EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Fruen**

Respondent: **The Country Candle Company Limited**

Heard at: **Bristol** **On: 27, 28 & 29 March 2018**

Before: Employment Judge Maxwell
Ms J Le Vaillant
Ms S Maidment

Representation
Claimant: Mrs E Gale, Solicitor
Respondent: Mr C Johnson, Consultant

JUDGMENT

1. The claimant's claims of unfair dismissal and discrimination because of religion or belief are not well-founded and are dismissed.

REASONS

Preliminary

Claim

1. By a claim form presented on 18 August 2017, the claimant brings claims against the respondent. She claims constructive unfair dismissal on the basis that a repudiatory a breach of the implied term was occasioned by:

    1.1. her grievance not being addressed;

    1.2. The unjustified commencement and pursuit of investigatory and disciplinary proceedings.

2. The claimant also relies upon the commencement and pursuit of investigatory and disciplinary proceedings as less favourable treatment because of religion or belief, namely that she is not a member of the Plymouth Brethren.

Witness Evidence

3. We heard evidence from the following witnesses

    for the claimant

    3.1. Jeniffer Fruen, the claimant;

    for the respondent

    3.2. Tony van As, the respondent's Managing Director;

    3.3. Owen George Simpson, who worked on a part-time basis for the respondent whilst he was a full-time student;

    3.4. Katie Jane Simpson, the respondent's Director of Finance (and Mr Simpson's mother).

Documentary Evidence

4. We were provided with:

    jointly

    4.1. agreed bundle of documents running to 111 pages;

by the claimant

4.2. Witness statement from Christian Hills, Graphic Designer (of Christian Hills Design);

4.3. Schedule of loss;

4.4. Chronology;

4.5. Case law.

5. During the course of the hearing we were provided with additional documents by the respondent. It was quite apparent these were documents that should already have been disclosed to the claimant, pursuant to the respondent's obligation in this regard. The respondent's unnecessarily late disclosure was the subject of clear adverse comment by the Tribunal during the hearing. More than one adjournment was necessary for the claimant's solicitor to take instructions. Furthermore, at the end of the third day of hearing, when the Tribunal was about to give judgement and oral reasons, the claimant's solicitor sought permission to make further submissions on the facts relating to documents disclosed the previous day. Exceptionally, and notwithstanding the very late stage in proceedings, we decided to allow these further submissions on the claimant's behalf and considered the same before making a final decision.

Facts

Background

6. The respondent business is concerned with the design and manufacture of products including candles and reed diffusers. The claimant had been employed in the business, or its predecessor, since 2008. Her contract of employment included a confidentiality obligation.

7. Ownership of the business changed hands in 2015, being purchased by Tony and James van As. Both the former and current owners are members of the Plymouth Brethren. The claimant does not share that religious belief.

Toby Pocock

8. The claimant relies upon Toby Pocock as a comparator for her discrimination claim.

9. On 12 September 2016 Toby Pocock was suspended from work, so the respondent might carry out an investigation into alleged misconduct, namely downloading software onto his work computer so as to avoid the monitoring of, and limitations imposed on, internet usage. The letter of suspension stated the allegations were potentially acts of gross misconduct.

10. As an alternative to disciplinary proceedings and dismissal, Toby Pocock's employment was terminated by his acceptance, in a letter of 23 September 2016, of what was termed a "redundancy" dismissal. Mr Pocock was also paid "a small sum of money"; the actual figure was not disclosed.

<u>Claimant's Role</u>

11. The respondent is a small employer. During her employment the claimant had taken on various different roles. Pursuant to a job description she agreed in April 2016, her job title was "Production - Reed Diffusers" and the detail of that document included "May be used in different departments of the business if required".

12. In November 2016, the respondent seeking to make best use of talent already employed in its business, invited the claimant to spend part of her working week in a creative role; this involved the design of new products and preparation for the Spring Fair at NEC Birmingham, which would take place at the beginning of February 2017. Nothing was said about the duration of this new role; the respondent viewed it as something of an experiment and the claimant, who we are satisfied was pleased with this development, hoped it would be long term. Whilst the claimant's job title within the company did not change and there was no pay rise, business cards were prepared for use at the Spring Fair which referred to her as "Creative Assistant".

<u>Design Submission</u>

13. One of the claimant's designs, "Denim", was submitted for review by a panel operated under the auspices of the Not on the High Street ("NOTHS") website. Mr van As instructed Mr Simpson to do this. The claimant was not told it was being done.

14. The NOTHS panel did not accept the claimant's design, although they did approve one produced by Mr Simpson and submitted by him at the same time.

<u>Josh Pocock</u>

15. Josh Pocock is another employee relied upon by the claimant as a comparator. On 11 January 2017, Mr Pocock sent an email to the claimant, attaching her Denim design, as submitted to NOTHS, and Mr Simpson's design. There does not appear to have been any business reason for Mr Pocock having sent this communication to the claimant. Mr van As and Mrs Simpson were unaware of this email being sent.

16. In the subsequent investigation (the subject of the claimant's complaint in these proceedings), the respondent discovered what Mr Pocock had sent to the claimant. A draft letter was then prepared by Mrs Simpson to address this matter with him. The draft, dated 21 March 2017, confirmed the fact of a meeting having taken place with Mr Pocock that day, along with advice and

an informal warning for his misconduct (sending designs to the claimant and mobile phone usage at work). Plainly, it was intended this letter would be given to Mr Pocoock following a meeting with him in the terms described. Once the meeting had taken place, or perhaps in advance of the same, the draft would have been amended to reflect the date this was being done. We also note a reference in the body of the document which appeared to require completion, "meeting […] today (date above)". The letter was, however, never actually deployed. Mrs Simpson received and acted upon HR advice to deal with the claimant's case first, and Mr Pocock resigned before that was concluded. Contrary to the late submission of Mrs Gale, there is no evidence of a meeting taking place between Mr van As and Mr Pocock on 21 March 2017. Whereas Mrs Gale described the letter as purportedly sent to Mr Pocock, the evidence of Mrs Simpson, which we accept, is this letter was not used.

17. Going back to the point on 11 January 2017, when the claimant received Mr Pocock's email, she was most unhappy to learn about the submission of her design to NOTHS. The claimant thought she ought to have been consulted in advance about this and whereas Mr Simpson's design was submitted in a well-prepared and stylised fashion, her design was not in its final form or otherwise presented to best effect.

18. The claimant decided she would discuss matters with Christian Hills.

<u>Christian Hills</u>

19. Mr Hills is an independent graphic designer, from whom work has been commissioned by the respondent over many years; Mr Hills says he came up with the respondent's name and logo. Mr Hills was not, however, the "founder" of the business as suggested by the claimant, since this would require he had been an owner of the same when it was set up. Mr Hill was not an employee of the respondent, he was an external contractor, a supplier of services to the business.

20. On 11 January 2017, the claimant forwarded to Mr Hills the email she had received from Mr Pocock, attaching her design and that of Mr Simpson. Mr Hills responded saying, in effect, Mr Simpson's design was late to the marketplace.

21. On 17 January 2017, the claimant wrote again to Mr Hills:

> **"Tony never set one foot in the warehouse all day.**
>
> **Why would he not even be interested enough to look. Owen did whilst I was having lunch with the girls. Told Josh there was not enough candles on the stand and that the XXL boxes I had pyramided together, one was in the wrong place and not quite square with the rest.**
>
> **Emma didn't speak a single word to anyone in the office all day. Sat with her rug round her all day and her feet up on the stall.**

They came out in the warehouse together briefly to select products for her Facebook hamper. Did you see that? They pointedly did not look at the stand area. What's happening to the TCCC? We have been happy band till these two came in.

I left before then this evening. Before I drove off I could see she moved into his seat in front of the computer he was taking her photograph from behind.

Josh was certain they would be out in the factory soon as I left. He said he was going to ask them why they wouldn't tell me if they had comments to make. The pair of them have only ever been to one tradeshow and Owen's making out he's some sort of authority on it.

Bad atmosphere! Don't like it."

22. Mr van As and Mrs Simpson were not, at the time, aware of this email traffic passing between Mr Pocock and the claimant, or between the claimant and Mr Hills.

Role Change

23. During January 2017, Mr Simpson had heard the claimant's colleagues bemoan her lack of activity with respect to the production of reed diffusers. On 19 January 2017, Mr Simpson was producing a video intended to be played on the respondent's stand at the Spring Fair, and in the course of this asked the claimant if he could record her pouring some reeds. The claimant refused to do this. In an email sent to Mrs Simpson that day, Mr Simpson said

    "Asked Jenny if she could pour some reeds for me to record "that's not really my role any more, I've got a creative roll now, can you get one of the girls too?""

24. Having received a copy of this report from Mr Simpson, Mrs Simpson and Mr van As decided to revisit the claimant's role, as she appeared to be neglecting the reed diffuser aspect of it; which had been intended by the respondent (to the claimant's knowledge) to remain the larger part.

25. At a meeting on 24 January 2017, Mrs Simpson and Mr van As informed the claimant that her creative role would be removed, and a new "Creative Ideas Panel" would be introduced instead, to which all staff would be invited to contribute. This change was not to be made immediately, but would be "rolled out after the spring fair".

26. An email of 25 January 2017 from the claimant to Mr Simpson included:

    "I just wanted to write to you with reference to my meeting with your Mum and Tony yesterday.

    Despite feeling aggrieved about a couple of things that have come up over the weeks I want you to know it has no bearing on any personal relationship with you and I have no problem working alongside you at all.

I was directly asked what problems there were, if any, and so it seemed best to be upfront.

As I pointed out, I'm sure Emma would have been unhappy if I had taken Nordic Charm designs which were unfinished and incorrect and submitted them to others alongside styled photographs of my own range without mentioning what was happening.

Similarly, the first I knew of the show votive was to see my design on it, having been rejigged.

I think perhaps there has been a general lack of communication across the board but I do hope you can appreciate my feelings.

I'm understanding that there have been issues with references to Christian. He has been the most helpful, honest and down-to-earth person. He knows the company through and through and is never adverse to listening to new ideas.

He has worked so hard on the new brochure and worked all hours to bring it to fruition at the correct time and it feels like I have also put my life and soul into it along with the new ranges for many months.

This brochure has been our trademark for a number of years, with the same format. I am very sure that keeping costs to the minimum was a big priority and I'm positive that if he had been given a new brief and budget he would have deliver the goods. It feels very deflating for it to be referred to as just a copy with new photographs.

I guess the rest of the factory have been affected by all this and I hope I can tell them that I have aired in cleared this with you and we can move on with the full design team that Tony suggesting.

27. The claimant's email to Mr Simpson, by its content and the fact of it being addressed to a colleague rather than a manager, was not a grievance. Whilst she had been unhappy, in particular about the manner in which her Denim design was submitted to NOTHS, having ventilated matters she was willing to accept the position and "move on".

28. The claimant's email to Mr Simpson had been cc'd to Mr van As and Mrs Simpson. Mr van As wrote to the clamant later the same day:

May I ask that you do not speak to other staff in this instance regarding this matter and I will speak to them to reassure them that things have now been sorted.

I would also like to invite you to a further meeting to discuss the company's grievance policy and will let you know a date and time.

[…]

May I also confirm to you that I would hope our meetings are confidential and that anything discussed should not be repeated to staff or suppliers.

29. The meeting referred to by Mr van As did not take place. In the course of this hearing, on the claimant's behalf, it has been argued that she raised a grievance, either verbally on 24 January 2017 or in writing on 25 January 2017, that Mr van As said he would deal with it and then he did not do so. We do not accept that argument. The claimant did not seek to raise a grievance, on the contrary she spoke of her intention to "move on". The response of Mr van As does not say he will discuss a grievance already submitted, rather his email evinces an intention to refer her to the correct way in which to raise such concerns, if she has them (i.e. using her employer's grievance procedure, rather than discussing the same with colleagues or external suppliers).

<u>Dropbox Closure</u>

30. In February 2017, the respondent discovered that its printing requirements could not be fulfilled. This was because Mr Hills had, without any warning, closed access to an online Dropbox in which the necessary artwork was stored. The primary reason for his decision appears to have been that the respondent was late in paying his bills, although this situation had arisen previously and Mr Hills had not then reacted in this way. Mrs Simpson engaged in a correspondence with Mr Hills, assuring him that he would be paid and requesting their access to the artwork be reinstated.

31. Mr Hills' email of 24 February 2017 included:

> **"I notice that I have received a Country Candle Company payment clearing your December account, for which thanks. The January account in the sum of £1884 falls overdue next week. As you appear to be under financial pressure perhaps you could let me know over the next few days when you plan to settle that account.**
>
> **[…]**
>
> **5. Future Commissions**
>
> **Given recent events the question is less, 'will The Country Candle Co want to use CHD" and more 'will CHD want to work with The Country Candle Company'. Perhaps you'd care to mull this over and figure out what value I bring to the business, if any, and get back to me with your thoughts in due course. As you may appreciate I regard the entire venture as something in which I have shared the creation.**

32. Mrs Simpson and Mr van As were very concerned by Mr Hills' reference to "recent events" and invited him to expand on the same. Mr Hills declined to do so. The respondent began to suspect that someone was sharing the company's information with Mr Hills.

Investigation

33. The respondent investigated the email accounts of its employees, looking for messages sent to external suppliers, in the course of which it discovered the email from Josh Pocock to the claimant and those from her to Mr Hills.

34. Mrs Simpson spoke with various employees about their knowledge of any recent communication or sharing of information with suppliers and summarised what she was told, together with her own thoughts, in an email of 16 March 2017 prepared for the respondent's HR advisors. In the claimant's case this was:

> **Jenny – Originally said she didn't know why Christian would withhold any files. That she only has spoke professionally with him. We then showed her the emails. She didn't flinch but said she was upset when she wrote them. When showing her the candle images that were nothing to do with her designs, she said that she had sent them as she was upset that Owen had uploaded her designs to Not on the High Street without telling her.**
>
> **To be clear– the designs she was working on are not "hers" – they belong to the company. Tony had asked Owen to send them to Not on the High Street so was doing what he was told.**
>
> **Jenny's reaction was to send a Christian confidential information regarding some new designs.**
>
> **Jenny went on to say she had already apologised and that she was "over it" and had "moved on" from her upset and she felt the matter was dealt with.**
>
> **She said she didn't know why Christian withheld the data files.**

35. Plainly, Mrs Simpson thought the claimant had disclosed confidential information to Mr Hills, in terms of the designs, as well as advising him of her negative views on the performance and behaviour of her managers and colleagues.

Disciplinary Process

36. By a letter of 27 March 2017, the claimant was required to attend a disciplinary hearing on 31 March 2017, and informed she might receive a "formal sanction", in connection with allegations she had:

    36.1. "sent confidential information to an external supplier";

    36.2. "use your mobile phone and Ipad during working hours".

37. By a letter also of 27 March 2017, the claimant complained of "specious 'disciplinary' allegations", which she said were "victimisation" in response to her "verbally" raising a grievance about the use of her design, and an attempt to engineer her departure from the business. The claimant referred to Mr Hills

as the company's "chief designer". She also said that staff belonging to the Brethren had suffered no detriment for their breach of company policy".

38. Thereafter, the claimant took sick leave. Various correspondence passed between the parties, in which the claimant was supported or represented by her solicitor:

    38.1. the claimant was told that dismissal would not be considered as an option in the disciplinary;

    38.2. given the claimant complained about the respondent's senior managers, the respondent invited her suggestion as to who might chair disciplinary and grievance proceedings;

    38.3. the claimant suggested that mediation with ACAS take place;

    38.4. the parties engaged in without prejudice discussions, with a view to achieving an agreed termination of her employment, the content of which has been provided to the Tribunal, save that the financial sums proposed have been redacted;

    38.5. negotiations foundered when the parties could not agree on a settlement sum.

39. By a letter of 2 May 2017, the respondent said that in the absence of agreement having been reached, it proposed to continue with the grievance and disciplinary processes. A proposed chair was identified for this purpose, being a named HR consultant. The respondent explained she was an independent HR person, not used by the company previously. Website details were provided and the claimant was invited to say whether this was amenable to her. The letter concluded:

    "I hope this will go some way towards indicating to you that I would like to resolve these issues positively and have you back to work as normal."

40. The claimant resigned by her letter of 5 May 2017:

    I have read the letter sent on 2nd May regarding the withdrawal of a settlement and the Company's decision to continue with the disciplinary procedure.

    I have concluded that the actions of the Company in persisting with these unfounded and baseless set of allegations amount to breach of contract. I believe your actions have destroyed the trust and confidence that should exist between the Company and me as the employee.

    After almost 9 years of service I am left with no option other than to resign with immediate effect.

41. Mr van As wrote in response shortly thereafter, offering the claimant a "cooling off period" in which her resignation might be retracted. The claimant did not take up this offer.

Law

<u>Unfair Dismissal</u>

42. So far as material, section 95 of the **Employment Rights Act 1996** ("ERA") provides:

> **95 Circumstances in which an employee is dismissed**
>
> **(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if...**
>
> > **(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.**

43. Where, as here, the respondent denies dismissal, the claimant has the burden of proving dismissal within section 95(1)(c).

44. In accordance with **Western Excavating v Sharpe [1978] IRLR 27 CA**, it is not enough for the claimant to leave merely because the employer has acted unreasonably, rather a breach of contract must be established.

45. In order to prove constructive dismissal four elements must be established:

    45.1. there must be an actual or anticipatory breach by the respondent;

    45.2. the breach must be fundamental, which is to say serious and going to the root of the contract;

    45.3. the claimant must resign in response to the breach and not for another reasons;

    45.4. the claimant must not affirm the contract of employment by delay or otherwise.

46. Implied into all contracts of employment is the term identified in **Malik v BCCI [1997] IRLR 462 HL**:

> **The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.**

47. In **Baldwin v Brighton and Hove City Council [2007] IRLR 232** the EAT held that a breach of trust and confidence may be caused by conduct calculated <u>or</u> likely to have the proscribed effect.

48. Either as an incident of trust and confidence, or as a separate implied term, employers are under a duty to afford their employees a means of prompt redress with respect to their grievances; see **W A Goold (Pearmark) Limited v McConnell [1995] IRLR 516 EAT**, per Morrison J:

> **11. […] It is clear therefore, that Parliament considered that good industrial relations requires employers to provide their employees with a method of dealing with grievances in a proper and timeous fashion. This is also consistent, of course, with the codes of practice. That being so, the industrial tribunal was entitled, in our judgment, to conclude that there was an implied term in the contract of employment that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. It was in our judgment rightly conceded at the industrial tribunal that such could be a breach of contract.**

49. At least insofar as the question of breach of the implied term of trust and confidence is concerned, the band of reasonable responses test does not apply; see **Buckland v Bournemouth University [2010] IRLR 445 CA**.

50. In a last straw case, the final act relied upon need not in isolation constitute a breach of contract, nor even amount to unreasonable or blameworthy conduct, although an entirely innocuous act will not suffice; see **Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA**.

51. If a constructive dismissal is established the employment tribunal must still consider whether the respondent has shown a potentially fair reason for dismissal within ERA section 98(1) and whether or not dismissal was reasonable in all the circumstances under section 98(4).

Direct Discrimination

52. Section 13(1) of the **Equality Act 2010** ("EqA") provides:

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

53. We must consider whether:

    53.1. the claimant received less favourable treatment;

    53.2. if so, whether that was because of a protected characteristic.

54. The question of whether there was less favourable treatment is answered by comparing the way in which the claimant was treated with the way in which others have been treated, or would have been treated. This exercise may involve looking at the treatment of a real comparator, or how a hypothetical comparator is likely to have been treated. In making this comparison we must be sure to compare like with like and particular to apply Section 23(1) of the **Equality Act 2010**, which provides:

> **(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.**

55. Evidence of the treatment of an actual comparator who is not close enough to satisfy the statutory definition may nonetheless by of assistance since it may help to inform a finding of how a hypothetical comparator would have been treated.

56. As to whether any less favourable treatment was because of the claimant's protected characteristic:

56.1. direct evidence of discrimination is rare and it will frequently be necessary for employment tribunals to draw inferences from the primary facts;

56.2. if we are satisfied that the claimant's protected characteristic was one of the reasons for the treatment complained of, it will be sufficient if that reason had a significant influence on the outcome, it need not be the sole or principal reason;

56.3. In the absence of a real comparator and as an alternative to constructing a hypothetical comparator, in an appropriate case is may be sufficient to answer the "reason why" question - why did the claimant receive the treatment complained of.

57. The burden of proof is addressed in EqA section 136, which so far as material provides:

> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision occurred.**

58. Although decided under the former legislative provision, the guidance appended to the decision of the Court of Appeal in **Igen v Wong [2005] IRLR 258** may still be of assistance.

59. When considering whether the claimant has satisfied the initial burden of proving facts from which an ET might find discrimination, the ET must consider the entirety of the evidence, whether adduced by the claimant or the respondent; see **Laing v Manchester City Council [2006] IRLR 748 EAT**.

60. Furthermore, a simple difference in treatment as between the claimant and his comparators and a difference in protected characteristic will not suffice to shift the burden; see **Madarassy v Nomura [2007] IRLR 246 CA**.

61. The burden of proof provisions will add little in a case where the ET can make clear findings of a fact as to why an act or omission was done or not; see **Martin v Devonshires Solicitors [2011] IRLR 352 EAT**, per Underhill P:

> **39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination**

> **cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head "the devil himself knoweth not the mind of man" (per Brian CJ, YB Pas 17 Edw IV f1, pl 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent!s motivation and what is in issue is its correct characterisation in law[…]**

Conclusion

Unfair Dismissal

62. The first matter relied upon by the claimant is the failure to address her grievance. This is based on the proposition that she raised a grievance on 24 and / or 25 January 2017, that Mr van As said he would invite her to a meeting to address this, and it did not happen. For the reasons set out above, we do not agree. The claimant did not raise a grievance at this time, on the contrary she expressed her intention, having aired matters, to "move on". Nor did Mr van As identify her as having raised a grievance. The purpose of the meeting he proposed was to advise the claimant, in general terms, about how to raise matters of concern, which is to say that she should bring them to him as her line-manger under the grievance procedure, and not take them to colleagues, or outside of the company.

63. The second matter relied upon by the claimant is the respondent's decision to commence and pursue investigatory and disciplinary proceedings. As set out above, the investigation was commenced because of Mr Hills' reference to "recent events" in his email of 24 February 2017, which raised a concern that someone within the company was disclosing confidential information to him. The respondent had reasonable and proper cause to enquire into this matter.

64. The investigation revealed that Mr Pocock had sent information to the claimant, when he had no business reason to do so, and then the claimant had forwarded that outside of the company to Mr Hills. Contrary to the claimant's contention, Mr Hills was not a founder of the business, he was, and on the evidence provided to us was always, an external supplier of services, albeit an important one with whom the business had worked closely. When asked about this matter on 16 March 2017, the claimant did not deny having sent the information and sought to explain her actions by saying she had done this when upset, which would appear to involve an acknowledgement by the claimant that she had overstepped the mark. Given the claimant was subject to a confidentiality obligation, had provided confidential information to an external supplier, not pursuant to her job role but rather to ventilate her own annoyance at how she had been dealt with, there was a proper basis for the respondent to believe that she may have been guilty of some misconduct in that regard and to invite her to a disciplinary hearing to respond to the same. The second allegation about

mobile phone and iPad use was, to some extent, and adjunct of the first, the offending emails having been sent by her (and Josh Pocock) during their working hours. The claimant told us that she may have been on a break at this time. She could have attended the disciplinary hearing and said the same thing, but did not. We are satisfied the respondent had reasonable and proper cause to require the claimant to attend a disciplinary hearing as it did.

65. Whilst it may be straying a little beyond the matters relied upon by the claimant as amounting to a repudiatory breach, we also note that contrary to her assertion the respondent was seeking to engineer her departure from the business, she was told several times, verbally and in writing, that the respondent was not considering dismissal. The respondent was, it would seem, considering whether a low-level disciplinary sanction might be appropriate to underline the importance of keeping matters in-house.

66. Given we have found the respondent was acting with reasonable and proper cause when it instigated and pursued investigatory and disciplinary proceedings, it follows that the claimant has not established that either of the matters relied upon by her, as identified in the order of EJ Roper on 2 January 2018, amounted to a breach of the implied term of trust and confidence. The claimant was not dismissed, she resigned. Accordingly, her unfair dismissal claim must fail.

<u>Direct Discrimination</u>

67. As to her direct discrimination claim, the detriment alleged is established, in that the claimant was subject to an investigatory and disciplinary process.

68. As to whether the detriment was less favourable treatment because of religion or belief, we find it was not. As set out above, the investigation was commenced because of a concern prompted by Mr Hills' email. The disciplinary process followed because the respondent had evidence which it believed might establish the claimant had acted in breach of her confidentially obligation, and was using her mobile or iPad during working hours. Neither of these procedures was commenced or pursued, to any extent at all, because the claimant was not a member of the Plymouth Brethren.

69. We also note the respondent's willingness to encourage the claimant in a new creative role in November 2016, which is inconsistent with her being treated less favourably because she was not a member of the Plymouth Brethren, or any hidden agenda on the part of the owners of the business to employ a workforce comprising only their co-religionists.

70. As to the claimant's comparators, neither was in a sufficiently similar position to satisfy EqA section 23. In both cases there were material differences. Toby Pocock was accused of different and more serious misconduct, which was clearly identified in his letter of suspension. Josh Pocock was accused of lesser misconduct, passing on information he should not have, but within the company.

71. The claimant complains that whereas she was required to attend disciplinary proceedings, the Pococks avoided this by resignation or an agreed termination. On the evidence, however, it is apparent that the claimant had the same opportunity. The reason she did not leave in that way is because the parties could not agree on the size of her termination payment.

72. Accordingly, the claimant's claim of direct discrimination fails.

Employment Judge Maxwell

Date: 29 March 2018

JUDGMENT SENT TO THE PARTIES ON

....

FOR THE SECRETARY TO THE TRIBUNALS