



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs M Warrington

v

Lloyd's Pharmacy Limited

Heard at: Cambridge

On: 26 & 27 April 2018

Before: Employment Judge G P Sigsworth

Appearances

For the Claimant: Mr B Henry, Counsel.

For the Respondent: Mr R Kohanzad, Counsel.

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant was constructively unfairly dismissed by the respondent.
2. There was a fifty percent chance that the claimant would have been fairly dismissed no later than 31 January 2017.
3. A remedy hearing will be listed, if required by the parties.

RESERVED REASONS

1. The complaint made by the claimant to this tribunal is of constructive unfair dismissal. The claim form is not particularised. However, the complaints that the claimant wishes to make to this Tribunal in support of her claim of constructive unfair dismissal are set out in her internal grievance to the respondent of 8 December 2016. Thus, at this hearing, her counsel set out the nine matters that the claimant relies upon as separately or in combination amounting to a breach of the implied term of mutual trust and confidence. Those nine matters are as follows:-

- 1) Mrs Ahmed conducting the sickness absence review meeting of 9 November 2016 in a busy coffee shop.

- 2) Inappropriate questions being asked during that interview by Mrs Ahmed.
 - 3) No copy of the notes of interview as promised were given to the claimant.
 - 4) The claimant did not have a return to work interview after returning from sickness on 22 November 2016.
 - 5) The claimant was told she would not be paid sick pay, other than the statutory sick pay, for her four weeks sickness absence (although in fact she was paid it).
 - 6) Comment from Mrs Ahmed in or about (date) – “Maybe it’s you, you need to change.”.
 - 7) The whispered comment to a colleague by Mrs Ahmed on 25 November 2016 – “Getting rid of Mel is a work in progress”.
 - 8) The respondent failing to properly manage the claimant when a grievance had been submitted by a colleague, lack of support, from 22 November 2016.
 - 9) Comment made by the area manager at an awards presentation on 28 November 2016 – “What’s Mel doing here?”.
2. The Tribunal heard oral evidence from the claimant, and called on her behalf were two witnesses. These were Mrs Sarah Whitehead and Mrs Sue Hart, two former colleagues. The respondent called two witnesses. They were Mrs Noreen Ahmed, branch manager; and Mr David Pemberton, healthcare operations manager. The parties provided to the Tribunal a bundle of documents of some 240 pages. At the end of the evidence, counsel for the parties made oral submissions. There was insufficient time at the end of the second day for the Tribunal to reach a decision and deliver it to the parties. The decision was therefore reserved. The hearing proceeded as a liability hearing only.

Findings of fact

3. The Tribunal made the following relevant findings of fact:-
 - 3.1 The claimant was employed by the respondent as a dispenser at its Pharmacy at Addenbrookes Hospital in Cambridge from 19 May 2004 until her resignation from employment, on 29 November 2016, but effective 27 December 2016. The dispensary/pharmacy at the relevant time were employed some four pharmacists on a rota basis, some five or six dispensers (two full time), an ACJ, and a supervisor. There was also the branch

manager. The claimant worked four days a week, Tuesday to Friday, 9am to 6pm.

- 3.2 In August and September 2016, the claimant's line manager at the time, Mr Omar Kamal, had cause to speak to her on several occasions about her conduct. He noted that her performance involved a lot of idling and a lot of talking. She promised to find her old focus and strive to implement it all the time. He criticised her attitude to work and noted that she would come up with a plan of action to remedy it. These comments were noted in writing by Mr Kamal. Other than that, the claimant had no formal disciplinary record.
- 3.3 There was then a change of line management, and from about September 2016, Mrs Ahmed became the new branch manager. I find that Mrs Ahmed had to manage some strong personalities in the team including the claimant. The claimant needed more direction than some colleagues. She could be disruptive and she upset colleagues on occasions. Mrs Ahmed had informal discussions with the claimant about these matters at which the claimant appeared to accept the feedback, but then her behaviour continued. There was an incident with a colleague, Mrs Geatar, was spoken sharply to by the claimant and another colleague called Mrs Hart, leading to tears and upset on the part of Mrs Geatar. Mrs Geatar was upset and felt that the claimant was not supporting her, leaving her to deal with oncology matters while the claimant filed prescriptions. Mrs Geatar and the claimant spoke after this incident and resolved their dispute between them. Mrs Ahmed, who was aware of the matter, and as Mrs Geatar did not wish to progress the matter further, Mrs Ahmed took no further action.
- 3.4 Early on in her new post, Mrs Ahmed also witnessed what she described as inappropriate behaviour by the claimant towards another colleague, Mrs Jacqui (Jackie?) Edwards. This behaviour occurred regularly, with the claimant taking down to Mrs Edwards in a condescending and intimidating manner, and shouting when Mrs Edwards asked her for information about patients' prescriptions. On one occasion, Mrs Ahmed saw the claimant put her hand very close to Mrs Edwards' face as if to stop her talking. Mrs Ahmed did not bring this up with the claimant at the time, because she was new and she wanted to see how staff behaved with each other more generally. A little later, Mrs Ahmed did talk to the claimant that her behaviour might come across as a bit aggressive and abrupt, which the claimant responded, "That's just how I am". It was in that context that Mrs Ahmed said, "you need to reflect a little bit on your own behaviour", and I find that allegation 6 above occurred in that context. Mrs Ahmed asked the claimant to make herself more visible, because she would disappear on numerous cigarette breaks.

- 3.5 Other members of the team gave statements to the investigation conducted by Mr Pemberton into Mrs Edwards' grievance of 13 October 2016. Mrs Karina Rivadeneira, dispenser, said that Mrs Edwards was constantly blamed and put down by the claimant and Mrs Hart. Mrs Geatar, pharmacist, said that she had witnessed the claimant's sharpness of speaking to Mrs Edwards. Mrs Whitehead said there was an atmosphere between the claimant and Mrs Edwards, and she described the claimant as a fiery redhead personality who was quite bossy and difficult to manage. On one occasion, Mrs Ahmed had asked the claimant to take a telephone call to which the claimant responded; "No, why can't you do it" – which Mrs Whitehead thought was inappropriate. Mr Kamal told Mr Pemberton he was aware of some intimidation and bullying by the claimant, and that he had seen her snatch a prescription out of Mrs Edwards' hands. He felt was to make Mrs Edwards feel that it was not her place to be in the pharmacy. The claimant often spoke to Mrs Edwards in a degrading manner. He would talk to the claimant about her performance and behaviour, following which there would be an initial improvement but then there was a reversion back to constant talking to colleagues and backchat, as he described it.
- 3.6 After the claimant's resignation, and her grievance, there was an investigation into that, and statements were given to that investigation. Some colleagues were positive about her. Mr Pemberton reached a conclusion that there were personalities within the team who found it difficult to work harmoniously together, and that it was a difficult team to manage. The claimant herself was part of that problem.
- 3.7 On 25 October 2016, the claimant had pre-planned surgery, and she was signed off work until 9 November 2016. Then, she was signed off sick until 22 November 2016. Mrs Ahmed received HR advice that she should have a review meeting with the claimant, to discuss her absence and the support that she required from the respondent. Mrs Ahmed arranged that meeting with the claimant in a coffee shop as the claimant did not want to meet Mrs Ahmed at her home. The coffee shop was a neutral venue. Notes were taken of that meeting by Mrs Ahmed. Mrs Ahmed asked the claimant about the impact of her condition on her work, and was told that she could not sit for too long or stay in one position, she could not bend or stretch and she had only just started driving again. She was asked whether there was anything that the respondent could do to assist her on her return to work, and the claimant said there was not. Mrs Ahmed asked the claimant to keep her updated on how she was getting along and that she may be referred to occupational health. Occupational health might be able to identify ways in which the respondent could help her recovery and provide reports. Mrs Ahmed asked how the claimant was coping with her children, and the claimant replied; "they were not babies so she could just take them

to school”. That last comment that is relied upon as being inappropriate question from Mrs Ahmed. These notes were typed up but were not sent to the claimant to check for accuracy, although it is not suggested by the claimant at this hearing that the notes were inaccurate. HR advised the claimant to raise the matter of the inappropriate comments (as she saw them) of Mrs Ahmed’s at her return to work interview (see below). In cross examination, the claimant said that matters 1-3 and 5 were not relied upon by her as being part of the reason for her resignation. However, allegation 4 (as well as the later allegations) was relevant. The claimant felt disappointed that the return to work meeting did not take place on or after 22 November 2016 so that the claimant was not able to raise her concerns at the sickness review meeting as she was told by HR that she could do. However, Mrs Ahmed’s recollection, as she told the Tribunal was that she had a meeting, or at least a conversation, with the claimant on Friday 25 November 2016, as she had been off the previous two days. Mrs Ahmed was able to give a detailed account of what was discussed at the meeting. She spoke to the claimant after her sick leave and told her not to stretch when working and told her to use a footstool, and to take regular breaks as she needed to or sit down if felt like it. The conversation of the meeting should have been recorded in a form, signed by the claimant, but Mrs Ahmed was not sure that this happened. Thus, I find that the meeting was not in fact minuted as it should have been, and was at most a conversation rather informally. However, I did find that Mrs Ahmed did speak to the claimant on her return to work about matters identified above, whether it was described as a return to work meeting or not.

- 3.8 As far as allegation 5 (above) is concerned, then the claimant’s case is that during the absence review meeting of 9 November 2016, Mrs Ahmed told her that she was not entitled to and would not be receiving company sick pay (which is discretionary). The claimant would only receive statutory sick pay as agreed at a previous staff meeting. As explained by Mrs Ahmed to this Tribunal, it was part of her policy (as agreed with her area manager) to try and manage high absence rates in her team, and one of the tools of this management process was not to in a manner of speaking award sick pay to those off sick. In other words, not just the claimant but everybody in the team who was off sick was not paid any company sick pay. However, in fact the claimant was paid company sick pay for this four week period of absence. Thus, this policy message apparently did not get through to HR or payroll. The claimant was paid that money before she resigned, and she told the Tribunal in cross examination that the issue had no inference on her decision to resign.
- 3.9 Allegation 6, the alleged comment from Mrs Ahmed that maybe it was the claimant who needed to change. Context is all, as explained by Mrs Ahmed (see above). I note that, as with many of

the other allegations, this is not pleaded specifically in the claim form, there is only a brief reference to it in the claimant's witness statement, with no date or context. It is unsurprising that Mrs Ahmed cannot recall the detail, and I accept her evidence about the context.

- 3.10 The seventh allegation is the comment – “getting rid of Mel is a work in progress”. This was alleged to have happened in the pharmacy, with Mrs Ahmed whispering to a colleague, Mrs Rivadeneira, these words, which the claimant heard, although on the other side in the dispensary, she was near the sink, and therefore I find that she could have heard what was said. The claimant raised the allegation in her grievance letter, and it was an entry she made in her diary at the time, which she says was a contemporaneous record. It is recorded slightly differently in the diary – “having said that I managed to find out today that getting rid of me was a ‘work in progress’”. Mrs Ahmed denied making that comment in her evidence to the Tribunal. Mrs Rivadeneira was asked about it in an interview for the purposes of the claimant's grievance investigation, and she also denied that anything had been said to her like this by Mrs Ahmed. I did not of course hear Mrs Rivadeneira give evidence. However, on a balance of probabilities I find that the comment was made and overheard by the claimant in the circumstances that she described. It is recorded by her contemporaneously, and part of her grievance of 8 December 2016.
- 3.11 The eighth allegation is the claimant was not supported by Mrs Ahmed on her return to work after her sickness absence. This was clarified in her evidence as meaning there was a lack of support in the context of her interaction with Mrs Edwards, with whom she still had to work, and who had raised a grievance against her. Mrs Ahmed told the Tribunal she was not involved in Mrs Edwards grievance investigation at all, and she tried to stay neutral. When the claimant complained to Mrs Ahmed that Mrs Edwards was ignoring her, Mrs Ahmed spoke to Mrs Edwards and said that she and the claimant must co-operate on work related matters. HR had advised Mrs Ahmed to tell the claimant and Mrs Edwards to speak only about work related issues. Mrs Ahmed felt that it was best not to put them in a room together and speak to both at the same time, because of frictions and tensions between them. It did not cross Mrs Ahmed's mind to suggest to the claimant, pending resolution of Mrs Edwards' grievance, she should suggest to the claimant that she might work at another branch, of which there are two or three in Cambridge. If she had made that suggestion, I find that the claimant might not have been favourable towards it.
- 3.12 The final allegation relied upon is the comment by the area manager, Mrs Raj Patel, at an awards ceremony for a colleague on Monday 28 November 2016. On seeing the claimant in attendance,

Mrs Patel said: “What’s Mel doing here?”. In the light of Mrs Ahmed’s comments three days earlier, the claimant interpreted this as meaning – Why is Mel still here (ie still working for the respondent). As Mrs Ahmed’s line manager, Mrs Patel would have known of Mrs Ahmed’s alleged intention to get rid of the claimant, says the claimant. Mrs Ahmed conceded that Mrs Patel didn’t query why some ex-colleagues/ex-employees were at the ceremony. However, Mrs Ahmed had two innocent explanations for Mrs Patel’s comment. First, that the ceremony was on a Monday, and the claimant did not work on Mondays so why would she be at the store? Second, that Mrs Patel would have known that the claimant had been off on long term sick because of her surgery because cover had to be organised for her, and so maybe she thought that she had not yet returned to work.

- 3.13 On 23 November 2016, the day after the claimant’s return to work, she was asked to attend an interview with Mr Pemberton in connection with Mrs Edwards’ grievance against her. In that interview, she denied the incident alleged by Mrs Edwards, that she had raised her hand to Mrs Edwards’ face to stop her talking, saying that she may have pointed to a shelf. However, the result of the evidence obtained by Mr Pemberton from other witnesses, Mr Pemberton believed that the claimant had behaved inappropriately towards Mrs Edwards on a regular and consistent basis, speaking to Mrs Edwards in a condescending and aggressive manner. Mr Pemberton believed she had created an intimidating atmosphere for Mrs Edwards, which amounted to bullying and harassment, according to the respondent’s bullying and harassment policy. He recommended that the matter progressed to a disciplinary hearing, as her behaviour could potentially amount to gross misconduct. However, the outcome decision by Mr Pemberton was not made for another two or three weeks. All that the claimant knew was that at the meeting with Mr Pemberton she was told that the question for Mr Pemberton was whether or not the matter should be progressed further. Thus, the claimant knew on 23 November 2016 she could potentially be disciplined. Mrs Edwards’ grievance was upheld, the letter being sent to her with the outcome on 15 December 2016.
- 3.14 The claimant tendered her resignation on 29 November 2016, giving four weeks’ notice in accordance with her contract of employment. In that letter the claimant made no reference to the reasons why she was leaving. She said therein that she had enjoyed her time at Lloyd’s, and would thank them and the team for the opportunities she had been given. However, on 8 December 2016, she put in a formal complaint against Mrs Ahmed, complaining of mis-management, victimisation and bullying. She raised most if not all of the issues that she complains of to this Tribunal. She said in her grievance that the complaint may appear to be a little tit for tat, but she could assure the

respondent this was not the case. The complaint was about Mrs Ahmed not giving her proper support and treatment. She said she was being discriminated against because she did not fit into Mrs Ahmed's gang. From being a hardworking and dedicated team, since Mrs Ahmed's arrival it had become a disjointed group of people who did not communicate for fear of saying something wrong or inappropriate.

- 3.15 Although I read and heard evidence of subsequent events, including the claimant's suspension on 22 December 2016, and the grievance hearing on 25 May 2017 (partially upheld in the context of not being sent notes of the sickness review meeting), the matters are not relevant to the constructive dismissal case.

The Law

4. By s.94(1) of Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by his employer. By s.95(1)(c), for the purposes of the Act an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) and in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct – so called constructive dismissal. An employee has the right to treat himself as discharged from his contractual obligations only where his employer is guilty of conduct which goes to the root of the contract or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract – see Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA. Thus, the employers conduct must constitute a repudiatory breach of the contract. There is implied in the contract of employment a term that the employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation which necessarily goes to the root of the contract – see Woods v WM Cars Services (Peterborough) Ltd [1982] IRLR 413, CA; and Malik v BCCI SA [1997] IRLR 462, HL. Conduct which breaches the term of trust and respect is automatically serious enough to be repudiatory, permitting the employee to leave and claim constructive dismissal – see Morrow v Safeways Stores [2002] IRLR 9, EAT. Failure to deal properly with a formally raised grievance may constitute a contractual repudiation, based on a specific implied term to take such grievances seriously (not just on the more general term of trust and respect) – see WA Goold (Pearmak) Limited v McConnell [1995] IRLR 516, EAT. In Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445, CA, it was held that the range of reasonable responses test is not appropriate to establishing whether an employer has committed a repudiatory breach of contract entitling an employee to claim constructive dismissal. The Malik test is the correct test.

5. The employee must leave in response to the breach of contract. In Nottinghamshire County Council v Meikle [2004] IRLR 703, CA, it was held that once a repudiation of a contract has been established, the proper approach is to ask whether the employee has accepted that repudiation by treating their contract of employment as at an end. It must be in response to the repudiation, but the fact the employee objected to other actions or inactions of the employer, not amounted to breach of contract, would not vitiate the acceptance of the repudiation. It is enough that the employee resigned in response, at least in part, to fundamental breaches by the employer. The innocent party must at some stage elect between whether to affirm the contract or accept the repudiation, the later course brings the contract to an end. Delay in deciding what to do in itself does not constitute affirmation of the contract, but if it is prolonged it may be evidence of an implied affirmation – see WE Cox Toner (International) Ltd v Crook [1981] IRLR 443, EAT. Thought there has been a breach of trust and confidence in any case is an objective test for the Tribunal to determine. The fact that the employer’s conduct must either be calculated or likely to destroy or seriously damage the employment relationship it is arguably a high threshold. The particular incident which causes the employee to leave may in itself be insufficient to justify his/her resignation, but may amount to a constructive dismissal if it is the ‘last straw’ in a deteriorating relationship. This means that the final episode in itself be a repudiatory breach of contract, although there remains the requirement that the alleged straw must itself contribute to the previous continuing breaches by the employer – see Waltham Forest London Borough Council v Omilaju [2005] IRLR 35, CA. In Lewis v Motorworld Garages Ltd [1986] ICR 157, CA, it was held that the breach of the implied obligation of trust and confidence may consist in a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each particular incident may not do so. In particular, in such a case the last act of the employer which leads to the employee leaving need not itself be a breach of contract. The question is, does the cumulative series of acts taken together amount to a breach of the implied term? This is the ‘last straw’ situation.

Conclusions

6. Having regard to the findings of relevant fact, and applying the appropriate law, and taking into account the submissions of the parties’ representatives, I have reached the following conclusions:
 - 6.1 The first issue is to determine whether the nine allegations relied upon by the claimant, separately or cumulatively, some or all of them, add up to a breach of the implied term of mutual trust and confidence.
 - 6.2 Insofar as the first allegation is concerned, this was not a major problem as the claimant recognised when she conceded that it was not part of the reason for her dismissal. The coffee shop venue was not ideal, but was a neutral venue and the claimant did not say,

let's move elsewhere. The meeting seems to have been conducted perfectly adequately and it was minuted. I conclude that the first allegation is not a breach and has not contributed to any breach of the implied term.

- 6.3 The second allegation concerns the inappropriate questions, or rather, as identified by the claimant one question in relation to her children. I conclude that the questioning was inoffensive, and taken unnecessarily badly by the claimant. It is clear that Mrs Ahmed was trying to be supportive, and seeking to understand what the respondent could do for the claimant on her return to work in terms of adjustments etc. In any event, this allegation is not relied upon by the claimant as part of the reason for her resignation. I therefore conclude that it is not a breach of the implied term, nor did it contribute to any breach.
- 6.4 The third allegation relates to the failure to provide the notes of interview to the claimant. This may have been minor unreasonableness, but not such as to be part of a fundamental undermining of the contract of employment. It may simply have been oversight by Mrs Ahmed, and not deliberate. In any event, it did not contribute to the resignation, according to the claimant. Thus, I find that the allegation was not a breach of the implied term, nor did it contribute to any breach.
- 6.5 The fourth allegation and the failure to have a formal return to work interview. Although this did not occur, there was a meeting. It should have been formalised by Mrs Ahmed, and in the light of a later allegation it may be part of the claimant's general allegation of lack of support on her return to work on 22 November 2016. Was it an oversight on Mrs Ahmed's part? Or was it rather that she could not be bothered to do the meeting properly, with this particular difficult employee? I conclude that I cannot be certain about this.
- 6.6 The fifth allegation relates to the sick pay issue. The claimant was paid it, and does not rely upon what Mrs Ahmed said to her as being part of the reason for her resignation. The key point here is that the payment of company sick pay is discretionary and not a contractual right. If the contract provides for a discretion, then any size of that discretion cannot be a breach of the implied term, because an implied term cannot contradict an express term. Mrs Ahmed simply was seeking to manage sickness absence in her team in this way. I conclude that this issue was not a breach of the implied term, nor did it make any contribution to it.
- 6.7 The sixth allegation is the comment by Mrs Ahmed that maybe the claimant needed to change. Maybe the claimant did need to change, and it was said in the context set out by Mrs Ahmed as I accept. What Mrs Ahmed was seeking to do was to encourage the claimant to look at herself and her behaviour critically. There is

nothing wrong in that, as the claimant was causing problems. I conclude that the remark was not a breach of the implied term and nor did it contribute to the breach.

- 6.8 The seventh allegation relates to the comment by Mrs Ahmed to Mrs Rivadeneira that "Getting rid of Mel was a work in progress". I found that that comment was made and overheard by the claimant. Clearly it is a remark that is substantially undermining of the employment relationship, intended to be so. Managers should not be saying such a thing to junior colleagues. I conclude that it was a major contribution to a breach of the implied term, if not a breach in itself.
- 6.9 The eighth allegation is the management of the claimant on her return to work, in terms of the alleged lack of support etc I have made findings of fact about this. Although, no doubt Mrs Ahmed was not bending over backwards to be supportive towards the claimant at this time as she wanted her out of the business. As the claimant's counsel said, management was somewhat re-active to the situation, and not pro-actively managing a difficult situation having Mrs Edwards and the claimant working together.
- 6.10 The ninth and final allegation, is the comment by Mrs Patel at the awards ceremony. In the light of Mrs Ahmed's comment three days before to Mrs Rivadeneira, I can quite understand why the claimant interpreted what Mrs Patel said in the way that she did. However, there is equally an innocent explanation, as set out in the findings of fact. I do not believe that I can infer from the comment a plot between Mrs Ahmed and Mrs Patel to get rid of the claimant. Thus, I find that there was no contribution by the remark to any breach of the implied term.
- 6.11 Therefore, allegation seven has been made out, which together with potential support from allegations four and eight, I conclude they point to a fundamental breach of the implied term, and thus a fundamental breach of the contract. Taken together, these matters are sufficient to severely damage the relationship of trust and confidence between the parties. The claimant had a reasonable belief that Mrs Ahmed wanted her out of the business, and was working towards achieving that. The case law suggests that any breach of the implied term of mutual trust and confidence is sufficient to amount to fundamental breach of contract.
- 6.12 I am also satisfied that the claimant resigned, at least in substantial part, because of that breach. The claimant also had in mind though, at the date of her resignation the recent interview with Mr Pemberton and the threat of possible disciplinary proceedings for her conduct towards Mrs Edwards. Her colleague, Mrs Hart, also resigned, some days before the claimant and that was because of the potential disciplinary proceedings, as she told this

Tribunal. I conclude that the potential disciplinary proceedings were also a factor in the claimant's decision to resign. However, in accordance with Nottinghamshire County Council v Meikle, the fact that the claimant resigned in part because of the respondent's fundamental breach of contract is sufficient to establish constructive dismissal based on a fundamental breach.

6.13 Clearly, delay and waiver of breach are not factors in this case.

6.14 Therefore, the claimant has established constructive dismissal. I conclude that it was also unfair. In the response/ET3 the respondent seeks to put forward a reason for the claimant's dismissal (if constructive dismissal is established), and that this was misconduct in relation to the bullying and harassment of Mrs Edwards. However, conduct had not yet been conclusively established as at the date of the claimant's resignation, and a disciplinary process against the claimant had not yet begun. Further, dismissal may not have been the outcome (see below).

6.15 I turn to the Polkey point. I conclude that there was a good chance the claimant would have been fairly dismissed after a disciplinary process – say by the end of January 2017, or like Mrs Hart she may have decided to leave because of that pending disciplinary process. I assess that chance of a fair dismissal if there had been no fundamental breach of contract by the respondent as being 50%. On the face of it, there was quite bad conduct on the part of the claimant towards Mrs Edwards, clearly capable of being in breach of the respondent's bullying and harassment policy and thus gross misconduct. However, the claimant had mitigation – her ten years' service with no disciplinary record, which may have led to a written warning or a final written warning being imposed instead. Contributory fault is not pursued by the respondent, on the facts of the case and would not seem to be a feasible option.

7. A remedy hearing will be listed if required by the parties. However, I anticipate the parties will be able to settle the matter between themselves, as the claimant's financial loss claimed in the schedule of loss is relatively modest.

Employment Judge G P Sigsworth

Date: 18 May 2018

Sent to the parties on:

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For the Tribunal Office