Case Number: 3200861/2018

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EMPLOYMENT TRIBUNALS

Claimant: **Ms E Aldridge**

Respondent: **Reliance Employment Limited**

Heard at: **East London Hearing Centre**

On: **29 August 2018**

Before: **Employment Judge Russell**

Representation
Claimant: **In person**
Respondent: **Mr R Myers (Counsel)**

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. **The claim for unfair dismissal succeeds.**

2. **There is no deduction for Polkey or contributory fault.**

REASONS

1 By a claim form presented to the tribunal on 24 April 2018 the Claimant claims that she was unfairly dismissed when she resigned from her employment as Financial Controller with effect from 16 November 2017. The Respondent resists all claims.

2 The details attached to the claim form are lengthy and cover a wide range of matters over the course of her employment. By contrast, the Claimant's witness statement is much shorter (only two pages) and limited in the conduct relied upon as causing her resignation. The Claimant was asked to what extent she relied upon the more detailed complaints attached to her claim form not least as Mr Myers said that it was vexatious and the Respondent could not meet its contents. The Claimant confirmed that it was only the matters in her witness statement which were relied upon as conduct amounting to a repudiatory breach of the implied term of trust and confidence. These are:

2.1 From January 2017, problems with the Wood Green branch approach to paying holiday pay and statutory sick pay to carers.

2.2 Breach of an agreement in January 2017 to provide the Claimant with support.

2.3 From around summer 2017, not paying statutory sick pay to carers; and

2.4 16 November 2017, being wrongly criticised following a call from HMRC with regard to payment of SSP to carers. This is relied upon as the final straw.

3 I heard evidence from the Claimant on her own behalf and from Mr Holmes, Managing Director of the Respondent. I was provided with an agreed bundle of documents and I read those pages to which I was taken during the course of evidence.

Findings of Fact

4 The Claimant commenced employment with the Respondent employment agency on 16 June 2014 as Financial Controller, responsible for management accounts, salaries and purchases. The Respondent has a sister company EEBS Limited which shares the same offices as the Respondent in Chelmsford. Mr Holmes and Mr Nick Pilgrim are the directors; the former primarily ran the Respondent, the latter primarily ran EEBS.

5 The Claimant's case is that she was also Financial Controller for EEBS with line management responsibility for EEBS accounts staff. Mr Holmes accepted that the Claimant was financial controller for both companies but denied that she managed the EEBS staff. On balance, I prefer the Respondent's evidence. The Claimant's Job Specification refers to responsibility for financial process administration and accounting functions for both companies and refers to 'liaising' with the EEBS payroll supervisor. It does not refer to line management responsibility. The emails relied upon by the Claimant are consistent with the Respondent's case. The Claimant's involvement in the recruitment of Louise was to answer specific queries related to payroll issues such as holiday entitlement and pension. With Rachel, the Claimant dealt with maternity pay entitlement but stated that a holiday request needed to be approved by a director. With Aaron, the Claimant's involvement was to deal with a pay question. In none of the emails is the Claimant exercising line management duties.

6 In early 2017, there were a number of disagreements between the Claimant and some of the Respondent's branch managers about the correct approach to payment of holiday pay to agency workers upon termination. On 20 March 2017, the Claimant resigned stating that the last straw was "Arla/Wendy". Arla is a client to whom the Respondent provides workers. Wendy was the manager at the Wood Green branch. The Claimant went on to describe the holiday pay/Arla issue as something that might "explode" on the company or at least continue to cause problems. The "Arla issue" was that temporary workers supplied to Arla for more than 13 weeks were entitled to holiday pay. A special job code should have been used for such workers to ensure the accrual and payment of holiday entitlement. This has not been used at Wood Green with the result that those Arla temporary workers were not receiving holiday pay to which they were entitled. A solution was agreed (as referred to in the Claimant's resignation email) to ensure that with future effect correct payment should be made but that it could not be backdated.

7 The Claimant's evidence was that she had expressed concern previously to Mr

Holmes that workers placed with Arla by Wood Green were not being paid properly and had calculated the holiday entitlement to which they were entitled. She says that Mr Holmes instructed her that Wendy would decide what should be paid, the Claimant should make that payment and then essentially wait and see whether or not the temporary worker asserted their right to further holiday pay. Whilst Mr Holmes was keen to emphasise the difference between employees, workers and self-employed contractors in respect of holiday pay entitlement and repeatedly asserted the Respondent's full compliance with its obligations, he eventually accepted that temporary workers placed with Arla for over 13 weeks were entitled to parity, whilst there had been some errors in the calculation of holiday pay prior to March 2017 for such workers, these had been corrected for the future but that the changes could not be backdated. He maintained that primary responsibility for calculating the sums to be paid rested with the branch manager, Wendy, and the Claimant. Overall, I considered Mr Holmes' evidence about the Respondent's treatment of these Arla temporary workers' holiday entitlement to be initially evasive but ultimately consistent with that of the Claimant.

8 The Claimant and Mr Holmes discussed the Arla solution and her resignation. Mr Holmes was keen to persuade the Claimant to remain in her employment and offered her a pay rise. There is a dispute as to whether in return the Claimant's notice period was increased to three months. I find that it was not. In an email sent to Mr Holmes on 21 March 2017, the Claimant set out her options: (a) to let the resignation stand, (b) to retract it, take the pay rise offered by Mr Holmes but then resign in any event or:

> "**I can retract my notice, without putting me on three month's notice, and effectively I put the company on 3 month's probation – and if there's no real improvement in the three months, I resign with one month's notice. "**

There is no evidence that Mr Holmes disagreed with this final suggestion, indeed he relies upon it as proof of an agreement to increase the notice period. It is not. The Claimant made it clear that she was not agreeing to 'putting me on three months' notice'. To the contrary, she would review her position in three months but, if unhappy, would give only one month's notice as required in her original contract. I prefer the Claimant's evidence and find that there was no variation of the contractual notice period.

9 Emails in the bundle support the Claimant's evidence that even after the solution agreed in March 2017, there continued to be problems with payment of holiday pay to workers placed by Wood Green with Arla. On 10 October 2017, the Claimant forwarded to Mr Holmes an email from one such worker. According to the Respondent's annual leave liability report, he was entitled upon termination to a payment in lieu of accrued holiday entitlement of £1,796.63. On 9 October 2017, the worker contacted the Respondent complaining that he had not been paid his holiday entitlement in full. Wendy, still the manager at Wood Green, maintained that he should be paid only £405. The Claimant asked Mr Holmes for his instructions. Her contemporaneous note and manuscript documents on internal records support the Claimant's evidence that Mr Holmes instructed the Claimant to pay the lower sum despite the evidence of the Respondent's own leave liability report.

10 When asked about this by the Claimant in cross-examination, Mr Holmes could not recall this particular worker but said that if there was a disagreement between the manager and the worker, there were 'defined procedures' to follow which he described as being either going to Court or Tribunal. When pressed further, Mr Holmes accepted that

there had been occasions when the Claimant told him that workers were claiming holiday pay to which the computer system showed that they were entitled but that he had told her to pay the lower amount as the branch manager had said. He suggested that this was because there could be discrepancies between the system and the branch manager's information. He believed that it was for the worker to raise any issue about greater entitlement either internally or externally with evidence. On balance, I accept the Claimant's evidence that after March 2017 she continued to raise concerns that the Respondent was failing to pay the full holiday pay due to Arla workers and was instructed to pay the lesser amount and wait and see whether the worker asserted their statutory entitlement, as she describes at paragraph 4 of her witness statement. This caused the Claimant concern about the risk of claims and to feel professionally embarrassed.

11 In June 2017 there was a disagreement between the Claimant and an employee of EEBS, Ms Connie Walker. It arose out of a request by Ms Walker that a member of the EEBS team be permitted to attend a couple of meetings with new or existing clients in order to gain experience and confidence. In her emails on 27 June 2017 to Mr Pilgrim, the Claimant expressed her disagreement in terms which were abrasive and discourteous, stating that she was "**fed up with your accounts bunch**" and accusing Ms Walker's team of "**being trained to be slackers**". As stated in her email, the Claimant had spoken to Ms Walker in the boardroom and made clear her reporting line, specifically that she did not have the right to decide to reallocate staff without talking to the Claimant about it. This is consistent with Mr Holmes' evidence that the Claimant had taken Ms Walker into a boardroom and had been very abrasive, raising her voice and expressing displeasure that Ms Walker had arranged for Amber to attend client face-to-face meetings. On balance, I accepted Mr Holmes' evidence that he believed the Claimant had overstepped her responsibilities and handled manners in an inappropriate manner. In her evidence to the Tribunal, the Claimant demonstrated that she is somebody who is forthright in her expression and can appear abrasive when challenging things with which she did not agree. This is also consistent with the frank way in which she expressed her view of her importance to the business and her disagreements with Mr Holmes in earlier emails.

12 Upon becoming aware of Ms Walker's unhappiness in being spoken to in such a way, Mr Holmes made clear to the Claimant that she did not manage the EEBS staff. This was not a removal from a position of authority as, I have found, the Claimant had been given no line management responsibility.

13 The difficulty in working relationship between the Claimant and Ms Walker was not resolved prior to the latter commencing a period of maternity leave. There were also problems in the working relationship between the Claimant and Ms Colette Rayner, the EEBS sales and marketing manager. On 21 September 2017, Ms Rayner complained to Mr Pilgrim that the Claimant had behaved appallingly that afternoon towards Ms Walker, shouting at her across the office for all to hear. Ms Rayner said that the situation had persisted over the last few months and described the Claimant's behaviour as abhorrent and totally unnecessary. She suggested that the Claimant was not aware of the atmosphere that she causes, that the business risked losing staff due to her unprofessional behaviour and being aggressive and unapproachable. I accept that Ms Rayner's complaint was genuine. It is consistent with the language used by the Claimant in her own witness statement when accusing Ms Walker of relaying distorted or flagrant untruths.

14 Mr Pilgrim spoke to Mr Holmes about Ms Rayner's complaint. Mr Holmes was

uncertain as to how to proceed and decided to reissue the Bullying and Harassment Policy as an indirect way of trying to encourage the Claimant to reflect upon her behaviour towards her colleagues. This was clearly a difficult situation for Mr Holmes and I accept that in the circumstances it was entirely appropriate to re-issue the policy. The Claimant alleges that Mr Holmes told other members of staff that the Claimant was bullying them. Mr Holmes denies any such statement. I prefer the evidence of Mr Holmes. It is inherently implausible that he would have made such a statement which would inflame the situation which he was seeking to resolve.

15 The Bullying and Harassment Policy was reissued on 27 September 2017. The following day, Ms Walker (who was about to start a period of maternity leave) sent a formal complaint against the Claimant addressed to Mr Holmes and Mr Pilgrim. In it she alleged unfair treatment and behaviour by the Claimant towards her and her colleagues over a period of four months. This included the Claimant's loss of temper and misuse of power in the June 2017 disagreement. Mr Holmes acknowledged the complaint on 2 October 2017. He advised Ms Walker that he would not be able to meet with her within the anticipated 10 day timescale as he needed to take advice given that the Claimant was employed by a different group company to Ms Walker and due to her impending maternity leave. He suggested a meeting when she attended the office on 11 October 2017 but believed that no further action was required at that time.

16 Mr Holmes did not tell the Claimant about either complaint. To some extent he regarded Ms Walker's complaint as "a hand grenade" thrown as she was about to go on maternity leave and that the separation during maternity leave would provide some breathing space to find a solution. Nevertheless, the Claimant was aware at least informally that complaints had been made against her. She was again unhappy in her job, in part because of the friction in the working relationship, in part due to the ongoing failure to pay Arla workers the full holiday pay to which they were entitled and in part due to a disagreement with Mr Holmes about the payment of SSP to temporary workers. Her domestic financial responsibilities were such that the Claimant wanted to obtain an offer of alternative employment before deciding whether or not to resign. The Claimant started to make preparations to find another job by updating her CV on the reed.co.uk job site on 23 October 2017. Her updated profile stated that she was available for employment from 15 November 2017.

17 The concern about SSP payments dated back to earlier in 2017. Upon review of the Respondent's finances, Mr Holmes found what he believed to be a huge liability for payments of SSP to workers whom he believed should not have received them. Mr Holmes introduced new guidance dealing with entitlement to SSP. The guidance given earlier in 2017 was the same as that set out in his email dated 16 November 2017, namely that as soon as a sick note was received, the Claimant and the branch manager must:

> "**First check**
>
> - **If they earn more than £113 a week average over the last 8 weeks. If they have not then they are ineligible.**
> - **If they are pregnant, or have had a baby in the last 18 weeks. If so consult Lis**
>
> **If they are eligible then, from my reading, our policy going forward should be:**
>
> **1. <u>Contract of services</u>**
>
> **a. Under 3 months continuous service – pay SSP only up to the Saturday of the week**

in which they last providing services

b. Over 3 months service – issue the email below immediately a sick note submitted and once again only pay up to the Saturday of the week in which they last providing services

2. <u>Employment contract</u> – always provided that the thickness is not related to a disability, on receipt of a sick note

a. Under 2 years service – we should terminate their contract and notice as allowed by their Contract. No reason is required, or should be given. SSP paid until termination.

b. Over 2 years service - refer to MGH.

<u>Emails to sick Workers</u>

We are in receipt of your Sick Note and confirm that you will be paid Statutory Sick Pay … until your current assignment ends [insert date of Saturday following the last service].
If the Saturday is before the 4th day we should send email
We are in receipt of your Sick Note but regret we are unable to pay Statutory Sick Pay from because your current assignment ends [insert date of Saturday following the last service."

18 In his evidence, Mr Holmes maintained that the policy was "**100% within the spirit of the law**" but confirmed that the same guidance applied to all workers and employees meeting the earnings threshold. Irrespective of whether they had under or over three months' service, upon receipt of a sick note the worker's contract should be terminated without giving a reason. The same applied to all employees with less than two years' qualifying service so long as sickness was not disability related.

19 The Claimant's evidence was that she was concerned about the decision to terminate the contracts of workers who exercised their statutory right to SSP, especially in cases where there may be pregnancy or disability related illness. Mr Holmes accepts that when the policy was introduced, the Claimant questioned its legality and he tried to persuade her that it was the correct thing to do, but that the Claimant 'did not take ownership and went on work to rule'. This I take to be confirmation that the Claimant did not agree with Mr Holmes' assertion that the policy was legal or appropriate and is consistent with her evidence that she refused to sign SSP1 forms for three workers as she believed the forms to be inaccurate. On balance, I accept that Mr Holmes told the Claimant that he did not want to spend money unless a claim arose and he would deal with it then. This is consistent with his stance on holiday pay to Arla workers as he described in this Tribunal hearing.

20 It was against that background of disagreement, that the Claimant received a telephone call from a member of HMRC on 14 November 2017 enquiring about SSP entitlement for a temporary worker. I accept the Claimant's evidence that she knew nothing about the worker being refused SSP until she received the call from HMRC. An email of the same day from HMRC to the Claimant states that the worker was unable to return to work following an operation and had been told by the Respondent that as she was a zero hour contract worker with a contract which renewed weekly, she was not entitled to SSP. HMRC took the view that as the worker had accrued three months of continuous employment she was entitled to SSP. The email required a response from the Claimant or they would investigate more formally. The Claimant forwarded the email to Mr Holmes.

21 Mr Holmes wanted to know who had told HMRC that this was a zero hours contract. The Claimant confirmed that it was the worker and that she (the Claimant) had explained the correct position that her contract terminated on the Saturday. Mr Holmes

replied: "**No employment. Contract for service. Only service. Will address AM."** Mr Holmes did not take issue with the Claimant's reference to the contract terminating on the Saturday.

22 On the morning of 16 November 2017, Mr Holmes spoke to HMRC and informed them that the worker had no entitlement to SSP apparently asserting that she had less than 13 weeks' continuous service. This was wrong. Upon receipt from the manager of the contract and sick note and from the Claimant of P11s to date, it was apparent that the worker had been providing services for over two years. The email from HMRC forwarded to Mr Holmes also refers to the worker having over three months' continuous employment.

23 At 14.12 on 16 November 2017, Mr Holmes emailed the branch manager and the Claimant re-stating the policy with regard to payment of SSP and stating: "**That these clear instructions have not been followed means you have both let me down badly and made me look foolish.**" He went on to say that they had dealt with the case in a way not consistent with his instructions and without providing back up information, leading to him incorrectly defending a wrong position to HMRC and putting him at risk of "**denial of "employment rights" due to sickness**". The worker was in fact entitled to SSP as she had over two years' (in fact six) of service.

24 The Claimant regarded Mr Holmes' email as unjustified blame, this knee-jerk response was the final straw. Within an hour of receipt of his email, she resigned without notice.

25 In evidence, Mr Holmes said that the criticism of the Claimant was for reasonable and proper cause. The Claimant should not have told the carer that her contract had terminated on the Saturday and that if she had over 13 weeks' employment, the carer would be entitled to SSP. In re-examination, Mr Holmes stated that it was inaccurate for the Claimant to say that carer contracts terminate on the Saturday. I considered Mr Holmes' evidence unreliable. The policy in place (as confirmed in that email) was that a contract for services would be terminated upon submission of a sick note even if the worker had over three month's service. In response to a question from the Tribunal, Mr Holmes had earlier accepted that carers had always been employed on contracts which terminated every week. He did not challenge the Claimant's reference to termination on the Saturday in her email before he spoke to HMRC. Finally, his own email on 16 November 2017 expressly refers to making payment only up to the Saturday of the week in which they last provided services. Furthermore, I have accepted the Claimant's evidence that she had no knowledge of the issue until the call from HMRC and had simply told HMRC the position regarding weekly contracts.

Law

26 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.

27 The term of the contract which is breached may be an express term or it may be

an implied one. In this case, the Claimant relies upon breach of the implied term 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.

28 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.

29 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**."

30 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. Mere delay in itself is not an affirmation, but prolonged delay may be evidence of an implied affirmation.

31 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.

Conclusions

32 The conduct relied upon by the Claimant as constituting a breach of the implied term of trust and confidence is set out above at paragraph 2. It is the Claimant who bears the burden of providing the breach. I am not satisfied that she has done so in relation to any agreement in January 2017 to provide support, an issue about which I heard little evidence. Even if there were any such agreement, I am not satisfied on the evidence before me that the Claimant has proved breach in any event.

33 In essence, the remaining conduct concerns the Respondent's policies on the payment of holiday pay and SSP continuing throughout 2017 and culminating in the email sent by Mr Holmes on 16 November 2017. I have found that the Claimant was instructed to pay Arla workers with over 13 weeks employment a lesser amount of holiday pay than shown as due on the system and wait and see whether the worker asserted their statutory

entitlement, as she describes at paragraph 4 of her witness statement. As for SSP, I have found that the policy was that, irrespective of whether they had under or over three months' service, upon receipt of a sick note the worker's contract should be terminated without giving a reason. The same applied to all employees with less than two years' qualifying service so long as sickness was not disability related.

34 Mr Myers submitted that the Respondent's business practices were lawful. He referred to them as "**existing in a grey area of experimentation of the sort the companies like the Respondent have attempted**" but that "**sailing close to the wind and remedying complaints is lawful**". That may be so, but the conduct of this Respondent was to instruct the Claimant to refuse workers (and employees with under two years' service) their legal entitlement to holiday and/or sick pay and only make payment once challenged. This is not simply experimentation or testing the waters on the changing nature of employment status. Whatever grey areas may still exist on the delineation between workers and employees, it is not in doubt that workers are entitled to statutory holiday pay, SSP and the protection against disability discrimination contained within the Equality Act 2010. Moreover, employees are entitled to SSP if the eligibility threshold is reached even if the right not to be unfairly dismissed can only be enforced after two years' service. The Respondent's policy was effectively to dismiss any such worker or employee upon assertion of their statutory right to SSP and, it is noted, that the 'disability related sickness' exemption in the SSP guidelines is stated only to apply to employees. This was not a refusal of discretionary payments but of statutory entitlement unless the worker or employee expressly asserted their legal rights. There is no reasonable and proper cause for such conduct.

35 The Claimant was concerned that the instructions were intended to deprive workers of payments to which they were legally entitled. To maintain the instructions about holiday pay and SSP in response to her concerns about legality is conduct which, cumulatively, is capable of amounting to a repudiatory breach of contract. It is not enough, as the Respondent submits, that Claimant would bear no personal liability for the failure to make proper payments to agency workers. The Claimant is an experienced financial controller and part-qualified ACCA. She was being instructed to act against financial good practice and in a manner which gave rise to considerable risk to the business. Looked at objectively, a reasonable person in the Claimant's position of Financial Controller would also be concerned about the risk to their professional reputation from being required to act in accordance with such instructions.

36 The last straw is Mr Holmes' email on 16 November 2017. The Respondent submits that it is 'laughable' to regards its content as a final straw in the context of a working relationship where the Claimant and Mr Holmes regularly sent each other emails expressed in similarly robust terms. The Claimant's objection, however, is not the manner in which criticism is made but the very fact that she is being blamed in circumstances where no blame is warranted. In the context of the Claimant's previously expressed concerns about the legality of the policy and whether or not it was right to deprive carers of their SSP entitlement, upon challenge by HMRC in this case the Claimant was essentially found to be right. Then to be criticised when she had not been involved in the original decision and, as I have found above, without reasonable and proper cause adds to the overall cause of conduct and was sufficient to amount to a final straw.

37 The Respondent submits that the claim of constructive dismissal was disingenuous and that the Claimant did not resign in response to any breach but because

she was unhappy due to the problems in working relationships with colleagues and the complaints against her. This, says Mr Myers, is shown by the fact that she was looking for a new job as early as 23 October 2017. The Claimant has not relied upon problems in the working relationship with colleagues as part of the repudiatory breach which caused her to resign. If she had, I would have found that Mr Holmes had reasonable and proper cause for reprimanding the Claimant in June 2017, re-issuing the Bullying and Harassment Policy in September 2017 and in his response to Ms Walker's complaint.

38 As I set out in my findings of fact, the problematic working relationships were only part of the reason for the Claimant's decision to look for alternative work in October 2017. The other parts were her unhappiness with the ongoing failure to pay Arla workers the full holiday pay to which they were entitled and her disagreement with Mr Holmes about the payment of SSP to all workers and employees without two years' service. 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. In this case, the repudiatory breach was such an effective cause as demonstrated by her swift resignation in response to the final straw.

39 Having found that there was a repudiatory breach and that the Claimant resigned in response to it without affirmation or undue delay, it follows that a dismissal has occurred.

40 Turning then to section 98, I have found that the Respondent's conduct was without reasonable and proper cause. The Respondent has failed to show a potentially fair reason for its conduct or that dismissal was fair in all of the circumstances of the case.

41 I considered the Respondent's submissions as to a possible reduction to reflect the possibility that a fair dismissal could and would have happened in any event (the **Polkey** point). The matters relied upon are the Claimant's misconduct in providing incorrect and/or late information in connection with the HMRC enquiry and the complaints by colleagues about the Claimant's behaviour towards them.

42 Based upon my findings of fact, there was no misconduct on the part of the Claimant for which she could have been fairly dismissed in connection with the HMRC issue. The Claimant had limited involvement and responded in a timely manner, including providing Mr Holmes with the HMRC email setting out its understanding of the situation (in particular that the worker had over 3 months' continuous service).

43 As for the complaints, these were serious matters which would have required proper investigation. I accept that even after being interviewed to give her side of the story, there is a chance that the Claimant would be found to have behaved in a manner which was inappropriate. I refer back to my findings of fact in this regard. Even if there was possible misconduct, would the Claimant have been fairly dismissed because of it? Mr Holmes was content to let the matter lie in the hope that Ms Walker's maternity leave would provide some breathing space to find a solution. Mr Holmes had taken no formal action on Ms Rayner's email by the date of the Claimant's resignation. In circumstances where no steps were taken between 21 September 2017 and the Claimant's resignation on 16 November 2017 to investigate the complaints and the Claimant had not even been notified formally of their receipt, I am not persuaded that the Claimant could or would fairly have been dismissed even if there was possibly misconduct on her part.

44 Finally, with regard to contributory fault, the dismissal arose from the conduct of the Respondent in connection with its policy on holiday pay and SSP, culminating in the email on 16 November 2017. I have found there was no reasonable and proper cause to blame the Claimant with regard to inaccurate information to HMRC. Nor do I find that there was any foolish, culpable, negligent or otherwise blameworthy conduct on the part of the Claimant in connection with her stated concerns and objections to the policies themselves. It was appropriate that she decline to sign SSP1 forms whose content she believed to be inaccurate. As for the relationship with her colleagues, whilst part of the Claimant's subjective reasons for looking for other work, it was entirely unconnected with conduct which objectively amounted to a repudiatory breach and therefore a dismissal. No deduction for contributory fault is appropriate.

Next Steps

62 The claim having succeeded, a one-day remedy hearing will now be listed. The following directions will apply:

62.1 The Claimant must provide an up to date schedule of loss within 2 weeks of the date on which this Judgment is sent to the parties.

62.2 The parties will disclose all documents relevant to the issue of remedy within 4 weeks of the date on which this Judgment is sent to the parties.

62.3 The Respondent will produce a bundle including those documents to which the Tribunal will be referred on remedy within 6 weeks of the date on which this Judgment is sent to the parties.

62.4 The parties will simultaneously exchange witness statements setting out all of the evidence upon which they intend to rely at the remedy hearing within 8 weeks of the date on which this Judgment is sent to the parties.

62.5 The remedy hearing will be listed for the first available date after 12 weeks. If there are any dates to avoid, the parties must notify the Tribunal as soon as possible.

Employment Judge Russell

7 November 2018