on legal principles and case law relating to mistakes as to terms of contract. I have been taken, in particular, to paragraph 3-022 of *Chitty on Contracts* and Hartog v Colin & Shields [1939] All ER 566. Essentially: a party to a contract will not be held to it if it made a mistake, known to the other party, in the wording of its offer.

68. Leaving to one side the questions of whether it is appropriate to look at the pay rise as a contract rather than as the respondent's unilateral decision (and if it is, what the offer, acceptance, and consideration were), the mistake the respondent supposedly made was not as to the terms of the relevant contract. I know of no authority for the proposition that – outside a fiduciary relationship or some other relationship of utmost good faith, and outside of the consumer sphere – a contract may be unenforceable against a party because of that party's mistaken belief about something that is relevant to whether it was advisable for the contract to be entered into, other than a mistake about the contract's terms. For example, it might arguably be unethical for a business to sell something to another business at an inflated price in the knowledge that that other business mistakenly thinks the price is a good one, but the contract is no less enforceable for that.

69. Finally, in relation to this part of the respondent's defence, if and in so far as the respondent continues to allege that the claimant made a misrepresentation about a holiday entitlement by her silence, I unhesitatingly reject that allegation. She made no representations at all, let alone unequivocal ones, about her holiday entitlement simply by asking for a rise; particularly not in circumstances where the respondent was well aware what her holiday entitlement was, even if Professor Mughal wasn't.

70. Those are my reasons for deciding that the respondent made unauthorised deductions from the claimant's wages. The respondent has not put forward any discernible coherent reasons why, if unauthorised deductions were made, they would not amount to a fundamental breach of contract. In any event, they plainly did amount to one. The respondent had unilaterally decided to cut the claimant's pay by more than a quarter on an ongoing basis, in the teeth of the claimant's entirely reasonable and justified objections.

71. If the respondent is suggesting that its position in these proceedings is improved by its offer or ultimatum to the claimant, contained in its solicitors' letter of 24 February 2017, by which it required her to choose between retaining her holidays and retaining her increased wages, I disagree. That offer or ultimatum amounted to a demand that the claimant choose between two fundamental breaches of her contract of employment and consent to one or other of them.

72. Similarly, the claimant's inability to be able to produce definitive documentary evidence of the 2005/06 Agreement does not begin to mitigate the respondent's conduct, not least because it was almost entirely the respondent's own fault that no such evidence was available.

73. In light of my decision on this first set of issues, I don't propose to go into any great detail in relation to the claimant's alternative case that there was a breach of the trust and confidence term. In short, I am not satisfied that there was – at least not one separate and distinct from the fundamental breach of contract consisting of the unauthorised deductions from wages.

74. The claimant's case – as set out in her witness statement – is that she lost all trust and confidence in the respondent, "*for the reasons contained in my grievance and the way they had handled it*". Examining her grievance, it is almost entirely about the

deductions. So far as concerns the complaint about the way the grievance was handled, despite claimant's counsel's best efforts in submissions to persuade me otherwise, I do not read into the claimant's evidence a broader complaint about the contents of correspondence sent by the respondent's solicitors around that time. The complaint about the handling of the grievance is only about what the respondent did procedurally in relation to the grievance hearing and about the grievance outcome. Suffice it to say that although I don't think the respondent behaved entirely reasonably in these respects, I don't think what it did breached the trust and confidence term.

75. I turn to the issue of causation: did the claimant resign in response to the repudiation, i.e. was the pay cut a significant part of her reasons for resigning? My answer is: yes she did; yes it was.

76. No doubt the claimant's resignation, including its timing, was materially influenced by the threat of disciplinary action. It seems to me that to an extent both parties were playing tactical games. I imagine they, or at least their legal advisors, could see, by February/March 2017, that the relationship between the parties had probably broken down irretrievably and that the claimant's employment was going to come to an end one way or another, whether that was by voluntary termination under a settlement agreement, resignation, or dismissal. It may be the claimant and her solicitors took the view that the best way forward, tactically, was to resign rather than wait to be dismissed for gross misconduct. It is, though, plain for me that at least part of her reasons for resigning was the deductions from her wages. The claimant had threatened to resign and claim constructive dismissal because of the [at the time prospective] deductions, before the respondent had threatened disciplinary action. And had the wages issue not arisen, resignation would barely have been on the agenda.

77. It follows that the claimant was constructively dismissed; and (as already explained) it follows from that, in turn, that the claimant was unfairly and wrongfully dismissed.

Polkey / Devis issue

78. I have already found , on the basis of the available evidence, that on 3 February 2017 the claimant probably did take a day of sickness absence from work when she was not genuinely ill. Even if I'm wrong about this, the respondent had ample evidence that it was so.

79. I disagree with claimant's counsel's submissions to the effect that there was a significant amount more investigation that any reasonable employer would have done. Written statements would probably have been prepared for the purposes of any disciplinary hearing, but the evidence that would have been used to produce those statements – essentially, Mr Davis's email and his own recollection – was a more than adequate basis upon which to proceed and was in place in February 2017.

80. Any reasonable employer would see this as serious misconduct and in my view it would have been within the so-called 'band of reasonable responses' for the respondent to treat it as gross misconduct meriting dismissal.

81. One of the principal submissions made on the claimant's behalf on this issue was to the effect that the respondent had no intension of taking disciplinary action against the claimant in relation to this or any other instance of alleged misconduct.

82. It is true that the respondent moved slowly when dealing with disciplinary matters, certainly so in relation to matters other than the claimant's sickness absence on 3 February 2017. For example:

    82.1 nothing had happened in relation to the allegation about the claimant's interactions with Mr Bassi since November 2016;

    82.2 the complaint about the claimant's alleged rudeness to colleagues was unparticularised in the respondent's solicitors' letter of 24 February 2017, and such particulars of it as were provided for the purposes of these proceedings related to things that happened in 2015;

    82.3 the allegation that the claimant was "*passing most of her work to other members of staff*" dated back at least to October/November 2016;

    82.4 although the respondent's solicitors had been instructed to raise these potential disciplinary matters with the claimant before 24 February 2017, a couple of weeks passed before any steps were taken to deal with the issue of the claimant's sickness absence on 3 February 2017;

    82.5 it appears that no steps at all were taken between 24 February 2017 and the claimant's resignation on 17 March 2017 to advance those disciplinary matters.

83. However, it doesn't follow from the fact that the respondent was, in February / March 2017, seemingly reluctant to take disciplinary action against the claimant for some weeks that the respondent wouldn't ever have taken any disciplinary action against her.

84. I bear in mind the tactical skirmishing, mentioned above, that seems to have been going on behind the scenes in late 2016 and in early 2017. The possibility of the claimant resigning and claiming constructive dismissal was something discussed within the respondent in late 2016 and was raised in terms by the claimant's solicitors on her behalf on 24 January 2017. Professor Mughal gave evidence that I accept, not least because is accords with my expectations as to what the situation might have been, that following receipt of a letter from the claimant's solicitors in January 2017, the respondent was largely acting on the advice of its solicitors. It comes as no surprise to me that the respondent's solicitors were not (as presumably they were not) pushing the respondent to take disciplinary action against the claimant which might result in her dismissal in circumstances where the claimant's employment might well be brought to an end by the claimant resigning. Generally, when employment tribunal proceedings are on the cards, an employer is in a better tactical position if defending itself against a claim of constructive dismissal rather than one of conventional, non-constructive dismissal.

85. I imagine what both parties were looking for in early 2017 was for a 'parting of the waves' on agreed terms. From the fact that this situation turned into a tribunal claim, there clearly was no settlement agreement. But in my view the relationship between the parties had, by the time of the claimant's resignation, deteriorated to such an

extent that if they could not reach a compromise – and evidently they could not – the respondent would have taken disciplinary proceedings forward had the claimant not resigned when she did.

86. I think what would have happened had the claimant not resigned was that, within a reasonably short period, the respondent would have sought to 'throw the kitchen sink' at her. Although the respondent could, as I have already found, legitimately dismissed the claimant simply for falsely taking sickness absence, I don't think the respondent would have restricted itself to that one allegation.

87. From some of the respondent's internal documentation and from the way in which witnesses for the respondent, and Professor Mughal in particular, have expressed themselves in evidence in these proceedings, it appears to me that the respondent had, by March 2017, lost the ability to think rationally and objectively about the claimant. Professor Mughal was evidently angry with the claimant for what he unreasonably saw as her trickery in getting him to agree to a pay rise. He thought she had (quotation taken from paragraph 21 of his witness statement), "*told me a pack of lies in 2015 in order to achieve a pay rise*". The fact that he instructed the respondent's solicitors in their letter of the 24 February 2017 to dredge up the very stale allegations relating to Mr Bassi and the complaints about rude, abrupt and aggressive behaviour dating from 2015 illustrates the extent to which the respondent wanted to 'throw mud' at the claimant at this time.

88. Had the respondent moved as quickly as it reasonably could, and had it focused exclusively on the allegation relating to sickness absence on 3 February 2017, the respondent could have dismissed the claimant before her resignation date, and certainly within a week or two of her resignation date. The reason why I have limited her compensation to six weeks from the resignation date, rather than to a shorter period, is:

    88.1 as above, I think the respondent would not have pursued disciplinary action against the claimant in relation to just the sickness absence incident;

    88.2 it appears from the evidence that, no doubt in part because Professor Mughal devoted only one or two days a month to the respondent, the respondent did not do anything on its own initiative with any speed.

89. Making the educated guesses that I'm obliged to make when considering a possible Polkey / Devis reduction, I think what would have happened would have been that the claimant would have been *unfairly* dismissed by the respondent had she not resigned. When discussing this type of reduction, the appellant courts and the EAT usually refer to whether there might have been a *fair* dismissal in any event. However, I think that an injustice would be done to the respondent on the facts of this case if I were not to make a Polkey / Devis reduction even so.

90. I remind myself that what I am assessing in accordance with ERA section 123(1) is, "*such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*". The dismissal that I think would almost certainly have ensued had the claimant not resigned would

have been an unfair one; but if the claimant had brought a claim about it, seeking compensation only, there would have been a finding of unfair dismissal but no compensatory award would have been made to the claimant. The reason for there being a £zero compensatory award is that had the respondent not 'thrown the book' at the claimant, but had instead concentrated on the sickness absence allegation, the dismissal would have been fair. The reason I think an unfair dismissal would have resulted is that the respondent would have relied on allegations ii., iii., and iv. set out in the respondent's solicitors' letter of 24 February 2017 (see above), and in my view no reasonable employer would have based a dismissal on those allegations, even partly, for reasons I shall explain below.

91. Compensation for unfair dismissal should be such as to place the claimant in the same financial position she would have been in had she not been unfairly dismissed on the date on which she was unfairly dismissed. Had the claimant in the present proceedings not resigned on 17 March 2017 – i.e. not been unfairly dismissed on 17 March 2017 – she would have been dismissed around six weeks later. Although she could have brought a successful unfair dismissal claim in respect of that dismissal six weeks later, her financial position at the end of that successful unfair dismissal claim would have been that she would have been better off to the tune of six weeks' pay and not a penny more. That is why I assessed compensation pursuant to ERA section 123(1) at no more than six weeks' pay; and did so even though, had the claimant not resigned, the dismissal that I think would have ensued six weeks after resignation would have been an unfair one.

ERA section 122(2) & 123(6)

92. I turn to why I have decided that the claimant's basic award should be reduced by 50 percent pursuant to ERA section 122(2).

93. My decision is based solely on the claimant's false sickness absence on 3 February 2017. This was blameworthy and/or culpable conduct on any sensible view. I don't, though, think it had any significant impact on the claimant's decision to resign (except, possibly, in relation to the timing of her resignation); and, in any event, I don't think it can be said to have caused or contributed to the claimant's dismissal to any significant extent.

94. The lack of causation or contribution between the fake sickness absence and dismissal seems to me to be a relevant factor when considering ERA section 122(2) even though that section does not require causation or contribution in order for it to be engaged. A basic award is a kind of penalty; a claimant gets a basic award irrespective of whether she has suffered any loss. Given that the blameworthy and culpable conduct I am relying on to make a reduction pursuant to that section was substantially unconnected with dismissal and with the reasons it was unfair, it would not, in my view, be just and equitable to reduce the basic award by 100 percent, or anything close to 100 percent, as the respondent, through counsel, urges me to. Nevertheless, balancing that factor against the fact that the claimant could and would have been dismissed in any event, I also think that this is not s case where a reduction pursuant to ERA section 122(2) at the bottom end of the range should be made.

95. In all the circumstances I have decided that a 50 percent reduction would be just and equitable.

96. I shall now explain why I have decided that no reduction pursuant to ERA section 123(6) should be made. My explanation also provides the reasons why I have taken the view that the only matter that could legitimately have resulted in the claimant's dismissal had she not resigned is the allegation of wrongfully taking sickness absence; and why that allegation is also the only one in relation to which I have made a reduction to the basic award pursuant to ERA section 122(2).

97. I refer to allegations ii., iii., and iv. set out on the third page of the respondent's solicitors' letter of 24 February 2017. I also refer to paragraph 26 of respondent's counsel's submissions dated 18 October 2017. In those paragraphs, various allegations are set out against the claimant that the respondent relies on for the purposes of these proceedings to reduce any compensation that would otherwise be payable to the claimant. I shall now deal with each of those allegations in turn.

98. By 2017, the allegation relating to Mr Bassi was a 'dead duck'. It was, I think, resurrected in February 2017 purely in order to give the impression that there were more disciplinary allegations outstanding against the claimant than was in reality the case. In the absence of any contemporaneous written complaint from Mr Bassi or other evidence from Mr Bassi, either at the time or subsequently, I am not satisfied that the claimant did anything blameworthy in relation to Mr Bassi, still less that anything the claimant did in fact do in relation to him could legitimately have resulted in her being disciplined in early 2017.

99. I would make similar observations about the allegations relating to complaints from the claimant's colleagues. By early 2017, there was no substance left to these.

100. Much the same goes for the allegation that the claimant was passing most of her work to other members of staff. I think that, at the time, this allegation was wrapped up in Professor Mughal's mind with the allegation about her lying about the extent of her duties. There also seems to have been one particular occasion, in or around October/November 2016, when Professor Mughal, without informing the claimant that this was the case, seems to have expected her to carry out a particular piece of work herself rather than delegating any part of it to anyone else. Again, based on the evidence before me, I think that by February/March 2017 this was not a real, live issue. I am not satisfied that the claimant did anything blameworthy or culpable and I don't think this could reasonably have been used as a significant part of the respondent's justification for disciplining and dismissing the claimant in early 2017.

101. The respondent alleges that the claimant improperly emailed information to herself, and that this could have resulted in the claimant's dismissal, and/or that this was blameworthy or culpable conduct justifying a reduction to any compensatory award pursuant to ERA section 123(6). I don't agree.

102. First, Mr Jackson, the individual who gave evidence before me who had possibly the least of an 'axe to grind', confirmed in his evidence that there had historically been nothing wrong with members of staff emailing work-related matters to their home email addresses. There was no clear change of policy in this respect.

103. Secondly, and perhaps more importantly for the purposes of this case, the essential allegation being made against the claimant – at least the allegation that I think has any potential substance to it – is the allegation that she, during work hours, was going through the respondent's documents and finding and emailing to herself material for her own selfish purposes, and that this was being done with a view to preparing a future legal claim against the respondent. I do not accept this part of the respondent's case on the facts. I largely accept the claimant's evidence that what she was doing – periodically, if and when she came across something in the course of her normal duties, or in her own time – was sending home, so that she would have it if she needed it, something that she could use if the respondent decided to try to force her out. I accept she had a genuine and legitimate concern that the respondent might do this. I accept this because of the respondent's behaviour once Professor Mughal fell out with her. There is no real evidence of the claimant wasting significant amounts of the respondent's time on this, which I accept was not part of her work and which she should therefore not have been doing in the respondent's time.

104. I also accept that what she was doing was essentially defensive and that the extent of it was reasonable. It is not blameworthy or culpable, nor could it legitimately be the cause of disciplinary action (certainly not disciplinary action resulting in dismissal), for an employee to take such defensive action.

105. The other things mentioned in paragraph 26 of respondent's counsel's written closing submissions are unsustainable in light of my decisions on other issues and/or were raised for the first time in those written submissions.

    105.1 The claimant did not hold herself out as carrying out duties which she didn't carry out and I am not satisfied she failed to carry out duties which she ought properly to have been carrying out.

    105.2 The respondent has rightly accepted that the 2009 agreement did not limit her holiday entitlement to 33 days (25 days plus statutory holidays).

    105.3 She did nothing wrong in failing to mention to Professor Mughal that the 2009 agreement suggested her holiday entitlement was less than it in fact was.

    105.4 Her refusal to accept the respondent's proposal that either her salary be cut or her holiday entitlement be cut, far from being unreasonable, was no more than a refusal to accept one or other proposed fundamental breach of her contract of employment.

Unauthorised deductions – contractual sick pay

106. There is no dispute that the claimant was not paid contractual sick pay in relation to two days in March 2017 when she was off sick. On the basis of the totality of the evidence, whatever the position in theory, I have decided that custom and practice was that employees who were genuinely off sick were invariably paid contractual sick pay in respect of short periods of absence and that there was no discretion in this respect. The claimant was not paid contractual sick pay in relation to the two days in March because of a suspicion she was feigning illness and/or, possibly, because of general ill-feeling towards her. I am satisfied she was genuinely off sick in March

2017 and was, in the circumstances, entitled to contractual sick pay; and that the respondent had no legitimate reason for failing to pay it to her.

Summary

107. There was no legal justification for the respondent unilaterally cutting the claimant's wage from £15,000 p.a. to £11,820 p.a. and doing so was a fundamental breach of her contract of employment, in response to which she resigned without notice. She was therefore constructively dismissed, and, in the absence of any potentially fair reason for this constructive dismissal, wrongfully and unfairly so.

108. Shortly before her resignation, however, the claimant had committed an act of misconduct, namely taking a day of sickness absence when she was not genuinely too unwell to work, for which she could and would, had she not resigned, have been dismissed. Any unfair dismissal basic and compensatory awards should be significantly reduced as a result, as set out in the Judgment.

Employment Judge Camp
16 January 2018