mf

EMPLOYMENT TRIBUNALS

Claimant: **Mrs T Sarwar**

Respondent: **Barnardo's**

Heard at: **East London Hearing Centre**

On: **13-16 & 20 March 2018 (In chambers 21 March 2018)**

Before: **Employment Judge Russell**
Members: **Mrs P Alford**
Ms T A Jansen
Representation
Claimant: **Ms S Ismail (Counsel)**
Respondent: **Ms R Crasnow (Queen's Counsel)**

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. **The Claimant made protected disclosures in her email of 23 December 2016 and her first email on 5 January 2017 (the latter in respect of product safety only).**

2. **The Claimant was subjected to a detriment because of a protected disclosure when she was not given the supplier responses to her questions, when she was not supported by Mr Clark in respect of an offensive email from the supplier and when Mr Clark called her a blocker.**

3. **The detriments extended over a period continuing until the Claimant's resignation on 5 February 2017.**

4. **The Claimant was entitled to resign and treat herself as dismissed by reason of the Respondent's conduct.**

5. **The dismissal was dismissed contrary to s.98 Employment Rights Act 1996 but was not contrary to s.103A Employment Rights Act 1996.**

REASONS

1 By a claim form presented on 12 June 2017 the Claimant brings claims of detriment and/or unfair dismissal which she says was principally because of protected disclosures. The ACAS early conciliation period lasted from 8 February 2017 until 22 March 2017 (six weeks). The Respondent resists all claims. It was agreed that this hearing would deal with liability only.

2 The issues were agreed between the parties in a List dated 11 March 2018 and were further clarified during the course of the hearing. We referred to the full list as agreed but, for ease of reading in this Judgment, they may be summarised as:

2.1 Did the Claimant make a protected disclosure on any of the following dates?

(1) 23 December 2016: email to Mr Clark regarding the Teletubbies contract;
(2) 5 January 2017: email regarding the Teletubbies contract;
(3) 5 January 2017: email to Mr Clark regarding the DHX contract.

2.2 Did the Respondent subject the Claimant to any of the following detriments because of the disclosure(s)?

(1) Undermining the Claimant by failing to allocate to her duties and decisions which would previously have been within her remit (PC para 29). Specifically, failing to share with her all but one of the responses of the supplier and/or failing to share with her the internal actions proposed in respect of her email of 5 January 2017.
(2) Undermining the Claimant to external suppliers, namely Louis Kennedy, the supplier of the Teletubbies contract (PC para 30). Specifically, Mr Clark's failure promptly to respond to Mr Morgan's email of 3 January 2017 despite it being copied to the Claimant and her work colleagues and/or the tone and content of Mr Clark's email of 13 January 2017 to Mr Morgan asking for a note of apology to be sent.
(3) Mr Clark referred to the Claimant as a "blocker" at a meeting on 12 January 2017, at which a junior member of HR staff was present (Further Information, para 4.4).

2.3 Was the Claimant entitled to treat herself as dismissed by reason of conduct by the Respondent amounting to a repudiatory breach of the implied term of trust and confidence? The Claimant relies on the following conduct:

(1) The decision of Mr Clark on 2 August 2016 to close the Wickford office without prior consultation;

(2) The decision of Mr Clark not to sign off the job descriptions of the Claimant's team despite these having been agreed by his predecessor;
(3) The failure by Mr Clark to consider a new job description for the Claimant in a timely way or at all;
(4) Bullying and intimidating management style in meetings with the Claimant;
(5) Despite a grievance and appeal about being sidelined by Mr Clark, the Claimant was excluded from the Teletubbies project until a very late stage;
(6) Failure properly to investigate the Claimant's grievance or appeal;
(7) Preventing the Claimant from exercising her proper role in respect of the Teletubbies project as a consequence of her grievance;
(8) Failure to have any or any reasonable regard to the Claimant's many concerns about the Teletubbies project;
(9) Describing the Claimant as a "blocker" at a meeting;
(10) Failure to permit the Claimant to review the supply contract on the Teletubbies project, despite this being part of her normal remit;
(11) Undermining the Claimant to the supplier on the Teletubbies contract.

2.4 Did the Claimant resign in response to any such breach?

2.5 If so, was the sole or principal reason for dismissal that she made any or all of the protected disclosures?

2.6 Were the claims or any of them presented within the prescribed period or, if not reasonably practicable, within a reasonable period thereafter?

3 We heard evidence from the Claimant on her own behalf. For the Respondent, we heard evidence from Mr Roy Clark (Director of Retail and Trading), Ms Lisa Freshwater (Human Resources) and Ms L Parkes (Corporate Director of Income and Innovation). We were provided with an agreed bundle of documents and we read those pages to which we were taken in the course of evidence.

Findings of fact

4 The Respondent is a well-known charity raising money from fundraising initiatives and its network of shops to help children throughout the United Kingdom. Barnardo shops sell three types of goods: those donated by members of the public, surplus stock gifted from other retailers or companies and new goods such as cards or fake flowers. New goods are sourced and purchased wholesale through Barnardo's Trading Limited ("BTL") a separate legal entity registered at Companies House. These new goods are sold in the shops, on-line and through mail order catalogues. The profits generated by BTL are gifted to the Respondent.

5 The Claimant commenced her employment with the Respondent on 9 January 1995, initially working as a buying controller, she was Head of BTL at the date of her resignation. The Claimant was a statutory director of BTL. Ms Parkes was also a director of BTL. The Director of Retail and Trading would usually be appointed as a

further statutory director of BTL but, as he was still in his probationary period, Mr Clark had not yet taken up that role.

6 When the Claimant started her employment, BTL sourced new goods from a range of suppliers largely being produced in China. As time passed, and with the knowledge of the directors of the Respondent then in post, the number of BTL suppliers reduced until in recent years BTL dealt exclusively with Creative Tomco Ltd.

7 There was no up to date job description for the Claimant's role. Her evidence was that she was responsible for sale of new goods through retail shops, decisions on product range, saleability, price and the ethical considerations of production in Chinese factories. The Claimant had been appointed by the Respondent as a champion on modern day slavery issues. The Claimant's evidence was that she was also responsible for product testing and sign off under UK and EU regulations, product packaging and labelling requirements from a health and safety perspective, agreeing commercial terms, bar coding products, sample testing sign off, production of artwork and packaging, shipping, safety assurance, logistical dispatch to the shops for sale and licensing arrangements. On this latter aspect, the Claimant liaised with IQS an external specialist which provided advice on safety and technical matters.

8 Initially, the Respondent disputed the wide range of duties described by the Claimant as falling within her remit. However, in the course of his evidence, Mr Clark accepted that those were duties undertaken by the Claimant in her dealings with product supplied by Creative Tomco Limited. These included sign-off on factory audits and product testing. The Respondent's case was that the Claimant's role was more limited on the Teletubbies contract to which we shall return.

9 The Claimant managed a team of three employees in BTL: Ms White, Ms Vary and Mr Anderson. The Claimant reported to the Director of Retail and Trading. At the time of her resignation, this was Mr Clark. In turn, the Director of Retail and Trading reported to the Corporate Director of Income and Innovation, this was Ms Parkes. There had been a large amount of management turnover at the Respondent in 2016. Mr Gerard Cousins left his post of Director of Retail and Trading in December 2015, the post was filled by Mr Chris Judd until he left in July 2016 and Mr Clark appointed from August 2016. Ms Parkes had only been in post since January 2016. The effect was that only the Claimant and one other employee on the Retail Management Board had over a years' service by late 2016.

10 Given the Claimant's experience and knowledge of the business and the changeover in her managers, the Claimant had almost total autonomy in the day to day running of BTL. The Claimant was accountable for BTL's performance at regular retail and trading meetings. There was no evidence before us to suggest that the Respondent was unhappy with the management of BTL prior to late 2016. BTL was generating a healthy profit and there was no suggestion of underperformance before the appointment of Mr Clark.

11 The Respondent operates a job evaluation process aimed at objectively assessing the weight and appropriate financial remuneration for its jobs. The process required that there be a new job description written; an evaluation request form completed and an independent evaluation by the Pay and Reward team. If satisfied

that there had been a significant change in the content, level of responsibility and/or method of working in a job, the Pay and Reward team would recommend a regrade which would then be discussed by the Corporate Leadership Group Member and relevant line manager. If the evaluation was accepted, the approval form would be authorised and returned to Pay and Reward for implementation.

12 Each of the three members of the Claimant's team had been through the process; and by November 2015, the Pay and Reward team had recommended that each be regraded. The relevant decision maker was the Director of Retail and Trading. Prior to their departures, neither Mr Cousins nor Mr Judd had made a decision to accept or reject the evaluation and it remained outstanding at the commencement of Mr Clark's employment.

13 The Claimant also considered that her job required re-evaluation. She had written a job description but this has not yet been agreed and no evaluation request had been submitted.

14 The Claimant had her annual performance appraisal in June 2016. Whilst the Claimant drafted the content of the appraisal, it was signed off by Mr Judd on behalf of the Respondent. We infer from his signature that he agreed with the content of the Claimant's draft. The appraisal describes the Claimant's specialist skill base in product sourcing, range planning and development, negotiation and procurement as well as her role in safeguarding and ensuring that new goods and products comply with EU and UK standards, as well as her membership of the retail management board. The manager's feedback is positive, commends her contribution to the retail management board and thanks her for a successful year for BTL.

15 Mr Clark took up his role as Director of Retail and Trading on 1 August 2016. He and the Claimant met on 2 August 2016. Whether it is termed a "meet and greet" or a formal 1:1 matters little, in substance it was an initial meeting in which each introduced themselves to the other and the Claimant gave a brief overview of the BTL business to Mr Clark. The Claimant raised a number of issues, including her outstanding job description, the re-evaluation process for her team and the fact that the lease on the Wickford office had expired. The meeting was pleasant and calm, as one would expect from an initial meeting of this sort.

16 Following the meeting, the Claimant sent Mr Clark an email in which she provided further information about the BTL operation and also provided a copy of the Wickford lease.

17 The Claimant and Mr Clark next met on 12 August 2016 when Mr Clark visited the BTL offices in Wickford. The Claimant showed Mr Clark around the office and they discussed key products, the business supply chain and future opportunities for BTL, including diversifying and increasing the range of products offered. There is a dispute of evidence as to what happened when the Claimant and Mr Clark returned to her office.

17.1 The Claimant's evidence is that Mr Clark told her that he had made a decision not to renew the lease at Wickford but intended to relocate the BTL team to Barnardo's House in Barkingside. He gave as his reasons

the immediate cost saving on rent and the desirability of the BTL team being based with the broader retail and trading team. Mr Clark could not, or would not, say if or when the BTL team job descriptions and re-evaluations would be progressed. The Claimant was shocked at the bluntness with which Mr Clark presented this information as a "done deal" in the last 10 minutes of a site visit which had lasted for over two hours.

17.2 Mr Clark's evidence is that he told the Claimant that he was thinking of not renewing the lease and wanted to hear her views but, as it was a Friday evening, they would talk about it at their scheduled 1:1 meeting the following week. Mr Clark told the Claimant that he would not sign off the revised job descriptions until he found out more about BTL. Mr Clark denied that telling the Claimant that he had made a decision not to renew the lease or that he was blunt, rather he was careful to be diplomatic in the way that he expressed himself.

18 On balance, we prefer the evidence of the Claimant. In his evidence, Mr Clark described the Wickford offices as exceptionally plush and not what he would expect of a charity satellite office. That is consistent with the Claimant's evidence that Mr Clark told the Claimant that he wanted cost savings. The manner in which Mr Clark gave evidence to this Tribunal, and his admission that he did make a "like it or lump it" comment in a later meeting, are consistent with a manner of expression which was blunt and decisive rather than open and consultative. This was consistent with later evidence about a retail and trading strategy plan in January 2016 which Mr Clark maintained was a draft but which Mr Clark's email objectively considered gave the impression of being a concluded plan. On balance, whilst we accept that Mr Clark may have intended only to convey his preliminary thoughts in order to obtain the Claimant's views about closing the Wickford office, the way in which he expressed himself clearly conveyed to the Claimant the impression of a decision that had been definitely taken. Mr Clark also, we find, told the Claimant that he could not sign off or progress the job descriptions and re-evaluations at such an early stage in his employment.

19 The next 1:1 meeting took place on 17 August 2016. The Claimant explained in a passionate manner her disappointment about the lack of progress on the job descriptions and her team's experience of a previous move to Barkingside, which had not proved successful due to the impracticalities of travel leading to a move to Wickford. There is again a dispute of evidence. The Claimant says that Mr Clark said that he would think about her presentation but that his intention remained unchanged to relocate BTL to Barkingside. The Claimant describes Mr Clark as very forthright in his management style during the meeting, "eyeballing" and wagging his finger at her in a manner which she said intimidated her. Mr Clark did not give any great degree of detail about the meeting. He denied "eyeballing" and finger wagging, stating that he simply thanked the Claimant for her feedback which he would take away and give the matter further thought.

20 Again, on balance, we prefer the evidence of the Claimant. We noticed that on at least three occasions during the course of cross-examination, Mr Clark displayed behaviours and gave answers which demonstrated a degree of irritation when he felt that his decision making was being challenged. For example, when put that he should have brought the Claimant into a later conversation with the CEO of a logistics

company, his blunt response was "**that's your view; it didn't happen and I've told you why**". Similar questions about why the Claimant had not been provided with product test reports on the Teletubbies project, elicited a blunt and, we felt, dismissive reply that: "**I had been given reassurances; why would I need to check in on everything with Tracey Sarwar**". The meeting on 17 August 2016 was emotionally charged and revealed a significant difference of opinion. The Claimant was passionate about what she regarded as best for her BTL team. Mr Clark was irritated at being challenged and what he perceived as the Claimant's resistance to his new ideas. He was blunt and dismissive, although we would not go so far as to characterise this as bullying and intimidating.

21 Also on 17 August 2016, the Claimant was told by Ms Parkes that the BTL board meeting scheduled for the following week had been cancelled. Ms Parkes was considering more generally whether or not the Retail and BTL board meetings should be merged. The Claimant did not agree that this would be desirable.

22 The next 1:1 meeting between the Claimant and Mr Clark took place by telephone on 22 August 2016. Mr Clark asked the Claimant to provide him with the BTL key performance indicators, told her that he was setting up a strategy group to shape retail and trading strategy and said that it was important that she be a part of it. There was discussion about the Claimant's imminent annual leave and about the practical logistics of a move to Barkingside. Again the dispute in the evidence is about the interpretation to be drawn from the conversation and the manner in which it was conducted. The Claimant says that the request for KPIs was inappropriate as it had already been agreed that they would be discussed in September and that Mr Clark was pressing forward with the move without proper consultation and consideration of her objections. By contrast, Mr Clark believed that the Claimant was defensive about the KPIs and listed aggressively the reasons why BTL could not move to Barkingside.

23 These differing perceptions of the discussion are in our view indicative of the deteriorating nature of their working relationship and their inability to communicate without misunderstanding. We find that Mr Clark was genuinely frustrated at the Claimant's resistance to what we consider a reasonable and proper request for the KPIs to be sent before the planned discussion. Equally we find that the Claimant was genuinely frustrated by Mr Clark's plan for the move despite her reasoned objections and in light of a decision which he had given the impression had already been taken. We do not accept that this was bullying or an intimidating management style by Mr Clark in this meeting, simply a genuinely held difference of opinions and a lack of sensitivity on the part of Mr Clark as to how his earlier comments and manner could reasonably have been interpreted.

24 On 25 August 2016 Mr Clark telephoned the Claimant to say that the only practicable dates for the strategy days fell within her annual leave, namely 13 and 14 September 2016. He had made the decision to go ahead in her absence as the next available date would be much later and this was an important event. The Claimant accepted that Mr Clark apologised and assured her that he would come to Wickford for the Christmas launch and would brief her on the intended agenda in advance of the strategy days. The Claimant decided that two members of her team would attend on one day each.

25 The Christmas launch was held at Wickford on 30 and 31 August 2016. It was

attended by about 40 to 50 people, including Mr Clark, the BTL team, members of the retail team and representatives of the company responsible for logistics. The Claimant and the BTL team had put significant effort into the arrangements for the event, including overnight accommodation and an evening meal. The Claimant made a presentation for which Mr Clark congratulated her. In her subsequent grievance, the Claimant complained that Mr Clark did not speak to her at all, excluded her from his lengthy conversation with the CEO of the logistics company and did not brief her on the forthcoming strategy days as promised but instead discussed future strategy ideas directly with two members of her team. The Claimant felt that she was being deliberately ostracised and sidelined. Mr Clark denied that he had ostracised the Claimant at all. The issues in this hearing do not include the conduct of Mr Clark at the evening meal but the Claimant does rely upon the handling of her grievance.

26 The strategy days took place on 13 and 14 September 2016 attended by Mr Jeff Anderson and Ms Clare Vary on behalf of BTL. From early 2016, the Respondent's fundraising team had been in negotiations to enter into a licensing agreement with DHX to use the Teletubbies brand in support of a number of fundraising events including "The Big Toddle". By September 2016, the Respondent was considering extending the range of the project to include sale of Teletubbies gift items in its shops although at this stage specific products had not been decided. On 16 September 2016, Mr Clark sought feedback about which products might be sold. The email was sent to those attending the strategy days where the Teletubbies project had been discussed; it was not sent to the Claimant. Mr Anderson replied to the email, suggesting six lines which could work well, nine that may not and the possibility of some cards. Mr Anderson said that he would need to speak to the Claimant upon her return from holiday.

27 Another strategy day attendee, Mr Charlie Enright, also emailed feedback. Under the heading "new goods", Mr Enright referred to the possibility of stocking a small range of paper products such as children's cards, gift bags and wrapping paper. Mr Clark copied the email to Mr Anderson, asking him to note the comments about new goods. Shortly afterwards, and without input from the Claimant, the Respondent agreed the Teletubbies product range which would be sold in its shops.

28 On 20 September 2016, immediately upon her return from holiday, the Claimant submitted a detailed written grievance setting out her concerns about the conduct of Mr Clark since their first meeting on 2 August 2016 and culminating at the launch party. In her grievance, the Claimant complained that Mr Clark had breached internal policies, failed to treat her as a senior manager, instead showing a total disregard for her role, opinions, wealth of experience and length of service. The Claimant complained that the relocation was being forced through without proper consultation, that it was not practical or in the best interest of the business. She was concerned about the continual delay in job descriptions and erosion of BTL board meetings. The Claimant described feeling bullied by Mr Clark's approach, his blunt management style and scare tactics and excluded by his deliberate attempts to network directly with her team at the launch and strategy days. The Claimant believed that Mr Clark and more senior managers were colluding to undermine her position so as to force her out of the organisation.

29 Mr Adam Pemberton was appointed to hear the grievance. He interviewed both

the Claimant and Mr Clark on 27 September 2016. The Claimant repeated her concerns; Mr Clark refuted the Claimant's complaints. In her interview with Mr Pemberton, Ms Parkes stated her belief that Mr Clark had quickly started to form a view that a move from Wickford would bring financial and operational benefits but maintained that he had not yet made a decision. Ms Parkes suggested that Mr Clark considered the Claimant's initial concerns to be emotional rather than business driven. The job evaluation process had not progressed as it had been left with previous managers; the merger of the quarterly BTL board meetings with the weekly retail meetings would be a more efficient use of time as a lot of information was repeated. Mr Pemberton did not interview Ms Vary or Mr Anderson; the Claimant did not suggest that he should do so.

30 By a letter dated 3 October 2016, Mr Pemberton did not uphold the grievance. Overall, Mr Pemberton preferred the evidence of Mr Clark to that of the Claimant but he did not give reasons for doing so. Given the nature of the Claimant's concerns, it would have been preferable to set out his key reasoning. In failing to do so, the grievance decision gave the impression that he had simply preferred the evidence of the more senior Mr Clark rather than the Claimant who had given many years of service without prior problems in her working relationship with her managers. This added to the Claimant's sense that she was not being valued or listened to by senior managers. One of the outcomes of the grievance recommendations was to propose that there be mediation between the Claimant and Mr Clark. The Claimant wished to consider her position on appeal and to be provided with additional information as to what would be involved. A proposed mediation on 18 October 2016 therefore did not proceed.

31 On 5 October 2016, two days after the grievance decision, the Claimant and members of her team received a letter from the Respondent informing them that there would be a period of consultation about the proposed move from Wickford. Although the grievance decision letter stated that a formal consultation about the move would should commence as soon as possible, Mr Clark did not speak to the Claimant about it before the letter of 5 October 2016 was sent. The Claimant was surprised to have had no proper forewarning and regarded it as a further example of her seniority being undermined. Although not relied upon specifically as a breach of the implied term of trust and confidence, the Tribunal considered that this was indicative of the poor communication shown by Mr Clark towards the Claimant. Given her position, it was inevitable that more junior members of the BTL team would approach the Claimant with questions. Courtesy and good industrial practice would have been for Mr Clark to tell the Claimant that the letter was being sent out and even to provide her with an advance copy of the consultation document.

32 The consultation was undertaken as a non-redundancy exercise despite the proposal being the cessation of the BTL operation at Wickford. The Respondent's consultation document set out the perceived operational benefits of a relocation but did not address the concerns previously raised by the Claimant. The BTL team asked to be accompanied by the Claimant in their consultation meetings. The Respondent refused, claiming that it may put the staff in a difficult position. The Tribunal did not regard this explanation as credible not least as it was the wish of the BTL team. We infer that it was borne of Mr Clark's desire to limit the Claimant's direct involvement given her opposition to the proposal. Following consultation, the Respondent accepted

that the relocation should not proceed. No new lease at Wickford was signed as negotiations with the landlord were ongoing, although the Claimant was not kept informed about the progress of these negotiations.

33 Following submission of the Claimant's grievance, the 1:1 meetings between the Claimant and Mr Clark ceased. They continued to have direct contact at the weekly retail and trading meetings and HR advised Mr Clark that even without 1:1 meetings there were other means of communication with the Claimant. We agree. The working relationship between Mr Clark and the Claimant needed to continue and the temporary suspension of 1:1 meetings is not a good reason for a failure to communicate between senior managers.

34 The Claimant's grievance appeal was heard by Mr Tony Cripps. Other than interviewing the Claimant on 2 November 2016, Mr Cripps undertook no further investigation and decided the appeal on the evidence already available. Mr Cripps concluded that the relationship between Mr Clark and the Claimant was at the heart of her feelings that she was being sidelined and ignored but that there had been no bullying. Mr Cripps found that Mr Clark had a different leadership style from the Claimant's previous managers. Mr Cripps concluded that the Claimant may have to adjust as the working relationship developed. We agree with those conclusions with the exception that the relationship of trust and confidence is mutual. It was not entirely the responsibility of the Claimant to adjust in order to accommodate Mr Clark, both bore responsibility for developing and maintaining a professional working relationship.

35 It is against those existing tensions in the working relationship that the Teletubbies project must be considered. This was a significant initiative for the Respondent. It had no dedicated project team but involved employees from a number of its teams as and when required. The Respondent was working with a third party company, Louis Kennedy, which had entered into a licensing agreement with DHX which owned the rights in the Teletubbies brand. Mr Grant Morgan worked for Louis Kennedy.

36 Following the discussion at the strategy days and subsequent emails, there was occasional mention of the Teletubbies project in the retail and trading team meeting. For example, on 18 October 2016 it is noted that Mr Clark and the Claimant would meet to discuss logistics once the Teletubbies contract was signed. The Claimant's case is that she understood at this time that the role of BTL and new goods would be limited to a small range of paper products with all other products being donated or gifts in kind. This belief is consistent with the emails from Mr Anderson and Mr Enright following the strategy days.

37 By 8 December 2016, the discussions between the Respondent and Grant Morgan had progressed to a point at which the supplier was ready to start production and the Respondent intended to make a payment in advance. As purchase approval for stock fell within the remit of BTL, on 13 December 2016, Ms Parr-Morley (the Finance Director) sent the Claimant an email requesting that asking her to talk to Ms Makesia Simmons (a member of the internal finance team) about an urgent request to make payment that week. This was the first time that the Claimant was directly involved in the Teletubbies project. The following day, the Claimant was asked to give a decision and approval for purchase of the Teletubbies stock that very day.

38 Over the same period from 8 to 14 December 2016, the Claimant was asked by a colleague in Retail about the services provided by MMC in the context of a visit by Mr Clark to discuss Teletubbies. From this we infer that Mr Clark intended to use MMC to provide the logistics and delivery of Teletubbies products but had not discussed his intention with the Claimant directly.

39 The Claimant was concerned that she was being asked at short notice to approve a significant payment for stock which she effectively knew nothing about. On 14 December 2016, she sent an email to Mr Clark in which she expressed her concern, raised a number of questions about terms of business and sought further information about the production, testing and supply arrangements. The following day, Mr Clark forwarded the email to Mr Morgan so that they could prepare answers in advance of a meeting planned for 20 December 2016.

40 On 15 December 2016, and before any reply to her initial questions, the Claimant asked for further information in advance of the meeting with Louis Kennedy. In particular, the Claimant wanted to see pre-production samples, test certification, terms and conditions of the licence with Teletubbies and copies of the internal and external communications about the project to date. This email was also forwarded to Mr Morgan. Later that afternoon, Mr Clark told the Claimant that she would receive answers the following day.

41 On 15 December 2016, Mr Morgan emailed his responses to the Claimant questions in both emails. The email responses were sent to Mr Clark and Ms Parkes but not to the Claimant. Mr Morgan believed that the Claimant was trying to expose procedural flaws and a lack of due diligence in the process to date, nevertheless his responses were detailed and sought fully to address the Claimant's concerns. Despite assuring the Claimant that she would receive answers to her questions, Mr Clark did not forward a copy of Mr Morgan's responses to the Claimant nor did he provide her with pre-production samples and the licence agreement which were already in the Respondent's possession.

42 The Claimant's evidence is that the questions raised were directly relevant to her normal role in BTL for stock purchase approval. The Respondent's case is that whilst these matters would have been part of her normal role, the Teletubbies contract was different and matters such as terms and conditions of the contract, payment terms and the like sat with the company secretary and/or external lawyers. Mr Clark's evidence was that the Claimant's advice was sought only because those in finance were new in post and did not know the appropriate process.

43 On balance, we prefer the evidence of the Claimant. In her email on 13 December 2016, Ms Parr-Morley accepted that the Claimant was responsible for stock purchase and approval for retail and asked her to advise whether she was able to progress the order. In her further email on 15 December 2016, Ms Parr-Morley thanked the Claimant for her responses and expressed her gratitude that suitable processes were in place. These responses are not consistent with the Respondent's case that stock approval and due diligence were not part of the Claimant's role on Teletubbies and that she was being asked only for advice. We do not find it credible that, as he suggested for the first time in cross-examination, Mr Clark advised Ms Parr-

Morley that she was mistaken in her understanding of the Claimant's role yet did not clarify the position in writing or with the Claimant at all. Nor is the Respondent's case consistent with the Claimant's statutory responsibilities as a director of BTL given that the payment for stock would be made by BTL. On balance, we find that stock purchase and approval even on the Teletubbies contract would form part of the Claimant's ordinary job duties even if these may be as part of a larger team given the importance and broader nature of the initiative.

44 The meeting on 20 December 2016 was attended by the Claimant, Mr Clark, Ms Vary, Mr Morgan and his colleague, Ms Julie Geller. Ms Vary took notes and produced an agreed list of 16 action items. There were wide-ranging discussions about various aspects of the Teletubbies purchase order, in particular health and safety concerns about certain products, testing, payment terms, the breakdown of product costs, purchase order quantities, licensing issues, the product range, quality control and branding. It was agreed that the Claimant would review queries about product testing requirements, be provided with a copy of the DHX licence agreement by Mr Clark, be provided with a full set of samples prior to mass production and be provided with other additional reports including bills of materials, safety assessments, declarations of conformity and ethical and technical factory audits as well as breakdown of cost prices. Ms Simmons was tasked with finalising the contract with the company secretariat and supplying it to Mr Clark.

45 We find that this meeting clarified the respective roles of those involved. It was clearly intended that the Claimant would be provided with the listed reports to review them as would ordinarily be part of her role; this included ethical and technical factory audits, quality assurance, testing and health and safety matters. Whilst ordinarily the Claimant would be involved in negotiation and agreement of commercial terms for BTL, given the size and nature of the Teletubbies project, responsibility was passed to finance and the company secretariat. Mr Clark was the person who would sign on behalf of the Respondent. This was an agreed action item and there is no evidence that the Claimant objected at the time.

46 In accordance with the agreed action items, the Claimant thereafter entered into direct communication with Louis Kennedy with regard to the arrangements for testing and packaging matters such as bar codes and declarations. Emails between Ms Geller and the Claimant on 21 and 22 December 2016 were detailed and professional even if the two were not always in agreement. Where the Claimant raised a question, Ms Geller provided the relevant information. As a result, a number of issues surrounding testing and production were satisfactorily resolved.

47 Upon receipt of the 6 page email with the notes of discussions and list of action items, Mr Clark's response to the Claimant (in full) read: "**Thanks for sending through the action points, I won't be send[ing] TS the DXL contract, I don't have it as it sits with Forbes [Mutch]"**. We considered the blunt response to be consistent with our earlier findings about Mr Clark's style of communication with the Claimant.

48 From the afternoon of 22 December 2016, when Ms Geller left for the Christmas holidays, Mr Morgan became involved in communications with the Claimant about packaging and testing. There was a significant dispute as the Claimant wanted the products to have four-digit bar codes and to be nickel free, whereas Mr Morgan did not

agree as it would increase cost. On 23 December 2016 Mr Clark intervened. He did not discuss the issues with the Claimant before sending an email to her and Mr Morgan in which he stated that there was no requirement for a four-digit code or to be nickel free especially if it led to additional cost. Mr Clark added: "**I expect this note will now give clarity and that all outstanding issues have been resolved and both parties can move on".** We find that in his email, Mr Clark was deciding the dispute in Mr Morgan's favour.

49 On 23 December 2016 at 13:28 the Claimant sent an email to Mr Clark, copied to Ms Simmons, titled "PRIVATE & CONFIDENTIAL: TELETUBBIES". This is said to be the first of the protected disclosures. The Claimant relies upon six phrases (underlined) in the following passages from this email as information tending to show a breach of a health and safety obligation:

> "**One of my major concerns as expressed during Tuesday's meeting with the supplier is around product health and safety. As the UK's largest Children's charity, I know you will agree our utmost concern is the welfare and safety of children. However after days of exchanging communication with the supplier regarding product testing and labelling, it is now clear that the supplier's product test standards fall short of our own requirements. As just one example this morning regarding the nickel testing, the supplier is insisting that there is not a requirement for nickel free product for items that do not touch the skin. I have now rechecked this with our external technical advisors and in our opinion based on the latest definition of prolonged contact with the skin set by the EU Commission, the items will be in contact long enough and that is why we have specified the test. However if all metal components are the same material from the same source one test may be possible. The factory/factories and the supplier need to confirm this. It is concerning that product labelling artwork has been produced ahead of product testing and both approved without any independent review and approval on behalf of Barnardo's. This is not the normal procedure that my team would follow when sourcing products.**
>
> **Although there was pressure during the last week to pay 100% of the order in advance ahead of mass production commencing the following week … at this point in time the supplier had not confirmed the test standards to which the products would comply. Due to the time pressures on the project I have asked for alternative documentation to be provided but no pre-production certification which should be available at each factory has been supplied or alternately certification for similar products as this would provide in the short term some assurance.**
>
> **Given that the 8 items are sourced from 6 different factories in China and without anyone internally having sight of factory ethical and technical standards, this is worrying. Furthermore the supplier is unable to provide BTL a full set of prototype samples branded to Teletubbies …**
>
> **…..**
>
> **At this point, I refer also to the question I posed to the meeting on Tuesday and asked as to everyone's thinking about the selected product range given that 7 out of 8 items were now known not to be suitable for children under 36 months. As the products are to be licensed to Teletubbies, a brand that targets an audience of a pre-school age, are we really comfortable that the products will therefore only be legally saleable to only 20% of this target audience?**"

50 The Claimant asked Mr Clark to understand the reasons why she was not comfortable or able from a product point of view personally to authorise the order. She

stated her opinion that the risks outweighed the benefits and that she would be failing in her stewardship and governance responsibilities were she not to make her views known. The Claimant asked that the email be treated in the strictest of confidence and not forwarded to the supplier, as her earlier emails had been.

51 Mr Clark did not respond to the Claimant's email on 23 December 2016. This is not surprising at it was the last working day before Christmas. However, he did not acknowledge her concerns in his emails sent on 28 and 29 December 2016 either. There was little, if any, progress on the project until the return to work on 3 January 2017.

52 On 3 January 2017, the Claimant provided Mr Morgan with some amendments to the information to be included on the packaging and raised the effect of the introduction of the new £1 coin on the trolley token product.

53 Mr Morgan did not welcome the Claimant's emails. In an email sent at 22.33 on 3 January 2017 to his colleague Ms Geller but copied to the Claimant, Mr Clark, Ms Simmons and Ms Vary, Mr Morgan stated that he refused to have the project "**further delayed or derailed through churlish questions, provocation, a lack of knowledge or possibly even all of the above**". We find that these comments were clearly aimed at the Claimant and her role on the project.

54 In an email sent to Mr Clark and Ms Parkes at 23.48 on 3 January 2017, Mr Morgan went further, stating:

> "**I am now fast losing my patience with this woman and I will not allow her to delay or derail the process and harm potential and significant Barnardo's income simply because it wasn't "invented here".**
>
> **She is provocative, ignorant and not versed in the subject in which she professes to be an expert. She is making a simple process overly complicated and is far from a team player.**
>
> **I hope you don't find my email offensive but she needs to know that her, now beyond, unacceptable behaviour will not be tolerated**."

This second email was not copied to the Claimant who did not see it before its later disclosure in these proceedings.

55 The Respondent accepts that both of Mr Morgan's emails were inappropriate and offensive. The first email was copied to a junior member of the Claimant's own team and both were sent to her senior managers. Mr Clark's evidence is that he did not respond initially as he had a pre-planned 1:1 meeting with the Claimant on 4 January 2017 and he wished to discuss the matter with the Claimant to determine the best response.

56 The 1:1 took place as planned on 4 January 2017 and we considered the notes of that meeting. At the outset, Mr Clark explained that he had invited Ms Badala, a member of the HR team, to be present because the Claimant had raised a 17 page grievance making a number of serious allegations against him in his first five weeks in post. Mr Clark then took issue with the Claimant's failure to talk to him before raising the grievance, noted that neither the grievance nor the appeal had been upheld and

referred to the Claimant's unwillingness to attend mediation. Whilst the decision to have Ms Badala present was sensible given the previous problems at 1:1 meetings, the way in which Mr Clark expressed himself was confrontational and unhelpful. His comments lead us to infer that Mr Clark was irritated by the Claimant's conduct and regarded her in a negative manner. Whether caused by hurt or anger, Mr Clark adopted an unfriendly and hostile attitude to the Claimant from the outset of the meeting.

57 The first item on the agenda was Teletubbies. The Claimant raised the email received from Mr Morgan and expressed her concern that she had been excluded and only became involved when it was too late for her to pick up the issues that fell within her remit. Mr Clark responded:

> "**To just clarify why you weren't involved in the project from the beginning; there was an opportunity to raise 350K net profit for the TT products. Why weren't you involved? Because you didn't want to engage in a working relationship with me due to your grievance and the allegations you had raised. I didn't feel I was in a position to approach you at the time.**
>
> **Secondly, I wouldn't want to sign off on anything that puts the charity at risk, whether that be financially, its reputation or from a health and safety perspective. It goes without saying that we ensure we carry out a governance process**."

58 Mr Clark told the Claimant that he was happy with the work she had done. He acknowledged that the project was brought to the Claimant because it came under her remit and that he had passed it to her as soon as he became aware that the work should be handled by the Claimant and the BTL team. The Claimant told Mr Clark that she found Mr Morgan's email offensive. The Tribunal considered it telling that Mr Clark's initial response was not to express agreement with the Claimant but to ask why she thought that Mr Morgan had made the comments. The Claimant asked for Mr Clark's support and expressed her concern at feeling rushed to sign off the order. Mr Clark said that he would be supportive of her as a member of his team and agreed that the words used could be considered offensive. He said that he was happy to respond but wanted to think of the best way to do so, taking into account the Claimant's views which he was happy to give her time to consider. Mr Clark did not tell the Claimant about the second email or its contents.

59 Mr Clark accepted that everything seemed to be in a rush and that he should have involved the Claimant or her team sooner. Mr Clark assured the Claimant that he had worked with other departments to mitigate any risks from making a payment in advance and to draft a contract which would address the issues. Mr Clark assured the Claimant that the order would not be approved until the Respondent's interests were protected and the Claimant had approved "her side of things". From the action items agreed on 20 December 2016, this included testing, packaging and factory audits.

60 The outstanding job descriptions and re-evaluation was also discussed at the 1:1 meeting on 4 January 2017. In late 2016, Mr Clark had agreed to a temporary enhancement of salary for the three more junior members of the BTL team whilst the process concluded. In December 2016, Mr Clark notified the Claimant and her team that he had not been able to review the job descriptions within the anticipated timescale but would do so without further undue delay. On 4 January 2017, Mr Clark

said that he had now considered the revised job descriptions and understood the roles and proposals. Mr Clark agreed that the existing job descriptions may be out of date but, before making a decision on the job re-evaluation, Mr Clark said that he wanted to review the future BTL trading strategy. Mr Clark agreed to continue the temporary allowance until that review concluded and proposed a direct meeting with the BTL team to discuss the topic. The Claimant broadly agreed whilst expressing disappointment at the delay.

61 On 5 January 2017 it was agreed that that all products would be nickel free as the Claimant had requested.

62 As requested by Mr Clark in the 1:1 meeting, the Claimant set out her concerns in two emails which she sent on 5 January 2017. The first email ("the Supplier email") was sent to Mr Clark at 12.31. It set out the Claimant's concerns about the conduct of Louis Kennedy and a list of 20 actions which she believed were required from the supplier. Each of the actions listed by the Claimant fell within the scope of her role on the Teletubbies project as agreed at the meeting on 20 December 2016 and more generally as head of BTL, for example pre-production samples, clarity on product lines, outstanding test reports and factory ethical audits, breakdowns of individual testing cost and product cost per item, declarations of conformity, bills of material, safety assessments and issues surrounding packaging, artwork, barcodes and again shipping.

63 In the Supplier email, the Claimant relies upon the first underlined phrase as information tending to show a breach of a health and safety obligation and the following underlined phrases as tending to show a breach of legal obligation:

> "**Given the high risk nature of the product safety in relation to the pre-school target market, what protection will Barnardo's post production/post shipment/post receipt of stock have if the items are deemed to be unsaleable due to QC [**quality control] **failures? Our standard payment terms are [x] days net after receipt of stock, which enables us to address any QC issues as well as late delivery and short delivery prior to releasing any monies to a supplier.**
>
> **I note that a contract is now being prepared internally for LK to sign but given the company's low credit rating and history, I remain very concerned that how much time and legal costs could potentially be involved for Barnardo's to try and recover monies paid out in advance? …**
>
> **… The order volumes are very high, especially in view that we have no history of selling this type of licensed product in Barnardo's stores. It will be very challenging to sell out this quantity of stock in the license term of six months. This sell-rate has never been achieved previously. What happens if we have significant residue stock at the end of the license term?"**

64 The second email was sent at 15.04 to Mr Clark and provided additional internal queries and actions still requiring clarification and assurance ("the Internal Actions email"). In this email, the Claimant relies upon the first underlined phrase as information tending to show a breach of a health and safety obligation and the following underlined phrases as tending to show a breach of legal obligation:

"**…nurseries & primary schools are intended channels to distribute TT product for Barnardo's …given 80% of product is not suitable for children under 3 years, is this still Barnardo's intention?**

…

In addition the licensor request that Barnardo's maintain and keep an accurate record of costs incurred by our 3rd Party supply chain.

…

Barnardo's need to ensure conformity to FR Fundraising Regulator and ensure the code of conduct is upheld by corporate partners and 3RD party suppliers. It is therefore important that this code of conduct is included and referenced in the LK contract.

…

The contract for LK as the importer must clearly state the need for LK to have 3rd party public and product liability insurance to cover liability for a minimal claim not less than £1million per incident.

…

Re DHX right to cancel/terminate the agreement – failure to agree marketing date ie 2 months after the prototype has been approved by the licensor. BTL needs clarity on this … has LK received approval from the Licensor already based on prototype samples ie some in ppt format"

65 Mr Clark forwarded the list of action items from the Supplier email directly to Mr Morgan on 5 January 2017 under a cover email which simply read: "**Here you go….**" This is the same phrase used when forwarding the Claimant's earlier email on 15 December 2016. Also on 5 January 2017, Mr Morgan sent an email to Mr Clark responding to each of the points raised by the Claimant. In the email, Mr Morgan provided assurances that product test reports, ethical and technical factory audits, individual cost breakdowns safety assessments and the EU declaration of conformity would be provided as part of the process.

66 Mr Clark did not forward this email to the Claimant, rather he cut and paste the response to action item 14 (packaging artwork) into a separate email. The Claimant's response to Mr Clark expressed concern at the lack of feedback from Louis Kennedy on the other action items which related to the critical certification required to confirm the order. Mr Clark still did not provide the full response from Mr Morgan to the Claimant. We do not accept Mr Clark's evidence that there was reasonable and proper cause not to forward the balance of the responses. Mr Clark had asked the Claimant to send him the email about what remained outstanding, the action items fell within the agreed scope of the Claimant's work on Teletubbies, Mr Morgan had provided full responses in an email which could easily have been forwarded and Mr Clark was aware that the Claimant remained concerned. We consider that there was no good reason to fail to send the responses in full to the Claimant.

67 At 23.21 on 5 January 2017, Mr Morgan sent an email to Mr Clark in which he complained that the Claimant's action items list implied a further divisive desire to

hijack the process. Mr Morgan concluded: "**This is a pure obstruction of the process and if she hasn't approved all of this by close of business tomorrow then we shall proceeding without her approval.**" The Claimant was not copied into the email and did not see it before these proceedings. The Tribunal considered this to be a remarkable email for an external supplier to send; criticising the Claimant and deciding, as Mr Morgan purported to do, that the Claimant's ordinary role in providing approval be dispensed with. Mr Clark did not respond to the email.

68 On 10 January 2017, Mr Clark sent to his direct reports an email headed: "Retail and Trading Strategy" and setting out what was described as the new and revised trading strategy. Mr Clark's evidence was that this was a draft strategy to be discussed. However, there is nothing in the email to indicate to the recipients that it was a draft subject to discussion and agreement. Quite the contrary. Read overall and considered objectively, the email gives the clear impression of settled strategy which was being notified to those concerns as something which would be implemented henceforth. The Tribunal considered this email in making its earlier findings about Mr Clark's management style and communication with the Claimant about the Wickford lease. Whether or not Mr Clark genuinely believed the strategy to be a draft, or indeed the move from Wickford to be a provisional view, the manner of his communication was such that an objective employee in the Claimant's position would consider them settled decisions already taken.

69 Mr Clark met with the BTL team on 12 January 2017 to discuss the outstanding issue of the job descriptions and re-evaluation process. Mr Clark made clear that he would not sign up to the amended job descriptions. The staff expressed their concern and dissatisfaction. Mr Clark does not deny that his response was to tell them that they had to "like it or lump it". The Tribunal find this further evidence of his blunt and at times insensitive approach to communication on matters of importance to employees.

70 The Claimant and Mr Clark also had a 1:1 meeting on 12 January 2017. When the Claimant expressed her unease at the presence of a junior member of the HR team given that this was a dispute between directors, Mr Clark replied that she was not a director of Barnardo's. Mr Clarks' response was factually accurate but again displays a lack of sensitivity and poor communication skills. The Claimant's concern was that her seniority was not being respected, Mr Clark's reply gave the impression that he was dismissive of her position as director of BTL even though he later acknowledged that they were both senior persons in the organisation.

71 The meeting did not go well. Mr Clark expressed his belief that he could not move forwards with the business as the Claimant was blocking him. Although the notes suggest that this related to direct discussion with the BTL team, both the Claimant and Mr Clark gave evidence that it related to the business more generally and specifically Mr Clark's belief that that every time he came up with an idea to make more money for the charity, the Claimant would put something in the way to stop it. The Claimant became upset and there was a short break. The meeting reconvened and discussion moved to the Teletubbies contract. The Claimant raised the lack of response from Louis Kennedy to all but one of her list of supplier actions sent on 5 January 2017. Still, Mr Clark did not tell her that replies and assurances had been received on each. Mr Clark advised the Claimant at least twice that the contract and legal aspects of the agreement would be dealt with by the company secretary and external solicitors and

assured her that the contract would not be signed until everything was in order.

72 The Claimant expressed concern about the way in which Mr Morgan treated her, including the offensive email he had sent. Mr Clark's reply (which he maintained in evidence at this Tribunal) was that he spoken to Mr Morgan on 5 January 2017, the day after the 1:1 meeting, and told him in clear terms that his email about the Claimant was unacceptable. Mr Clark said that Mr Morgan knew that he had crossed a line and was very apologetic. We do not accept Mr Clark's evidence that he had already spoken to Mr Morgan before this second 1:1. It is not credible that if such a conversation had taken place, Mr Morgan felt able to send a similarly unpleasant email about the Claimant to Mr Clark that very same night. On balance, we find that Mr Clark did not speak to Mr Morgan until the Claimant pressed the matter on 12 January 2017. This is consistent with Mr Clark's email on 13 January 2017 requesting that Mr Morgan apology, which he then did later that day.

73 In his oral evidence, but not in his written witness statement, Mr Clark's evidence was that the Respondent was provided with the ethical and technical factory audit reports on 13 January 2017 and that he and the company secretary spent three-quarters of a day considering their contents. Mr Clark did not tell the Claimant that they had been received nor did he provide her with copies, despite it being agreed on 20 December 2016 that this would be part of her role on the Teletubbies project. We infer that Mr Clark made a conscious decision not to pass the reports to the Claimant as he was concerned that she might identify issues and cause further problems with Louis Kennedy.

74 A 1:1 meeting on 25 January 2017 did not proceed as the Claimant wanted to be accompanied by a solicitor which the Respondent considered inappropriate.

75 On 2 February 2017, the Claimant was copied into an email from Mr Morgan to Mr Clark which confirmed that the Respondent had paid Louis Kennedy and they would now proceed to full production. The Claimant had not given her approval or signed off on her areas of concern. Mr Clark had not told the Claimant in advance that the money was to be paid and the email came as a total surprise to her. This was the last straw in the Claimant's mind and she decided to resign.

76 In her resignation letter dated 3 February 2017, the Claimant set out in detail her belief that she had been sidelined and excluded from the Teletubbies project which would normally have fallen within her remit, her position had been undermined internally and externally, she had been called a "blocker" in a 1:1, Mr Clark had proposed changes without proper consultation, refused to agree the job description and re-evaluation, failed to comply with normal procedures for due diligence or to respond to her concerns. The Claimant complained that Mr Clark had not sufficiently supported her in the face of Mr Morgan's offensive remarks when she was trying to carry out her job, had not given her the required testing and factory audit reports and that she had received only one response to her list of supplier action points. The Claimant expressed her general unhappiness with Mr Clark's manner and early decisions, such as the Wickford lease. Ultimately this and the decision to pay the money on the Teletubbies contract without telling her or dealing with her deep and genuine concerns had led her to resign. The Respondent accepted the Claimant's resignation.

77 On 7 February 2017, Mr Clark re-sent the Supplier email to Mr Morgan asking for his further comments in light of the Claimant's complaint that the contract had been signed before the outstanding points had been correctly actioned. Mr Morgan's replies confirmed that the outstanding reports and certificates had been provided (other than testing which he said could not be done before the contract was signed) and that the contract had been signed on 1 February 2017.

Law

Constructive Dismissal

78 Section 95(1)(c) ERA provides that a dismissal occurs if the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to do so by reason of the employer's conduct. Whether the employee was entitled to resign by reason of the employer's conduct must be determined in accordance with the law of contract. In essence, whether the conduct of the employer amounts to a fundamental breach going to the root of the contract or which shows that the employer no longer intended to be bound by one or more of the essential terms of the contract, **Western Excavating Ltd v Sharp** [1978] IRLR 27 CA.

79 The term of the contract which is breached may be an express term or it may be an implied one. The Claimant relies upon alleged breaches of express and implied terms, including that of trust and confidence. This requires that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The employee bears the burden of identifying the term and satisfying the tribunal that it has been breached to the extent identified above. The employee may rely upon a single sufficiently serious breach or upon a series of actions which, even if not fundamental in their own right, when taken cumulatively evidence an intention not to be bound by the relevant term and therefore the contract. This is sometimes referred to as the "last straw" situation. This last straw need not itself be repudiatory, or even a breach of contract at all, but it must add something to the overall conduct, **Waltham Forest London Borough Council –v- Omilaju** [2005] IRLR 35.

80 Where a contract has been reduced into writing, implication of additional terms is only possible to give business efficacy to the contract, or where necessary to give effect to an obvious combined intention of the parties or where it is a necessary implication to complete the contractual arrangements, **United Bank Limited v Akhtar** [1989] IRLR 507 per Knox J at paragraph 48.

81 The question of fundamental breach is not to be judged by reference to a range of reasonable responses, **Buckland v Bournemouth University Higher Education Corp** [2010] IRLR 445, CA. The tribunal must consider both the conduct of the employer and its effect upon the contract, rather than what the employer intended. In so doing, we must look at the circumstances objectively, that is from the perspective of a reasonable person in the claimant's position. The question of fundamental breach is not to be judged by a range of reasonable responses test.

82 In **Tullett Prebon Plc v BGC Brokers LLP** [2010] EWHC 484 QB, Jack J

stated at paragraph 81 that the conduct must be so damaging that the employee should not be expected to continue to work for the employer and that:

> "**Conduct, which is mildly or moderately objectionable, will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough.**"

83 Establishing breach alone is not sufficient: the employee must also resign in response to it and do so without affirming the contract. Once an employee has affirmed the contract, the right to repudiate is at an end. As summarised in **Chindove v William Morisons Supermarket plc** UKEAT/0201/13/BA, the issue is whether the employee has demonstrated by conduct or delay that he has chosen to hold the employer to the contract. This is more an issue of conduct than time, with the latter relevant where the employee continues to work for longer than the within he might reasonably be expected to exercise his right. There is no automatic time, it all depends upon context. Part of the context is the employee's position, such as the effects upon his finances, domestic arrangements and the ease with which employment may be found elsewhere. Another part of the context is whether the employee was actually at work or was off sick.

84 The employee must satisfy the tribunal that he left in consequence of the employer's breach of duty. There may be more than one reason why an employee leaves a job; it is enough that the repudiatory breach was an effective cause with no requirement that it be the most important cause, **Wright v North Ayrshire Council** [2014] IRLR 4.

Protected Disclosure

85 A qualifying disclosure requires a 'disclosure of information' which in the reasonable belief of the worker tends to show, amongst other things, that the health or safety of any individual has been, is being, or is likely to be endangered, s.43B(1)(d) Employment Rights Act 1996 or a legal obligation breached, s.43B(1)(b).

86 At the time when the Tribunal heard submissions, it had regard to the Employment Appeal Tribunal Judgment in **Kilraine v LB of Wandsworth** [2016] IRLR which cautioned some care in the application of **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38 where the Employment Appeal Tribunal drew a distinction between an allegation and conveying information: the question is simply whether there is a disclosure of information as required by the Act, that it is also an allegation is nothing to the point. On 21 June 2018, the Court of Appeal agreed that approach. The Tribunal must look at the words used by the Claimant to decide whether they convey information (and an allegation may contain information); words which are too general and devoid of factual content tending to show breach of a legal obligation will not amount to information. Words which otherwise fall short may be boosted by context or surrounding communication. The assessment is an objective evaluation in all of the circumstances of the case.

87 The Claimant must reasonably believe that the information tends to show a relevant breach and that it is in the public interest to make the disclosure. The belief that a disclosure is in the public interest must actually be held at the time of the disclosure; whether or not it was a reasonable belief may include consideration of

matters not in his mind at the time and it need not be the only or predominant motivation in making the disclosure, see **Chesterton Global Ltd v Nuromohamed** [2017] IRLR 837 at paragraphs 27 to 31 and 37.

88 The requirement for reasonable belief, which should not be conflated with good faith which is addressed below, involves an objective standard by reference to the circumstances of the discloser, including their qualifications, knowledge of the workplace and experience, **Koreshi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4, EAT.

89 In **Blackbay Ventures Ltd v Gahir** [2014] IRLR 416, the EAT gave helpful guidance as to the approach to be adopted by a Tribunal considering a protected disclosure claim. This emphasised the need not to adopt a rolled up approach but to consider each disclosure by date and content, identify the risk to health and safety in each case and the detriment (if any) which is caused thereby. The need to apply this detailed analysis was confirmed in **Patel v Surrey County Council** UKEAT/0178/16.

90 The correct approach to causation and the different tests which apply to dismissal and to detriment claims was set out in **Fecitt v NHS Manchester** [2012] IRLR 64 per Elias LJ at paragraph 45 (and applied in **Patel**). Whereas the Tribunal must decide whether the protected disclosure was the sole or principal reason for dismissal (**Eiger Securities LLP v Korshunova** [2017] ICR 561), it is enough that the disclosure materially influenced the Respondent's treatment of the Claimant in a detriment claim. If the Tribunal finds that the reason given by the Respondent is false, it may be appropriate to draw an adverse inference.

91 The time for bringing a s.47B is three months from the date of the detriment, or last detriment where there has been a serious of similar acts or failures. A tribunal may still hear such a claim even if presented late so long as it is satisfied that it was not reasonably practicable to have presented the claim in time and that it presented within a reasonable time thereafter.

Conclusions

Did the Claimant make a protected disclosure?

92 The first protected disclosure relied upon is the Claimant's email sent on 23 December 2016. We agree with Ms Crasnow that there is an element of overlap with the points being raised by the Claimant at the meeting on 20 December 2016. However, we do not accept that the Claimant is merely repeating her opinions on matters which had not previously been accepted. In the email, the Claimant sets out the reasons for her concerns, providing information to support her belief that there is a potential health and safety risk. For example, with regard to product testing standards, the Claimant conveys information that Louis Kennedy was insisting that nickel free was not required for product which did not touch the skin, she had checked with external advisors who had confirmed that the product met the EU definition for contact and required testing. Similarly, the Claimant conveyed information when she said that labelling artwork had been produced before testing, it had been approved without independent review and approval, in the context of a breach of normal sourcing procedure. Taking a further example, as context the Claimant says that the supplier

has not confirmed standards against which the products are to be tested for compliance before stating that pre-production certification at each factory should be available but none has been supplied. Objectively considered and properly read in context, even if the Claimant is sharing her opinion she is also conveying information. The same applies for each of the six phrases relied upon.

93 As well as conveying information, the Claimant must also reasonably believe it to tend to show a relevant breach and to be in the public interest. The belief of an employee is an essential component in a protected disclosure and shows the extent to which there may be an overlap between information, allegation and opinion. It was agreed on 20 December 2016 that the product testing, adequacy of samples and factory audits would all fall within the Claimant's remit on the Teletubbies project. The Claimant's belief was borne of her extensive experience with BTL sourcing new product, even if from only one supplier previously. We also took into account the late stage at which the Claimant had become involved and the pressure upon her to approve the order quickly. These are relevant circumstances in leading us to conclude that she was reasonable in her belief that there were outstanding issues around product safety which had not yet been addressed. As for public interest, the Respondent is a charity, accepting public donations and marketing items for sale to the public who wished to support its charitable works. The products being sourced were to be linked to a fundraising initiative and marketed at children as well as adults. We have no hesitation in finding that the Claimant held a reasonable belief that her disclosures in this email were in the public interest.

94 Turning to the Supplier email sent on 5 January 2017, and the first phrase about the high risk nature of the product, at first glance and in isolation this may be seen as a mere allegation rather than information. However, we reminded ourselves that the two are not necessarily mutually exclusive and we must consider the context and surrounding communication. The paragraph in which the phrase is used goes on to consider quality control failures and the need for a delay between receipt and payment to address these, before listing outstanding supplier actions on product testing and compliance. Objectively considered in the circumstances of the case, we consider that the Claimant was conveying information about product safety which tended to show a possible breach of health and safety obligations in selling products to pre-school children. For the reasons set out above, about the nature of the product, the nature of the Respondent organisation, the time pressure and the Claimant's experience, we again accept that she held a reasonable belief that her information tended to show a likely breach of health and safety which was in the public interest.

95 As for the other phrases which are relied upon, we accept that there was information conveyed in the sense that the Claimant was stating that Louis Kennedy had a low credit rating and history, in the context of assessing the wisdom of making a large advance payment and the cost of trying later to recover the same. The Claimant also conveyed information that the product volume was higher than usual given that it was a new type of product which required sale in a specified time period, something not previously achieved. The Claimant was genuinely and subjectively concerned about the wisdom of an agreement to make an advance payment and the commercial and reputational risk to the Respondent. However, s.43B requires that the Claimant reasonably believed there to be a breach or likely breach of legal obligations. On this point we preferred the submissions of Ms Crasnow that reputational risk is not the

same as legal obligation. It had been agreed on 20 December 2016 that negotiation and agreement of commercial terms would be undertaken by finance and the company secretariat. The Claimant was an experienced business woman, there was no reasonable basis for her to believe that the contract would not be properly negotiated not least as at that time she had been told that she would be responsible for approval of testing and compliance requirements. Nor do we consider that the Claimant could reasonably have believed that such matters were in the public interest.

96 The third alleged protected disclosure is the Internal actions email. As with the Supplier email, we consider that the Claimant conveyed information only in respect of the first phrase. The information was that the products being ordered were not suitable for 80% of target market of children under three years old, in the context of the rest of the paragraph which refers to the Respondent's intention to use nurseries and primary schools as channels to distribute the Teletubbies product. For the same reasons as with the previous two emails, we accept that the Claimant had a reasonable belief that the information about the unsuitability of the product tended to show a potential breach of health and safety which was in the public interest.

97 As for the other phrases relied upon, the Claimant is identifying matters which need to be provided by the Respondent and Louis Kennedy to ensure compliance with the licence agreement. Even if this is a disclosure of information, it cannot reasonably have been believed by the Claimant to tend to show a breach, or likely breach of a legal obligation. As with the Supplier email, the Claimant had been reassured that contractual matters were being handled by the company secretariat. The Claimant's input from experience about the record keeping requirements may have been sensible but, in our view, it falls far short of information tending to show that these records would not have been kept and the licence agreement breached.

98 The Claimant made a protected disclosure in her email of 23 December 2016 and the Supplier email on 5 January 2017, the latter in respect of product safety only.

Was the Claimant subjected to a detriment because of a protected disclosure?

99 The detriments relied upon in this claim are more limited than those in the constructive dismissal claim. We must consider whether any of these were detriments: (i) the Claimant was undermined when not allocated duties previously in her remit, specifically the failure to share with her all but one of the Louis Kennedy responses to her action items and/or the internal actions proposed in respect of her email; (ii) the Claimant was undermined to Louis Kennedy, specifically in Mr Clark's response to the offensive emails; and (iii) the admitted reference to the Claimant as a blocker at the 1:1 on 12 January 2017 in front of a junior member of HR.

100 We have found as a fact that the action items in the Supplier email all fell within the agreed role of the Claimant on the Teletubbies project, that Louis Kennedy provided responses to each and that Mr Clark provided only one of the responses to the Claimant. We have also found that the Claimant repeatedly expressed concern about the lack of full response, including at the 1:1 on 12 January 2017. The Claimant's concerns about the safety of the products for sale and the relationship with Louis Kennedy continued as a result and caused her a justifiable sense of grievance. In the circumstances, we accept that the failure to provide the full responses was a

detriment.

101 In deciding whether the detriment was because of a protected disclosure, we bear in mind that the latter must be a material and effective cause and that it is for the Respondent to show the ground on which the failure to act was done, s.48 ERA 1996. The Tribunal has rejected Mr Clark's explanation that he did not forward the full email because the other responses did not fall within the Claimant's area of responsibility. We do not accept that Mr Clark could genuinely have believed that, given the areas of responsibility agreed by the Respondent on 20 December 2016 in the exercise of its broad discretion about the allocation of work. Moreover, the email from the Claimant with her action items came at Mr Clark's request following the discussion on 4 January 2017 in which he accepted that the Claimant should have been involved sooner as the work came under her remit and that the contract would not be signed under she had approved "her side of things". There was no good reason for Mr Clark's failure to forward the responses in full.

102 Ms Crasnow submitted that the protected disclosure could not be an effective cause as Mr Clark had also failed to provide the Claimant for answers to her questions emailed on 14 December 2016. We do not agree. Whilst Mr Clark did fail to provide the Louis Kennedy responses at that time, a large number of her questions related to the commercial terms of the agreement as well as matters such as product testing and factory audits. At that time, the Claimant had only recently become involved in the project and the extent of her role was not yet defined. A meeting to discuss her concerns and the Louis Kennedy response was already arranged for the following week. Whilst Mr Clark may genuinely have believed on 15 December 2016 that the Claimant did not need to see the responses, the same did not apply to the responses to the 5 January 2017 for the reasons we have set out above. By 5 January 2017, Mr Morgan firmly believed that the Claimant was obstructing the process and had declared that if she did not give her approval, they would proceed without her. He had expressed his belief in strong terms to Mr Clark. Mr Clark had not defended the Claimant nor told Mr Morgan that his emails were inappropriate. On balance, we infer that the reason why the full responses were not provided is because Mr Clark was concerned that the Claimant would raise further concerns and challenges to the adequacy of the responses which may further delay the signing of the contract and further enrage Mr Morgan. Given the irritation and pressure being expressed by Mr Morgan and desire of Mr Clark to move matters forward swiftly, we are satisfied both protected disclosures, which related to the adequacy of testing and compliance each matters addressed in Mr Morgan's response, was a material and effective reason.

103 By contrast, we do not accept that the Respondent failed to share with the Claimant the internal actions proposed in response to her internal actions email. In the 1:1 on 12 January 2017, Mr Clark told the Claimant that the contract and commercial implications of the agreement would be dealt with by him, Ms Simmons and the company secretary. Insofar as Mr Clark did not give specific responses to the questions which the Claimant had raised, these were not matters within the agreed remit of her role on the Teletubbies contract. Moreover, the Claimant had previously been assured that the contract was being considered by external lawyers. Any queries which she had raised would be dealt with by others. The Claimant was not being undermined and she cannot have had a legitimate sense of grievance in all of the circumstances.

104 As for undermining her in front of Louis Kennedy, the Claimant relied in her submissions upon the Respondent's failure to respond promptly to Mr Morgan's emails on 3 January 2017. There was no evidence before us that either Mr Clark or Ms Parkes challenged Mr Morgan or sought to support the Claimant upon receipt of either email. The Claimant was a senior employee, a statutory director of BTL and was seeking to perform her duties as agreed on 20 December 2016 on the Teletubbies project. Mr Morgan clearly regarded her intervention as negative and made a number of offensive remarks about her. We found that Mr Clark did not speak to Mr Morgan until pressed by the Claimant on 12 January 2017 who was raising her upset for the second time. We accept that the failure to challenge these is capable of amounting a detriment, at least in respect of the one email about which the Claimant knew.

105 In deciding whether this failure by Mr Clark and the Respondent generally was caused by either of the protected disclosures, we considered the nature and tone of Mr Morgan's communications with Mr Clark concerning the Claimant even before the disclosure. Whilst the working relationship between Mr Grant and the Claimant was never warm, the personal hostility evidenced in the email on 3 January 2017 was markedly different from his email on 15 December 2016 that the Claimant was trying to find procedural flaws and any disagreement in the emails on 22 December 2016. Mr Morgan's irritation was because he regarded the Claimant's queries as obstructive. In the absence of any other credible explanation from the Respondent, and given his references to her as a blocker, we infer that Mr Clark shared this view. An effective cause of his belief was the Claimant's protected disclosures about health and safety.

106 It is accepted that Mr Clark referred to the Claimant as a blocker in the meeting on 12 January 2017 because he regarded her as obstructing his ideas to make more money for the charity. The Teletubbies project was a major initiative and one such attempt to make money. We conclude that Mr Clark had this in mind when he made his comment. The Claimant was raising concerns about matters which she reasonably believed required addressing in order to ensure that the product was health and safety compliant. We are satisfied that in such circumstances, Mr Clark's comment was a detriment and that the protected disclosures were a material and effective cause for him making it. As for the email on 13 January 2017, Mr Clark asked Mr Morgan to apologise for his conduct. We accept Ms Crasnow's submission that it is entirely neutral and do not consider that the tone or content of that email was such that a reasonable employee could justifiably have felt aggrieved by it.

107 For these reasons, we are satisfied that the Claimant was subjected to a detriment when she was undermined, both by not being given the supplier responses to her questions and in not being supported by Mr Clark in response to the 3 January 2017 offensive email, and also when she was called a blocker. All arose from a belief by Mr Clark that the Claimant in her protected disclosures was obstructing the agreement which he was very keen to conclude. This was not a one-off failure but a failure which extended over the period continuing until the Claimant's resignation on 5 February 2017.

108 If we are wrong on that point and the date of the last detriment was indeed 12 January 2017, as Ms Crasnow contends, we would have taken into account the extent to which the Claimant was misled by Mr Clark about the detriments at the time. It was

only in the course of these proceedings that additional documents were disclosed which made the true position clear: Mr Clark did not tell the Claimant that there had been a response by Louis Kennedy to her supplier action items, he told her that he had spoken to Mr Morgan on 5 January 2017 whereas the email that night from Mr Morgan led us to find that he had not and he assured the Claimant that the contract would not be signed until she had approved the matters within her remit when in fact he signed it anyway. In such circumstances, even if the last detriment relied upon occurred on 12 or 13 January 2017, we would have accepted that it was not reasonably practicable for the Claimant to have brought her claim within the three month limitation period by reason of the Respondent's conduct and that the claim was brought within a reasonable time thereafter.

Constructive dismissal

109 The Claimant relies upon 11 items of conduct which she says amounted to a breach of the implied term of trust and confidence. We bear in mind that when considering the implied term of trust and confidence, it is conduct which is without reasonable and proper cause which is capable of amounting individually or cumulatively to a repudiatory breach. Ms Crasnow submitted that the Respondent retained a broad contractual discretion in the allocation of work, the substantive exercise of which could only be challenged if **Wednesbury** unreasonable. Both she and Ms Ismail agreed, however, that the manner in which the discretion was exercised is nevertheless subject to the implied term of trust and confidence.

110 The Tribunal found as a fact that Mr Clark did make a decision to close the Wickford office without prior consultation. The desire to save cost and improve business efficiency by moving the BTL team to work more closely with the broader retail team is a reasonable and proper cause for an office move and within the discretion of the Respondent. The manner in which Mr Clark approached this, by presenting it as a "done deal" by 12 August 2016 was not appropriate and was, we consider, conduct which contributed to a breach of the implied term of trust and confidence.

111 We found that Mr Clark did not sign off the new job descriptions and did not consider them by the end of 2016 as agreed. In January 2017 he then deferred a decision further until a review of the future BTL trading strategy. Mr Clark was new in post, it was reasonable and proper for him to want to take some time to understand how BTL worked and to assess the future direction of the business. We accept the disappointment and frustration of the employees who were hoping for a re-evaluation but we also take into account the agreement of the Respondent to pay a temporary allowance pending a final decision. This was a reasonable and balanced approach and it did not undermine the Claimant in the eyes of her team. In the circumstances, we do not consider this to be conduct capable of contributing to a breach of the implied term of trust and confidence.

112 As for Mr Clark's manner in meetings with the Claimant, we have found it to be blunt, dismissive and demonstrating irritation. On 4 January 2017, Mr Clark was hostile and unfriendly. We have not, however, accepted that it was bullying or intimidating. The Tribunal inferred from our primary findings of fact above that from very early in the working relationship there was a genuinely held difference of opinion

between the Claimant and Mr Clark as to what was best for BTL. Mr Clark had come into his job full of new ideas to drive BTL forward, to bring it closer to the main Retail and Trading operation from which it had become rather separate and to revitalise a business which was languishing in its own comfort zone. By contrast, the Claimant was highly proud of the successful business that she had built up largely autonomously and which was one of the most profitable parts of the Respondent's operation. Mr Clark was not open and consultative in his management style but blunt and, at times, dismissive. The Claimant perceived this as bullying and intimidating even though that was not Mr Clark's intention. The Claimant was passionate about her view that the current manner of operating was successful and did not need to be changed. Mr Clark perceived this as being resistant to change and obstructive. It was this difference in opinion and communication difficulty from the very outset which lies at the heart of much of what then followed. Overall, we consider that whilst Mr Clark's intentions were reasonable the manner in which he spoke to the Claimant at meetings was not. It was conduct which contributed to a breakdown in trust and confidence.

113 The Claimant's concerns about Mr Clark's conduct caused her to raise a grievance very early in their working relationship. When hearing the grievance, Mr Pemberton interviewed the Claimant, Mr Clark and Ms Parkes. He did not interview Ms Vary or Mr Anderson and the Claimant did not suggest that he should do so. Mr Pemberton accepted Mr Clark's evidence without giving reasons and gave the impression that he had not taken into account the Claimant's years of service without problems with previous managers. On appeal, Mr Cripps acknowledged Mr Clark's different leadership style and that the Claimant may have to adjust. Mediation was offered but did not take place. Whilst we think that Mr Pemberton could have explained his findings in more detail and Mr Cripps could have acknowledged that Mr Clark may also need to adjust his style, overall we do not consider that there was a failure properly to investigate the grievance or appeal.

114 The existing difficulties in the working relationship and communication between the Claimant and Mr Clark were exacerbated by the Teletubbies project. There was no dedicated project team for the Teletubbies contract from which the Claimant was excluded. It appears to have been an ad hoc and reactive process rather than a planned project. This may have arisen from the inexperience of the newly arrived management team, including Mr Clark, who were not fully aware of the role of BTL in sourcing and purchasing new goods. However, it must have been apparent to Mr Clark that the BTL team should have been involved before 13 December 2016. Not least as the Claimant's approval was required for the advance payment and there remained a lot of work to be done on testing, packaging and logistics. This was a significant sum of money for BTL to pay on behalf of the Respondent and the Claimant owed statutory duties of good governance as a director of BTL. It was not reasonable or proper for the Respondent to leave it until 13 December 2016 to involve the Claimant and only then by expecting her to approve the payment the same day.

115 Mr Clark's explanation to the Claimant on 4 January 2017 was that she had not been involved sooner because of her grievance and that she should have been as it was work which came under her remit. This is consistent with our conclusion that Mr Clark must have known before December 2016 that BTL should be involved and that the testing, sampling and packaging work was within the Claimant's ordinary job role. We infer that had it not been for the need for the Claimant to sign off the payment, Mr

Clark would not have included her at any point in the Teletubbies contract. His conduct is consistent with an intention to deal directly with the trading aspects of the project, in particular the decision making, and not to involve the Claimant. Mr Clark's attempt to bypass the Claimant was, in part, an emotional response born of his unhappiness at the Claimant's grievance and their difficult strained working relationship. It was also, in part, because he regarded her as difficult and an obstacle to his attempts to his new ideas for making money for the business. This is consistent with his comment on 12 January 2017 that she was a blocker and we repeat our conclusions from paragraphs 105 and 106 above on this point.

116 The Claimant argued that her role as head of BTL also meant that she should have been permitted to review the supply contract and, essentially, to be involved in the contractual negotiations and payment terms on Teletubbies. We accept that this was work which the Claimant undertook on the ordinary range of goods sourced by BTL, sourced from its single supplier Creative Tomco. The Teletubbies contract was very different from the ordinary business of BTL. Taking into account the complexity, financial value, size and importance of the Teletubbies contract, and the requirements of the DHX licensing agreement, we consider that the Respondent had reasonable and proper cause to decide that its lawyers, finance team and company secretary should be tasked to deal with the contract and commercial risk. This decision was communicated to the Claimant on 20 December 2016 when the roles on the contract were agreed. The Claimant did not object and we consider that this was because she understood the different nature of this contract from "business as usual" in BTL. We do not accept Ms Ismail's submission that the Claimant's duties were removed without proper explanation or that she was prevented from exercising her proper role in respect of these parts of the Teletubbies project.

117 Once the Claimant became involved in the Teletubbies project, she was able to influence some of the key decisions, for example whether products should be nickel free and the cost of testing. The email exchanges between the Claimant and Ms Geller were detailed and the Claimant's involvement appropriate. The problem arose once Mr Morgan assumed responsibility for Louis Kennedy's role over the Christmas period and into January 2017. As we have considered above in the context of the protected disclosure claim, the Claimant had raised a number of outstanding supplier actions which related to matters within the scope of her agreed role on Teletubbies. Mr Morgan provided responses to each question; Mr Clark sent only one of these to the Claimant. Furthermore, we have found that Mr Clark was provided with the factory audit reports on 13 January 2017 but did not send them to the Claimant for her consideration. In these two respects, Mr Clark did prevent the Claimant from exercising her proper role on the Teletubbies project. He did so because he was concerned that the Claimant might raise further concerns and he regarded her as an obstacle to progress.

118 Overall, we accept that Mr Clark was dismissive of the Claimant's concerns and accept that he failed to have reasonable regard to the points that she was raising and to consider whether they had merit. Mr Clark gave the impression, from contemporaneous documents and in his evidence, that he was keen to press on with the agreement with Louis Kennedy irrespective of the concerns being raised by the Claimant and which he considered to be unhelpful. Indeed, despite his assurances to the contrary given to the Claimant, he proceeded to approve the advance payment

before she had approved the testing and factory audit regime. This was conduct without reasonable and proper cause which contributed to a breakdown in the relationship of trust and confidence.

119 Finally, the Claimant asserts that she was undermined in front of Louis Kennedy. In developing this point in submission, Ms Ismail relied upon all three offensive emails sent by Mr Morgan and what she regards as the Respondent's inadequate support of the Claimant in response. We have found that neither Mr Clark nor Ms Parkes responded to the first two emails to defend the Claimant. Nor have we accepted that Mr Clark spoke to Mr Morgan about his inappropriate conduct until after the 1:1 on 12 January 2017. We do not accept Ms Crasnow's submission that it was appropriate for Mr Clark not to respond immediately to the rude late night emails. Whatever Mr Clark's view of the Claimant, there was no reasonable and proper cause not to challenge what even he regarded as offensive and entirely inappropriate emails about a senior member of his team. The test is contractual; did the Respondent's conduct have the necessary effect? It does not, it seems to us, matter that the Claimant was aware of only one of the emails when considering the effect of the conduct. This was conduct capable of contributing to a breach of the implied term of trust and confidence.

120 Having considered the individual aspects of conduct relied upon by the Claimant, we then considered whether or not cumulatively they were of such severity that they amounted to a fundamental breach of conduct. In doing so, we considered the objectively reasonable employee in the Claimant's circumstances. This would be a senior employee with over 20 years' good service and no previous problems with line managers who had headed a trading business which generating a healthy profit and without suggestion of underperformance. We consider that such an employee would reasonably consider Mr Clark's conduct to amount to a repudiatory breach of the implied term of trust and confidence, given his newness to the business, failure to consult properly with the Claimant and his manner of communicating with her, initially not including her on Teletubbies in part because she had raised a grievance, then failing properly to consider her concerns and not supporting her in front of the supplier in the face of clearly offensive emails sent to her more senior and junior colleagues. This was not conduct which was mildly objectionable but rather conduct which went to the heart of the relationship.

121 The Claimant resigned on 3 February 2017, having been told that the payment in advance had been made even though she had not signed off the matters which had been agreed as within her remit. Having regard to the content of her resignation letter which relied upon the objectionable conduct which we have accepted, we conclude that the Claimant did resign in response to the breach. She did not delay unduly and did not conduct herself in a way which affirmed the contract. The Claimant had repeatedly been assured that she would see the testing and factory reports before payment was approved; this was part of her agreed job and she was entitled to believe the Respondent's assurances. When she found out that they had been broken, the Claimant resigned immediately in circumstances where she was entitled to treat herself as dismissed.

122 Having accepted that the Claimant was dismissed, we must consider the reason for dismissal. We remind ourselves that the protected disclosure must be the sole or

principal cause for dismissal, here the resignation by reason of the Respondent's conduct. The Claimant asserts that it was because of her protected disclosures. Of the conduct relied upon by the Claimant as amounting to a repudiatory breach, we have accepted that the failure to share with her the full Louis Kennedy reply, not being supported by Mr Clark in response to the offensive emails and when she was called a blocker were because of her protected disclosures. We do not underestimate the importance of these detriments and the upset and distress they caused the Claimant. Nevertheless, we regard these as being conduct which largely confirmed to the Claimant her sense of being undermined dating back to the grounds for her original grievance. The Claimant's late inclusion on the Teletubbies project and the ongoing dispute about the job descriptions were nothing to do with her protected disclosure. Ms Ismail submits that there is a distinction between the nature of Mr Clark's attitude and conduct before and after the protected disclosures. We disagree and have set out our conclusion that the problems and difficulties experienced started from very early in the working relationship. Overall, we are not satisfied the protected disclosures were the principal reason for the conduct which we have found to amount to a dismissal.

123 The Respondent has not proven a potentially fair reason for dismissal and the claim for ordinary unfair dismissal contrary to section 98 of the Employment Rights Act 1996 succeeds.

Next steps

124 The case will now be listed for a remedies hearing. Within 28 days of receipt of this Judgment, please provide dates to avoid for a one day hearing between November 2018 and February 2019. The parties are to exchange documents no later than 28 days prior to the hearing and to provide any additional witness statements from which they intend to reply no less than 14 days before that hearing. If any further case management orders are required, the parties should write to the Tribunal and a telephone Preliminary Hearing will be listed.

Employment Judge Russell

24 August 2018